I. JUDICIAL DISSENT

A. General Principles

Dieter Grimm

Some Remarks on the Use of Dissenting Opinions in Continental Europe (Based on My German Experience)

A. Tradition

If there has ever been a tradition of separate opinions in Europe it came to an end with the rise of absolute monarchy. The absolute monarchs concentrated all powers in their hand including the judicial power. The judges were servants of the monarch and rendered decisions in his name. Their personal views did not matter. The monarch had the power to reverse a judgment of a court and replace it with his own decision. Under the influence of the Enlightenment some monarchs stopped exercising their power. But this did not change the position of the judge.

This basic understanding survived absolutism. It was and still is the institution, not the person that decides. The court adjudicates, not the judge. Nothing depends on the individual office holder. Already the term "opinion" would be regarded as inadequate. The court does not have an opinion. The court renders a decision and demonstrates how it follows from the law. The law cannot be found in previous court decisions but in abstract and general statutes that are merely applied to a concrete case. Beginning in the late eighteenth century the statutes took the form of a code, meaning a comprehensive and systematic regulation of a certain field of law, in which every legal issue finds an answer.

The codification of the law favoured a methodological approach (usually called legal positivism) according to which there was only one correct answer to a legal question. Divergent solutions were not regarded as alternatives, but as errors. There was no point in disseminating errors in official statements. The correct answer was not affected by social change that occurred over time. It remained correct as long as the law was in force. It could, of course, happen that, because of social change, the law no longer achieved its purpose. But this was regarded as a matter for the lawmaker, not for the law applicant.

All these factors worked against dissenting opinions. Although much of what I described is no longer the case or no longer generally admitted, the attitude vis-à-vis dissenting opinions has not changed. They have no room in continental legal thinking. Only recently a few exceptions were made for constitutional courts. In some countries the judges of constitutional courts obtained the right to file separate opinions. This does not mean that the courts decided to publish dissenting opinions. The right was given to them by the legislature, and only to them, not to the ordinary courts. Generally speaking the reason was that constitutional courts, different from ordinary courts, fulfil a political function since they have the power to review acts of the political branches of government, which is not the case for ordinary courts.

In Germany dissenting opinions were introduced in 1970, almost twenty years after the establishment of the Federal Constitutional Court. Spain followed the German example in its post-Franco Constitution of 1975, and so did many of the former socialist countries in their post-communist constitutions. Other countries like Austria, France, and Italy still do not know dissenting opinions. Among the European courts, the European Court of Human Rights allows for dissenting opinions whereas the members of the EU-court, the European Court of Justice, do not have the possibility to file dissenting opinions and do not want to get it.

B. Practice

In most European countries that allow for dissenting opinions, the opportunity is less frequently used than in the United States. To a certain extent this can be explained by the tradition. Justices who served in a lower court before being appointed to the constitutional court are not accustomed to dissenting opinions and do not miss them. There are also justices who think that the absence of dissents has its merits. Courts should speak with one voice, regardless of controversies among the judges. My predecessor in the German Constitutional Court, a former law professor and a highly respected and very influential judge, had made it a principle for himself never to file a dissenting opinion.

A very important factor seems to be the way in which a court reaches its decisions. In the German Constitutional Court serious and extensive deliberations based upon a lengthy memo prepared by the judge rapporteur are the rule. Although the judges may initially have quite different views about a case, there is an attempt to see whether a unanimous decision can be reached, although not at any cost. There is a preference for a

unanimous decision, but no pressure, let alone compulsion. The discussion matters. Judges change their mind because of arguments raised in the deliberation. If all sides have moved in the discussion and a viable compromise has been found, the tendency to file a dissenting opinion shrinks, even if a judge did not fully prevail with his or her opinion. This means that the lack of dissenting opinions in a certain case cannot be taken as proof of a unanimous decision. If in a divided court nobody insists on writing a dissenting opinion the public cannot know that, in fact, the court was divided.

The same is true for votes. In the famous First Abortion Decision of the Constitutional Court, two judges filed a dissenting opinion. Until I arrived in the Court and had access to the files, I had been of the opinion that it had been a 6:2 decision. In fact, it was a 5:3 decision, with one minority judge refraining from writing a dissenting opinion. However, there are some exceptions. In the case of a 4:4 decision it has become customary that the opinion of both sides is presented with the names of the justices belonging to each side. This was found necessary even before the dissenting opinion was formally introduced (***e.g.***, *Spiegel* case of 1966).

Sometimes the Constitutional Court chooses to disclose the result of the voting. ("This decision was taken unanimously," "the decision was taken with six against two votes," etc.). I have been unable to discover a principle behind this practice. During my tenure, in some cases a justice or a group of justices in the minority declared that they would refrain from filing a dissenting opinion if the vote was disclosed. In some cases where society was deeply divided on the issue of the litigation the Constitutional Court wanted to demonstrate its unanimity. In other cases of a deeply divided society the Court wanted to demonstrate that it was divided as well, thus giving a signal to the losing party that their arguments had not been without resonance in the Court.

The judges' motives to file or not to file a separate opinion if they did not or not fully prevail with their opinion are so manifold that any attempt to summarize them would be in vain. However, the most important motive is fundamental disagreement with the majority's result or reasoning, whereas minor differences are usually not regarded sufficient for a dissent. But there may be personal reasons as well, ***e.g.***, the desire not to be identified with a certain judgment in certain circles.

C. Effect

A justice who plans to file a dissenting opinion is obliged to announce this at the end of the Court's deliberation. But, after a long discussion, it is rather unlikely that such an announcement would prompt the majority to change its mind. The dissenting judge has three weeks to formulate his or her opinion. The court is free to resume the deliberation when the dissenting opinion is submitted. But again this occurs only rarely. It may happen, however, that the majority reacts to a dissenting opinion in the majority opinion.

The immediate impact of a dissenting opinion on the Court itself, which is low, should be distinguished from its effect over time. In some cases it has happens that the dissenting opinion of yesterday becomes the majority opinion of tomorrow. This is particularly true when a decision is based on assumptions about future developments and when the assumptions of the minority prove to be correct. Sometimes concurring opinions influence future decisions more than a majority opinion because they were written more forcefully or seemed more convincing in their way of arguing.

Regarding the effects of dissenting opinions outside the Court, it may be useful to distinguish between effects in the legal world and effects on the general public. For lower courts that are bound by the decisions of the Constitutional Court, it is natural to rely more on the majority opinion than on the dissent. For lawyers, dissenting opinions are often of help when they want to challenge a line of jurisprudence and convince the Court to reconsider its view. In academic writing and teaching, dissenting opinions usually find considerable attention. Some have given rise to lengthy debates.

The media usually take notice of dissenting opinions if they do not only concern purely doctrinal questions. In a system where decisions are normally handed down anonymously and the positions of individual justices are not transparent, it is one of the few sources for the media to learn something about the internal conflicts or cleavages in the Court. Of course, even in the absence of dissenting opinions journalists sometimes try to find out whether a decision was taken unanimously or not. But it would be inappropriate for a member of the Court to talk about this due to concern for the secrecy of the deliberation.

With regard to the general public, the concern that dissenting opinions might undermine the authority of the Court or confidence in the

clearness of the law has not been borne out. Sometimes one can find attempts to question the authority of a judgment because it was contested within the court. But in general the reputation of and the trust in the court have not suffered from dissenting opinions. Whether or not they have contributed to the high esteem for the Constitutional Court is difficult to ascertain.

Henry G. Schermers & Denis F. Waelbroeck
Dissenting Opinions[*]

§ 1478. In the International Court of Justice in The Hague and in many national judicial systems, the dissenting judges make their views known by means of *dissenting opinions*, and judges who agree with the court decision as to its final conclusions but who come to that conclusion by way of different reasoning can publish their *concurring opinions*. There are several arguments which can be advanced for such publicity.

(a) More arguments are brought out into the open: in the first place the arguments pleading for a different decision are voiced together with arguments which are intended to refute these arguments. This may lead to a more detailed reasoning of the final decision itself. Publicity may encourage the judges to greater efforts to formulate judgments of a high quality. If no dissenting opinions are published, arguments on which agreement cannot be reached may simply be left out of the final judgment.

(b) The individual answerability of each judge will be enhanced. On the one hand, this means that it will be more difficult for a junior judge to follow the opinion held by the stronger personalities in the Court without expressly formulating his own point of view, and on the other hand it will be clear to the outside world that a judge does not bear responsibility for a decision to which he objects.

(c) Judges who are continuously outvoted may become frustrated if they have no opportunity of expressing their own thoughts.

(d) If there are no dissenting opinions it may be that one judge is taken less seriously than the others; his arguments may not attract sufficient attention from the other judges. Publication of his views may compel the

[*] *Excerpted from* HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 736 (6th ed., 2001).

other judges to give more weight to his objections.

(e) Dissenting opinions may assist the future development of the law. In those fields where the law is developing, a prior dissenting opinion may act as a stimulus to bring a new case before the Court.

(f) Freedom of opinion is a basic human right. Dissenting opinions should, therefore, be possible as a matter of principle.

§ 1479. In the [European] Court of Justice, as in the vast majority of continental courts, neither dissenting nor concurring opinions are possible. The opinion reached by the majority of the judges determines the decision of the Court and the deliberations must be conducted in secret and must remain secret. The following four reasons, are generally given to justify that the deliberations of the Court of Justice should be guarded by secrecy:

(a) More than any other court, the decisions of the Court of Justice must enjoy authority. As a result of the recent constitution of the Communities, the Court of Justice must fill important gaps in the legal order and thus help to create legal certainty for those subject to Community law. Such legal certainty is more readily secured by firm rulings than by decisions characterized by hesitancy where the possibility exists that the Court could reverse its position when one of the judges is replaced. A new legal order in particular needs firm and unequivocal rulings as a basis for its future development.

(b) As the judges are appointed for only six years, their independence might be set at risk if their personal views were known. These could be elicited from dissenting opinions or from any failure to dissent. Even if the independence of judges is not directly affected—for it is to be expected that judges will not yield to irresponsible threats from government officials—good judges might, nevertheless, not be reappointed. Actual pressure on judges who do not support the position of their own State is probably not so much to be expected from the quarter of national governments, who are hopefully sufficiently aware of the importance of the independence of the judiciary, but from national public opinion which may, in some States and on certain issues, consider that their 'own' judge should support the national interest.

(c) The lack of any possibility openly to dissent promotes compromises within the Court of Justice. This aids the amalgamation of rules from all the national legal orders and their assimilation into

Community law. As with any well-conducted meeting, the Court of Justice is not readily inclined to make its decisions by way of a vote. The members of the Court will first try to win their colleagues over to a common view, and to find a solution acceptable to all. When the discussions reach a certain stage, a majority view and a minority view may well develop. The provision for dissenting opinions would then easily induce the President to advise the minority to formulate their dissenting opinion and then merely to accept the majority view as the view of the Court. When the minority has no such escape route, it is a far more serious matter within a harmonious group of colleagues for the majority simply to outvote the minority. The pressure will be greater to continue the discussions until a position is reached which is more acceptable to the minority. This means that some of the arguments put up by the minority will be taken into account.

In a national court, the outvoting of a judge and the formulation of his argument as a dissenting opinion only means that the opinion of that judge is not reflected in the opinion of the court. If the two opinions are basically different, this may even provide a clearer and more homogeneous decision. In the Court of Justice, a judge's viewpoint may also be representative of a national legal order. If, for example, the British and the Irish judges were to dissent from the rest of the Court, the formulation of their views as a separate opinion would mean that regard for the Common Law system had been insufficiently incorporated in the decision of the Court.

(d) If each judge, directly or indirectly, expresses his own opinion, he may feel morally obliged to stand by that opinion in future cases. If dissenting opinions are not published it is easier for the individual judges to accept prior case-law as a definite basis on which to found further decisions.

§ 1480. The arguments against the publication of dissenting opinions seem substantial, especially as regards international courts such as the Court of Justice, particularly as long as judges are not appointed for life.

Several of the objections to the publication of dissenting opinions are equally valid for "intermediary" solutions such as publishing dissenting opinions anonymously or merely publishing the voting results of the Court. Conversely the advantages to be gained by such intermediary solutions, in comparison to the present system, seem to be only minimal.

Lech Garlicki

Note on Dissent in the European Court of Human Rights

A. Legal framework

Article 45 § 2 of the European Convention on Human Rights provides that "if a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

This provision, as further developed in the Court's rules of procedure, establishes five major principles:

- separate opinions are permitted, however only with respect to "judgments"; thus, there is no possibility to lodge a separate opinion from a "decision," even if some "decisions" settle very important questions for the future case-law;*
- a separate opinion may take the form of a dissenting or of a concurring opinion;
- a separate opinion may be lodged individually or jointly by several judges;
- a separate opinion may address the judgment as a whole or only certain parts of the judgment;
- lodging a separate opinion constitutes a right, but not a duty of the judge—in the Court's current practice, however, judges who voted against the judgment only very rarely abstain from writing a dissenting opinion; in any case, each judgment discloses (but only anonymously) the result of the judicial vote with respect to each of the points of the "dispositive."

* The European Court of Human Rights operates in five Sections of nine judges; judgments and decisions are adopted by Chambers of seven judges, two remaining judges acting as substitutes. The most important cases are brought—by relinquishment or referral—to the Grand Chamber, composed of the President of the Court, presidents of all five Sections, the national judge and ten other judges selected by drawing lots.

B. Practical operation

Separate opinions are now not very common at the Chamber level—this should be seen as a combination of the increasing number of simple ("clone") cases decided by the Chambers and of the disappearance of "patriotic" or "stubborn" judges who almost always felt obligation to pronounce their dissent.*

Separate opinions are quite common at the Grand Chamber level and only very rarely is there unanimity with respect to important judgments. Since the beginning of the "new Court" in 1999, the Grand Chamber adopted separate opinions in 197 judgments (as of May 2008). In 2005, there were 12 judgments—11 of them with one or more separate opinions; in 2006, there were 30 judgments—14 with separate opinions; in 2007, there were 14 judgments—13 of them with separate opinions. Usually, there is a clear majority within the Grand Chamber; however, as of the end of 2007, in 8 cases the judgment had been adopted by a 9:8 majority and in 17 cases—by a 10:7 majority.

C. Role of separate opinions

There are several academic studies concerning the role and functions of separate opinions and there is no need to repeat their findings and assessments. That is why only few general observations shall be submitted here:

Separate opinions play a visible role in the Strasbourg Court and serve as a suitable instrument to express the internal plurality of the Court and to signal the controversiality of some problems presented to the Court;

There is no uniformity as to the functions of separate opinions: sometimes they play predominantly "doctrinal" role (when judges—usually concurring—provide their own interpretation of the Convention); sometimes they express—total or partial—disagreement with the essence or the reasoning of the adopted judgment;

Dissent in the Grand Chamber is usually meant as a declaration of disagreement or as an expression of hope that future generations of judges

* A recent study at the University of Leicester shows that between 1999 and 2004, only 20.4 percent of all judgments were adopted unanimously. While it would be difficult not to believe in statistics, the present situation is completely different, at least at the Section level.

might want to rethink the problem; dissent at the Chamber level may have more practical usefulness since there is always a possibility that the case would be reheard before the Grand Chamber; thus, particularly in respect to judgments adopted in a 4:3 vote, it may be very important to submit a convincing dissent;

The existence of separate opinions creates a "safety valve" that allows more homogeneity in the majority opinion and that does not require the inclusion of too many compromises into its text; it also allows more transparency by showing the "real" (as different from the "juridical") authority of particular judgments; while it is true that the Court should avoid situations where judgments are adopted by very weak majorities (it should not be forgotten that only 17, out of 47, judges sit in the Grand Chamber), there is nothing wrong with open admission that no European uniformity exists with respect to certain problems.

It is also true that there is always a danger of "politicization" of separate opinions, particularly in situations where a national judge feels obliged to disagree regularly with judgments in cases "lost" by his/her country or—in even worse situations—where a national government expects "its" judge to act in such manner; it should be noted, however, that such situations are hardly present in the current practice and that the whole problem has a more general dimension related to the independence of the ECHR judges.

François Luchaire

La transposition des opinions dissidentes en France est-elle souhaitable?[*]

[*Is the Adoption of Dissenting Opinions in France Desirable?*]

The French judicial system does not know dissenting opinions; it forbids them since the dissenting opinion runs counter to the principle of deliberative secrecy. Speaking only of constitutional adjudication, it should be remembered that the persons appointed members of the Conseil constitutionnel swear an oath before the president of the Republic "to maintain the secrecy of deliberation and of votes."

To double-back on so fundamental a principle would be to seriously compromise the authority, the credibility and the efficacy of the institution.

[*] *Excerpted from* 8 CAHIERS DU CONSEIL CONSTITUTIONNEL 111 (2000). [Translated by Hunter Smith].

First, as to authority: a decision taken by a majority—which may be weak—gains traction only with difficulty when some members of the tribunal make their opposition known by expressing a dissenting opinion with particularly sound legal argumentation. The risk is particularly large when, in case of a tie, a decision is reached only thanks to the president's tie-breaking vote. Moreover, inasmuch as the Conseil constitutionnel is renewed by thirds every three years, one might think that the dissenters could soon make up the majority. The very jurisprudence of the institution would thus lose its authority to political actors.

Next, credibility: the members of the Conseil constitutionnel are appointed by political authorities: three by the president of the Republic, three by the president of the Senate and three by the president of the National Assembly. No doubt their function as a legal tribunal creates an obligation for each member to "forget" the political character of the person who appointed him. Independence and impartiality are duties of their office. But if, through dissenting opinions, everyone's vote were known, how could it be prevented that many would explain a vote by the political sensibility of the person who appointed him who cast it? If the vote is manifestly contrary to that sensibility, how it could it be prevented that a good part of the political world would think that the member of the Conseil constitutionnel betrayed his appointer?

Finally, efficacy: to a question asked of the Conseil constitutionnel, the members may have different answers. Should an attempt at conciliation be made or, to reach a decision, should we be content to tally up all the similar answers?

Anyone who participates in a judicial decision and even has quite a firm opinion also necessarily feels that there is something worthwhile in the opinions of others. The quest for a consensus is therefore not impossible. At the Conseil constitutionnel, conciliation is facilitated by the technique of "validation with an interpretative reservation": the judge declares the law referred to him to be in conformity with the Constitution, but under the reservation of a certain interpretation, which, in particular, would not permit such and such conduct. This satisfies the proponents of the law's validity because the law is declared in conformity with the Constitution; it also satisfies the opponents of its validity since they believe that some of its drawbacks have disappeared. Consensus is achieved among all the members of the Conseil constitutionnel. But if the practice of dissenting opinions were permitted, everyone would be tempted to stick strictly to his first line of reasoning. Thus, the absence of dissenting opinions facilitates consensus.

After having left the Conseil constitutionnel, the author of these lines was a member of two other tribunals.

The first allows for dissenting opinions: it was the International Court of Justice, which had five judges to a chamber (of whom, two were ad hoc). We needed to resolve a frontier dispute between two African states, one that had already caused many deaths. If each of the ad hoc judges had written a dissenting opinion favorable to the state that had designated him, the war would have almost certainly recommenced. So each ad hoc judge wrote, not a dissenting opinion, but an individual one explaining why, starting from certain premises, he finally came round to the majority's position. Hostilities stopped completely and the actual placement of the border was carried out without problem.

The second tribunal does not allow for dissenting opinions: it is the Constitutional Tribunal of the Principality of Andorra; but how could it be otherwise? This is a tribunal composed of four members (two chosen by the Andorran Parliament, one by the president of the French Republic and one by the Bishop of Urgell). In case of a tie, the vote of the reporting judge (selected by lottery) is tie-breaking. For the same reasons as just discussed for the Conseil constitutionnel, dissenting opinions would be a disaster for this Andorran tribunal. The role of the co-princes (the one a bishop and the other the head of a foreign state) would be constantly questioned.

No, definitely no dissenting opinions.

Philipp Mels

Die Bekanntgabe von Sondervoten und Abstimmungsergebnis[*]

[*Disclosure of Separate Opinions and Voting Results*]

A special feature of constitutional judicature that is unknown at other judicial levels is the option of separate opinions, a so-called dissenting vote. A different though related aspect is the issue of the secrecy of judicial deliberations and the disclosure of voting results.

§ 1—The situation in France

French constitutional law knows no *opinion dissidente*. Moreover—as already mentioned—neither the number of consenting and dissenting votes within the Conseil constitutionnel nor the members of the Conseil who do not support a ruling that was made are disclosed. The reason for this is simple. In *France*, adjudication at the Palais Royal is governed by the principle of secrecy of deliberations and voting.

§ 2—The situation in Germany

The option of a separate opinion is a distinctive feature of *German* federal constitutional judicature. If a judge holds a different view in the deliberations concerning a ruling or its reasoning about which, however, he cannot convince his colleagues, he may then express his dissent in a separate opinion, which is added to the decision endorsed by the judges and published together with that decision in the official case reports (§ 30 II of the Federal Constitutional Court Act; § 56 of the Rules of Procedure [Geschäftsordnung]). The judicial senates may announce the proportion of votes reached in the otherwise secret deliberations. The way in which voting results are presented can certainly vary. Sometimes unanimity is specifically noted, at other times individual judges are identified in connection with specific issues, and the votes on specific legal issues are released in any event.

§ 3—Summary and comparison

The idea of an *opinion dissidente* was (subsequently) introduced only for the German Federal Constitutional Court. In the French tradition of

[*] *Excerpted from* PHILIPP MELS, BUNDESVERFASSUNGSGERICHT UND CONSEIL CONSTITUTIONNEL 252 (2003). [Translated by Tollund, Inc ▪ Nordic Legal Language Services].

a strict principle of secrecy, releasing the dissents of individual judges is impermissible.

§ 4—Review of the permissibility of separate opinions and the disclosure of the voting results

The judges of a constitutional judicature are either permitted the option of an *opinion dissidente* or not. There is no grey area. This special right of the judges of the German Federal Constitutional Court is a distinctive feature whose purpose needs to be examined, considering that the French Conseil constitutionnel, for example, does very well without such an option. No one would dispute that the Federal Constitutional Court, too, could exist without the option of separate opinions. Consequently, a review of the option of an *opinion dissidente* must ask whether the right to separate opinions has a beneficial or, in fact, a detrimental effect on the institution of constitutional judicature. The issue of maintaining voting secrecy and of releasing voting results raises similar questions.

I. Proponents of the option of separate opinions and the disclosure of voting results

The idea of separate opinions has many supporters in Germany. They view it as a benefit that the judges have the option of presenting the various points of view of the court. The *dissenting vote* would also enable the triggering of potential future developments. Furthermore, the court's statements of reasons would be ratified by the dissents. Finally, providing the losing party with some affirmation would be another factor in favor of separate opinions. The voting results, too, could therefore be published because . . . there is no need for the pretense of a consensus.

II. Opponents of the option of separate opinions and the disclosure of voting results

Especially in France, the option of separate opinions is generally vehemently rejected. Cited in support is that such an option would be an unacceptable intrusion into the secrecy of deliberations, a foundation of the French justice system. Most of all, an *opinion dissidente* would be a completely unacceptable impediment to the credibility and persuasiveness of the constitutional court's rulings. Due to the successful experiences with the secrecy of the voting at the Conseil constitutionnel and all other courts, France also opposes the disclosure of voting results.

III. Comment

In final analysis, all arguments by the proponents of the option of an *opinion dissidente* are unconvincing; instead, the French rejection of an *opinion dissidente* deserves to be favored. It is not the task of a constitutional court to trigger possible future developments through separate opinions, because the German Federal Constitutional Court, in fact, does not wish to trigger such development with a given ruling or else it would have ruled otherwise. The court is also free to pick up on respective ideas from the scholarship and public opinion that always surrounds it. Other German courts revise their jurisprudence even without the option of separate opinions. The argument that the statements of reasons would be ratified by the dissents is unconvincing as well and, in fact, speaks against separate opinions. By deciding differently, the judges who oppose a dissenter's arguments are arguably invalidating the dissenter's objections, or else they would have joined the dissenter's view. Moreover, the losing party is not supposed to receive any affirmation of its position but must instead accept the court's ruling, and that ruling must be persuasive. Separate opinions, however, have the exact opposite effect. . . .

[T]his is not about feigning a consensus but instead rendering a decision as the Federal Constitutional Court or the French Conseil constitutionnel. Favoring the abolishing of separate opinions is not only that they weaken the weight and persuasiveness of rulings by the Conseil constitutionnel or by the German Federal Constitutional Court, which would be reason enough to oppose the permitting of an *opinion dissidente*, but above all the fact that the role of the German Federal Constitutional Court and of a French constitutional court, as the case may be, is being misconstrued. The German Federal Constitutional Court is a court, and under the position taken here, the same applies to the French Conseil constitutionnel. A court dispenses justice. Therefore, the judicial function requires the rendering of rulings without equivocation. The rulings of a constitutional court must be free of dogmatic disputes and injured pride. It makes little sense that individual judicial senates may rule as "the Federal Constitutional Court" while individual judges in those senates may distance themselves from those decisions. It is not the task of judges to cultivate their individualism. Their opportunity is to convince their colleagues on the bench with weighty arguments in the course of the deliberations. If they do not succeed, there is no reason to publicize the objections. . . .

Allowing separate opinions appears to be a vexing concession to the great need for compromise that always prevails in Germany. Constitutional

court rulings, however, seem to be the wrong place for this. Especially when particularly critical issues are involved, such as, for example, the concept of state power, abortion term limits, etc., there is no doubt that the court is diluting its rulings with "dissenting votes." For instance, if a separate opinion was authored by a judge of the Federal Constitutional Court who happened to be recognized as a particularly distinguished jurist and was also appointed to the court by the political party that now prevailed, then the ruling is called into question. . . .

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As Mels suggests, the publication of dissenting opinions is allowed at the German Federal Constitutional Court, but this was not always the case. For the first two decades of its existence, the Court followed the more typical continental practice of publishing only a single judgment. Although some of its creators had initially wanted to permit dissent, concerns about compromising the authority of the young Court ultimately prevailed. In 1960, another legislative attempt to introduce dissenting opinions in the Constitutional Court, as well as in the highest courts of each state and the five federal supreme courts, failed.

In the late 1960s, however, the Constitutional Court began in some cases to disclose the vote tally of judges participating in deliberations. This new practice was prompted by the famous *Spiegel* case of 1966, in which the judges split evenly, four to four. Because the statute regulating the Court provided that a government act could be declared unconstitutional only by a majority of the judges, the act challenged in the *Spiegel* case was technically upheld. On the merits of the case, however, the judges felt compelled to publish the opinion of each side within the judgment, not as an appendix as in the case of separate opinions. The Court did not reveal the names of the judges who were on opposing sides. The Court then began to disclose the vote in some unanimous decisions as well as in some majority decisions, but, in contrast to the circumstance of a four-to-four tie, without publishing the opinion of the minority. This immediately attracted the attention of academics, judges and virtually everyone else who followed the Court. Such an unprecedented break with tradition reignited the controversy over whether the publication of dissenting opinions should be permitted, this time on a much larger scale. In 1968, an impassioned debate on the question occurred during a day-long session of the 47th Law Congress, a private association of members of the various legal professions. Led by former Constitutional Court judge Konrad Zweigert, who threw his ardent

support behind dissenting opinions, the Law Congress voted heavily in favor of the introduction of dissenting opinions in courts of last resort, finding that with the dissenting opinion "not just a mere procedural matter [was] at issue but instead fundamental questions about the standing of judges and the relationship between citizens, on the one hand, and the justice system and judges, on the other."

The German Parliament took notice of the Congress's recommendations and, in 1970, amended the Federal Constitutional Court's organic statute in order to permit dissenting opinions. Commentators in the press hailed "the liberation of the judge's personality from anonymity, the freedom of conscience and of judicial conviction, the advancement of law and the democratic openness" that dissenting opinions would bring (*Süddeutsche Zeitung*, Nov. 16, 1970). The more cautious *Frankfurter Allgemeine Zeitung* did not forget the ambitions of the 47th Law Congress, noting that the reform was "of special interest" because it would demonstrate "whether special opinions should be a peculiarity of constitutional judicature or an exemplary experiment for the other courts." (Dec. 23, 1970). To date, the attitude of judges in other courts has not changed significantly since 1968, when the members of Germany's five supreme courts declared themselves resoundingly (158-65) against the introduction of dissenting opinions.

In the following article, written for the Constitutional Court's fiftieth anniversary, Gerd Roellecke takes stock of dissenting opinions, both at the Federal Constitutional Court and more generally:

Gerd Roellecke

Sondervotum [*Separate Opinions*][*]

Until the 20th volume of its case reports, the [German Federal Constitutional Court's] judgments and decisions were kept anonymous in accordance with German legal tradition. Not even the names of the judges participating in the rulings were printed. . . .

I. Development of the Established Law

The rendering of separate opinions is expressly regulated only for

[*] *Excerpted from* 1 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 363 (Peter Bardura & Horst Dreier, eds., 2001). [Translated by Tollund, Inc ▪ Nordic Legal Language Services].

the Federal Constitutional Court. The Fourth Act to Amend the Law on the Federal Constitutional Court of December 21, 1970, was intended to strengthen the court's standing as the supreme constitutional body and improve its ability to function. The Act inserted the following subsection 2 in BVerfGG § 30 concerning deliberations and the announcing of judicial decisions:

> A judge who dissented in the deliberation from the decision or its reasoning may record his view in a separate opinion; the separate opinion shall be added to the decision. The judicial senates may communicate the proportions of votes in its decisions. Further details shall be regulated by the rules of procedure.

Section 56 of the Rules of Procedure of the Federal Constitutional Court contains more detailed rules on the announcing, rendering, releasing and publishing of separate opinions. The only substantive limitation is the connection to the decision. The judge's opinion may differ from the result (dissenting opinion) or from the reasoning (concurring opinion). Thus, mere agreement—"I agree with the result and the reasons for the decision"—is not a separate opinion, likewise, legal statements that have nothing to do with the matter before the court. The law does not address how such "non-opinions" are to be handled. . . .

The actual impact of introducing separate opinions has been discussed multiple times [since their introduction]. . . . The conclusion is nearly unanimous. The consequences are neither as negative as feared nor as positive as hoped. [T]he "almost revolution" in German judicature has almost completely failed to materialize. Neither has constitutional adjudication become more predictable nor has the people's interest in it been invigorated. [N]o consensus has been achieved even on basic issues. For *Friesenhahn*, the "main point" of separate opinions is "to strengthen the personality of the judge, to put greater emphasis on the judge in his personal dignity as the medium of adjudication." For *Millgramm*, that is a matter of strict prohibition: "By no means is it the separate opinion's purpose to strengthen the personality of its author."

[O]ne must inquire into the sociological and historical assumptions underlying the introduction of separate opinions. To what extent do separate opinions serve "the truth of the decision"? To the extent that they manifest "the struggle for justice"? But what does "the struggle for justice" have to do with the "truth of the decision"? Does not adjudication in the end expect

parties to accept rulings on purely decisionist grounds, as the mere will of state authority? Do not separate opinions at most present grounds that speak *against* a decision? Or is the public to be enlightened about the fact that judicial decisions could been decided in a different way? This fact has been known since the secularization of politics and law, for more than four hundred years. Anyone who still today wants to show "that law and judicial pronouncements, too, are the work of man and as such burdened with human shortcomings," is running through barn doors that are wide open and must in fact be referring only to people for whom separate opinions are a matter of utter indifference because they do not litigate anyway. With *Rabelais*' dice-throwing Judge Bridlegoose in *Gargantua and Pantagruel* and *Kleist*'s country judge Adam in *The Broken Jug*, the contingency of judgments has even gained literary status. It is also not clear what separate opinions have to do with democracy, if democracy is understood as something along the lines of the sovereignty of the people. Publicity and oversight are in line with democracy, asserts *Friesenhahn.* But do we need separate opinions so that everyone can know everything about everything and so that the people may form its true will? In that case, there should not be any secrets all, neither secrecy of deliberation nor trade nor personal secrets.

II. From Princely to Bureaucratic Adjudication

What remains is the aura of the United States and the radiance of the United States Supreme Court. But if one allows oneself to be dazzled by that, one would be unable to understand the role of separate opinions. Therefore I will attempt a critical historical approach. . . .

[In the seventeenth century] the [German] princes increasingly represented themselves by non-aristocratic, paid servants who were dependent on the princes and who could be hired and fired by the princes at will. This new principle of "civil service against money" proved itself beneficial in many ways. It permitted:

> -adjudication to be separated from the adjudicators and based solely on the substance of the proceedings;
>
> -the selection, deployment, and replacement of public servants based solely on qualifications and no longer on standing and title;
>
> -anonymity of decisions, in order to minimize political

influence and facilitate changes in personnel;

-formalization and standardization of qualifications;

-the creation of an artificial, non-aristocratic hierarchy;

-the generalization of instructions;

-the replacement in large part of individual memory with orderly record-keeping.

These characteristics have been taken from *M. Weber*'s review of bureaucracy. It would be hard to disagree that they describe the German justice system from the local court to the Federal Constitutional Court even today. They signify that the princes gradually shifted the function of adjudication from the aristocracy to a bureaucracy. Of course the princes wanted to remain the supreme judges in their territories. They delegated adjudication to their judicial servants not as a right but for administration subject to instruction. Judicial servants remained dependent, and as a rule princes could get directly involved in each individual case, just as the pope can even today. Princes issued their instructions as general rules which could be changed at any time: as positive laws. In such a system, neither separate opinions nor the publication of individual voting was legitimate or functional.

[T]he person of the judge was irrelevant; it became part of the system's landscape. The exclusion of personal features from adjudication made decisions more impersonal and, in that regard, "more objective" and "more just," and thus more likely to inspire confidence. The exclusion of personal features also expanded the flexibility of the judiciary, its capacity to innovate and to address problems. [F]rom this perspective, *Friesenhahn*'s concern with "strengthening the personality of the judge" seems anachronistic.

The monarchical legitimation of law laid the foundation for the subsequent independence of judges. It allowed a Prince's judicial servants to resist their ruler's particular instructions by referring to his general laws. This occurred in the trial of Arnold the Miller (1771-1780), which is regarded as a turning point. It was the last trial in which a Prussian ruler attempted to "lay down the law" as a supreme judge. . . .

From this follows: Whatever judges may or may not do in office depends solely on their legitimation. [I]f they are adjudicating on behalf of the holder of judicial power, like the Prussian judicial servants, their vote is only a means to the end of rendering a decision that adheres to the requirements of a given legal regime. Without an obligation of adherence [Anschließungszwang], dice might indeed often replace people, as *Rabelais* suggested. Strangely, the issue of legitimation is never directly raised in the ramified debate on separate opinions.

It is presumed that all state authority in the Federal Republic of Germany is derived from the people (GG art. 20(2) sentence 1), including the judiciary, and that therefore judges in office may not state views on a matter in litigation in their own right. Debate always focuses on improving the process of adjudication. In this context, it is acceptable to refer to a judge's individual personality as is a kind of efficiency argument along the lines of "employee motivation." [But] whether and to what extent the introduction of separate opinions has actually improved the effectiveness of constitutional adjudication ought to be posed as a verifiable question, and this has not been possible. . . .

III. Stating Reasons in Court Judgments

In the nineteenth century there arose a demand the judicial system be public. But the notion of "public" is anything but clear. It generally refers to something along the lines of "society," or at least society's "rational component," its public opinion. The identification of the public with society . . . resulted in the miscomprehension that judicial publicity implies popular sovereignty and is thus compelled by democratic principles. But in reality adjudication can be democratically legitimized only formally through the familiar chain-of-legitimation theory of the Federal Constitutional Court, not substantively, even if it is conceded that publicity would result in more "correct" judgments. . . .

It is correct that publicity signifies a form of observation that has a direct effect: That which is being observed cannot remain as it is but must instead present itself in the manner in which it wishes to be seen. Thus, court decisions that can be publicly observed must present themselves as being just and as serving society. In that sense, publicity generalizes and abstracts the oversight over decisions that is already performed by the stating of reasons and by the interests of the litigants. Publicity, the requirement of stated reasons, and the interests of the litigants, are unified in the notion that court decisions must not only terminate a dispute but also

link the termination to the social order and especially to the legal system. The subjective satisfaction that a losing party in litigation might derive from a separate opinion does not matter because that satisfaction is not ascertainable and should not be allowed to influence the decision. Adherence to the legal system, however, requires no separate opinions. In fact, separate opinions seem to hinder that adherence because, by definition, they generally frustrate the presentation of justice and the decision's societal benefit.

IV. Appraisal of the Option of Separate Opinions

1. Consequences of the Historical Development

[S]pecial opinions are dispensable, if not dysfunctional, in modern judicial procedure. The legislature therefore correctly refrained from including them in the general judicial system. It is of key importance in the modern age that adjudication be certain and clear and that it fit in with the social order. Enlightenment is not needed about the contingency of adjudication, but about why adjudication is accepted and followed despite its randomness.

The sociologist *N. Luhmann* has offered an explanation that stands to this day: Procedures absorb protests. Procedures distinguish between participants, who are internal to the legal system and subject to particular requirements, and non-participants, who are external and excluded. Procedures force participants to present themselves through particular processes and to agree to let everything that they have said and done be held against them. This causes participants to become isolated so that their protests remain inconsequential. The publicity of proceedings ensures that the external is included and prepared for an outcome and that the protests of litigants do not receive public support. A losing party has no choice but to accept the outcome of a proceeding. . . .

From the outset litigants put themselves in a situation in which they can lose only if they do not conform. This point is especially instructive in appraising the introduction of separate opinions, because it need not impute correctness or truth to the outcome of a proceeding and it thus allows us to appraise the question of separate opinions without taking their correctness or truth into consideration. No one claims that special opinions as such are more correct than majority decisions, or vice versa. In the debate over the introduction of separate opinions, most proponents nevertheless presume a kind of discursive theory of truth. But the hypothesis that truth reveals itself

through discourse can no longer be maintained from the point of view of epistemological theory. It presumes a criterion of truth outside the discourse that cannot exist if the truth is only revealed in the discourse. . . .The question can thus no longer be whether separate opinions make decisions "more correct," but only whether they impede the absorption of protests.

At first glance, one is inclined to answer this question in the affirmative. For the most part, separate opinions deviate from the outcome. Therefore, they could hint to the losing party that protest might actually pay off and receive public support. But the decisions of the Federal Constitutional Court continued to be accepted after separate opinions were introduced, and, even if they have not been accepted in exceptional cases—such as the crucifix decision or the 50 percent rule-in-tax law—this is clearly not because of the separate opinions that were associated with the decisions. That separate opinions have not verifiably caused unrest could be due to confidence in the Federal Constitutional Court. We must disregard whatever special confidence the Federal Constitutional Court might possess, however, because this confidence is itself a phenomenon that requires explanation.

It would be more appropriate to view separate opinions as an aspect of procedures that relates to publicity. A majority decision no longer appears as the unanimous opinion of an adjudicating body, but instead as the result of a universally accepted voting rule by which the outcome of litigation is decided. Separate opinions exhaust themselves, so to speak, with the litigation. One would be hard pressed to invoke their reasoning outside of litigation because the majority of a court has already rejected them. The holders of those opinions have already "lost." [S]eparate opinions reveal the pugnacious character of litigation, which begins to resemble a sports competition such as soccer, where only goals matter and where a victory is not called into question even though the loser has also scored goals. The comparison with competition can also illustrate that in integrating separate opinions into the process, it does not matter whether they are useful or serve society, whether they, for example, reveal internal inconsistencies in the adjudicative process, initiate changes in adjudication, or have the opposite effect. Once their permissibility has been accepted, they become a rule of the game, and such rules are in force not because they are "correct" or "useful" but because they make the game possible and vary its degree of difficulty. Thus, one can reckon that separate opinions tie up manpower and extend proceedings before the Federal Constitutional Court by at least the three weeks that GOBVerfG § 56(1) grants for the completion of separate opinions. Nonetheless, the extension functions like

an aggravation that is built into the game. It has a similar function as the minimum weight of a Formula-1 race car.

Thus, viewed sociologically, separate opinions derive their significance from rules of procedure. A greater purpose is not apparent. There is no reason for assuming that separate opinions strengthen or weaken the general confidence in the correctness and fairness of court proceedings. If the legislature were to abolish separate opinions again, then as little would change as when they became permissible.

However, separate opinions are here and provide commentary on specific judicial decisions, which in turn are debated. They thus necessarily become fodder for legal arguments. [B]ut it must be added that the enriching of legal debate is as much and as little a responsibility of the adjudicative process as is the provision of job security for judges and staff. It is a secondary function.

2. The Practice of Separate Opinions

[S]eparate opinions are neither detrimental nor beneficial. They simply do not matter because they have no truly relevant purpose. [A]rguments for introducing separate opinions resemble a creed more than verifiable hypotheses, and reviews of the practice of separate opinions tend to be affirmative rather critical, and no considered terminology exists for analyzing the practice of separate opinions. Reviews of the practice are either mere inconsequential statistics or they admonish judges based on good or bad examples not to misuse the option of separate opinions. . . .

3. Identifiability of Judges

The declared purpose of permitting separate opinions was to identify the individual office holders by their views on specific decisions. This purpose has been achieved for the most part. However, it also has a problematic consequence. As constitutional court decisions generally are politically significant, separate opinions by necessity also reflect the political views of their authors. Separate opinions indeed enable the grouping of individual judges into, for example, "conservative" or "progressive." The question is what this means.

[D]istinguishing between conservative and progressive is a programmatic code for political parties and enables flexible, yet useful, attributions. "Anyone who favors anything that can be characterized as

power, or holding power, is conservative. Anyone who wants to emancipate—including and particularly when they want to inflict this on others—is progressive. Representatives of monopoly capitalism appear as conservative, representatives of capitalist monopolism regard themselves as progressive." *Luhman*, from whom this quotation was taken, has shown in further detail that the code is universally applicable—including, of course, to the law—and how it guides politics by suggesting certain choices, such as in personal assessments. For example, if one has read the progressive separate opinions of a constitutional court judge, one is not surprised if that judge drops a careless ugly comment about another judge in private conversation who has written conservative separate opinions, even though the remark may have nothing to do with the separate opinions at all. Nevertheless, the conservative/progressive dichotomy "clarifies" the situation overall for the outsider. Of course, this does not apply to the constitutional court judge who in a separate opinion is completely convinced that he has strictly separated politics from the merits and has decided the case solely on its merits.

Meanwhile, an outsider, such as a lawyer, will read separate opinions, attribute them to the conservative or to the progressive camp, and deduce from them a judge's position in cases that in the public debate are pressed into the conservative/progressive scheme. The lawyer might be mistaken in an individual case. Nevertheless, he would neglect his professional responsibilities were he not to proceed in this manner, because the publication of separate opinions suggests that he is supported by statistics. The public, too, which is to say the general perception and the attendant chatter, attributes separate opinions, including their substance, to the individual judges who author them. Regardless of whether or not a judge wishes it to be so, the public identifies his separate opinions with him as a person and expects similar results from him in the future, because the public believes that individuals must remain identical with themselves for purposes of recognizability. If a judge changes a position that he took in a separate opinion, he appears fickle, if not unprincipled. Thus he can generally no longer change his view. He has to hold on to the position in chamber deliberations as well. The other judges know this, of course, and are prepared for it. Hence the publishing of separate opinions is likely to calcify constitutional adjudication. . . .

Constitutional court judges strongly assert that the personal political positions of individual judges do not affect their deliberations. Some farewell addresses by departing judges create the impression that the two senates of the Federal Constitutional Court are the only remaining

functioning graduate departments in the legal sciences in the Federal Republic of Germany. This impression, however, quickly dissipates in the face of the venomous tone of some separate opinions. . . .

Reasons for denying that the personal political positions of constitutional court judges affect deliberation include the right of final adjudication, which cannot be reconciled with the sovereignty of the people, and the court's will toward order, which is inconsistent with the creative power of politics. What becomes noticeable in this fundamental incongruence is that the democratic legitimation of constitutional court judges is somewhat weak and that they have no instruments of power at their disposal. Their only source of authority is the law. They must thus present themselves and the court as concerned only with the law. [T]he public cannot be permitted to disrupt this image, because it. would weaken the court's authority. For this reason, observing and describing the political positions of individual judges may be socially prohibited. One would be disdained if one were to appeal to the basic political position of a judge in a constitutional dispute or in a jurisprudential debate.

Meanwhile, the court's right of final adjudication and the independence of its judges present constitutional democracy with a problem of credibility, [which is why the court] prefers solutions to problems that are generally acceptable and avoids decisions that are deemed political.

This is the context in which published separate opinions must be viewed. [J]ust as political parties must explain their platforms by establishing certain leadership personnel, the public self-marking of individual constitutional judges is a surrogate for the lack of direct democratic legitimation. The linking of the judges to their separate opinions is for all practical purposes the only reason for justifying the maintenance of the current arrangement.

Mario Gorlani

La dissenting opinion nella giurisprudenza della Corte Suprema degli Stati Uniti: un modello importabile in Italia? [*]

[*The Dissenting Opinion in the Jurisprudence of the U.S. Supreme Court: A Model Importable to Italy?*]

2. [The practice of dissenting opinions] has given rise to certain theoretical problems in the United States that are not easily resolved. How can one reconcile the "dissolution" of the unity of the judicial decision with . . . the objectivity and impersonality of the "rule of law" (as distinct from the "rule of men")? If justices are asked to pronounce the "rule of law," and if that rule of law is supposed to be objective, because it is directly deducible from law or from judicial precedents, there can be no space left for the manifestation of dissenting opinions. The rule of law [can exist] only if the Court, after having elaborated a synthesis among divergent ideas and having verified the applicability of precedents to the case in review, expresses itself as a unified and impersonal institutional body that announces an "*opinion of the Court*" rather than as a summation of justices' opinions considered individually and in disagreement. The plurality of opinions also attacks the certainty of the law, because it spreads the belief that the orientation of the court is subject to easy changes, which can be brought about through a change of opinion or the replacement of a single justice. We are mainly talking about legal fictions, but fictions that nonetheless represent some of the fundamental theories of a modern state governed by law.

3. The peculiarity of *common law* systems, in which law is created principally through the judicial system—and, in particular, by the Supreme Court, through the rule of *stare decisis*—and only subordinately through the legislature, [forces] the judicial branch to confront the democratic foundations of its own function. It is no accident that the legitimacy of the Supreme Court has been the object of bitter contention since its beginning. To cite two well-known examples, the decision in *Marbury v. Madison*, in 1803, in affirming the power of judicial review over acts of Congress, faced the fierce opposition of the Republicans of Thomas Jefferson, an avid proponent of the democratic superiority of the legislative branch as the ultimate expression of the popular will. On another occasion, the Court—compelled by the impending threat of President Roosevelt's "*Court Packing Plan*," which sought to revise the composition of the Court in order to

[*] *Excerpted from* FORUM DI QUADERNI COSTITUZIONALI, http://www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=365. [Translated by Stephen N. Gikow].

overcome resistance—had to accept New Deal legislation, which was supported by a very strong popular mandate, even though the Court in so doing had to disavow its own judicial precedents. Each of these examples highlights the tension that is often created in the United States between political organs and the judiciary: they show that however much the Supreme Court can rely on its own reputation and authority, it is and remains a body devoid of legitimacy that is nonetheless inserted at a key position in the democratic decision process.

4. This lack of legitimacy is the main theoretical element that, though not alone, sustains the practice of the *dissenting opinion.* The Court successfully overcomes objections to its democratic legitimacy by introducing at the very center of its activity a dialectical confrontation between the opinions of different judges that, through the publication of concurring and dissenting opinions, is known by all. Thus even the jurisprudence of the Supreme Court, like the activities of other constitutional bodies, expresses the fundamental tenet of a deliberative democracy, in that the dominant will is majoritarian but is never "tyrannical," because it gives the minority the space to express itself and the space to be able to become the majority in the future. In this way, the judiciary, even as it creates new law, leaves the door open and even stimulates the evolution toward solutions that better conform to the sensibilities of the people, through both the ever-present possibility that one of the justices may change his or her opinion, and the possible radical alteration of the composition of the Supreme Court. Decisions with a plurality of opinions regularly promote a lively debate on the diverse positions expressed by the justices and enrich the shared judicial heritage. In this way they help to develop legislative and legal solutions that are best adapted to address needs as they arise.

5. Such a practice, however, is not immune to risks connected to the possibility that a justice who possesses a certain opinion can [be identified and subject] to political control. [I]mpersonal judgments protect individual justices from these influences and pressures, guaranteeing, at least in theory, impartiality in their decisions. In the United States, where justices are appointed by the President with the approval of the Senate, this risk is avoided by the constitutional guarantee of life-tenure "*during good behavior*" and by the guarantee that the compensation of judges cannot be reduced during their mandate. Primarily, however, this risk is avoided by the tradition of respect for the role of the Supreme Court, whose independence and autonomy is considered an essential element of the complex constitutional system created by the 1787 Constitution. The theory

of a constitutional structure of "checks and balances" [assures] the Supreme Court a high role that, with only a few exceptions, has never seriously been put into question in over 200 years of history. [This respect is also associated with] the flexibility of the [Court's] jurisprudence, a flexibility guaranteed by the institutions of dissenting and concurring opinions.

6. Are we dealing with a model that can be imported to Italy? And, most importantly, would it be good to import it, at least with reference to the decisions of the Constitutional Court? A recent pronouncement of the constitutional justices reopened the long-debated question, even if the Constitutional Court itself seems opposed on the whole. . . .

7. There are many reasons to support *dissenting opinions* in the Italian legal system, although such opinions would be characterized by profoundly different characteristics than in the United States. Besides stimulating and encouraging an academic and political discussion about judgments, [and besides] holding individual judges responsible for their opinions and thereby elevating the overall quality of constitutional jurisprudence, dissenting opinions in Italy could help enrich the democratic fabric of constitutional institutions, assuring the transparency of the formative process by which justices of the law make their decisions.

8. It should not be considered an obstacle that the Italian legal system is based on principles of *civil law*, which gives legislative and rule-making bodies the exclusive task of normative formation, limiting the role of the justice to the application of norms to concrete cases. If one puts aside the ever more frequent hybridization between the two models in virtue of the increasingly creative function of jurisprudence common to all countries of the continental tradition, the differences between *civil law* and *common law* would seem to render superfluous [the] employment of *dissenting opinions* for lower judges, insofar as they are subject to the law, according to art. 101 Cost. It is left to the legislator to interpret changes in civil, social and economic relationships and to translate them into general laws, [while] justices are assigned the task of applying law to concrete cases and thus find legitimation only in law and not in a popular consensus.

9. The Constitutional Court finds itself in a different position in the Italian legal system, since it is the judge of the law and it uses the Constitution as a parameter for judgment. In this guise, the Court becomes a potential antagonist to the legislative power, opposing its own binding interpretation of the constitutional text to the Parliament, which is a direct expression of the people. The Constitution is by its nature, elastic,

interpretable and applicable in different ways, [and] decisions of the Court thus assume an unavoidable political connotation which, according to the personalities of its members, can either conform or contrast with the evolution of the collective sensibility. In such a context, the transparency of the Constitutional Court's decisionmaking processes can provide public assurance that the Court is authoritative and democratic, opening its doors to outside contributions and to the critique and opinion of the public. . . .

10. There remain, of course, certain gray areas. Per art. 135 Cost., the fifteen constitutional justices hold their respective positions for nine years and are not eligible for another term. Given the number of justices and the relatively frequent changes in the Court's membership, there is an inherent risk that the Court could become a chaotic collection of voices, incomprehensible to the people and to enforcers of the law. The case is different from that of the U.S. Supreme Court, which has only nine Justices who remain on the bench for their entire lives and which produces changes in the law that are the fruit of the slow workings of time. The Italian Court changes its members frequently and people expect that each change in the composition of the Court will correspond to a change in jurisprudence. But above all, the essential issue remains the necessity of keeping the Court, and at least those members who were appointed by Parliament, from being suspected of having acted from purely political reasons, thereby supporting the leanings of their political groups. This necessity is all the more pressing at a time when the two principal political coalitions are engaging in reciprocal delegitimation at such a level as to endanger that very identity of values shared by all of the political forces, which is an essential pre-supposition for the Constitution—and for the body charged with its interpretation—to be recognized as functioning in a unified, lawful, political, and moral way.

11. In other words, the institution of *dissenting opinions* must be hailed as an expression of a mature society, one that does not fear to discuss "myths" and that recognizes in a vocal dialectic, even at the center of its constitutional bodies, an element of vivacity and an enrichment of democratic values. Yet, this presupposes a willingness on the part of all the political forces to acknowledge the Constitutional Court's essential role in the preservation and safeguarding of the fundamental principles and liberties. The recent delay by Parliament in appointing two justices would seem to indicate that we are heading in a dramatically opposite direction.

Lord Bingham of Cornhill

A Personal Perspective[*]

During the fourteen or so years during which I sat, on and off, in the civil division of the Court of Appeal the prevailing practice was that one member of the court (not always, but quite often, the presider) would undertake (after, not before, the hearing) to write a leading judgment and the other members would feel entirely free to contribute a supplementary, or of course contradictory, judgment if they chose. This was a practice which I welcomed and continue to support. Even when different minds reach the same destination, they often do so by somewhat different routes, often conditioned by the judge's professional background and experience, employing different chains of reasoning and attaching significance to different features of the case. Such a procedure, drawing on the diversity of a multi-judge court, in my view enriches the final product and enables the reader to know more or less exactly why each judge has reached the conclusion he has. . . . [To] this general preference for multiple judgments I would add [a qualification] . . . where the need is not for differing personal insights and reasons but for a single, lapidary, authoritative and (so far as achievable) final statement on the subject. . . .

There are some cases in which, as I think, the need is for a single statement carrying the authority of the whole House. . . . It is not a coincidence that [many of these cases] relate to criminal proceedings, for at least two reasons. First, the scope for judicial development of the law in the criminal field, whether by introducing new offences or extending or abolishing old ones, is very limited and multiple opinions can less often point the way to future trends. Secondly, a judge charged with the often difficult task of managing a criminal trial or directing a criminal jury is assisted by a clear, intelligible and preferably simple statement of the relevant law or practice on the subject in hand and is unlikely to be assisted by a choice of differing viewpoints and modes of expression. Where the members of the House are unanimous, both as to the result and the reasons, I am generally in favour of a single judgment in cases ruling on matters of practice and criminal law. . . .

This brings me to the last topic on which I wish to touch, which is dissent. I understand, of course, that in some countries and some courts the tradition or the rule is that the court speaks with a single voice and no

[*] *Excerpted from* an address delivered at the Oxford Institute of European and Comparative Law on June 20, 2008.

discordant opinion may be heard. I would also accept that when a court habitually divides along what appear to be ideological grounds the judges begin to look less like interpreters of the law and more like purveyors of personal opinions. All that said, however, I am in general strongly supportive of freedom to dissent, for four main reasons. First, if on occasion one feels that the decision reached by the majority is unjust, or based on unsound reasoning, or is likely to be mischievous in its effect, it is morally objectionable to be obliged to acquiesce and to be denied the opportunity to voice one's own view. Secondly, a single judgment drafted to take account of differing and contradictory opinions in a way that will command the assent of as many judges as possible inevitably tends to blur differences and resort to qualifications which detract from the clarity of the judgment. It is better that those who do not agree, or who agree for different reasons, say so, leaving the majority free to express their ruling more clearly and simply. Thirdly, the dissent of today may well become the orthodoxy of tomorrow. . . . As Lord Steyn (dissenting) observed in *Fisher v. Minister of Public Safety and Immigration*, "[a] dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting judgment sometimes contributes to the continuing development of the law." Fourthly, a well-argued and persuasive dissent may provide a potent stimulus to statutory intervention, as did Lord Rodger's dissent in *Barker v. Corus UK Ltd.* and as will, I hope, Baroness Hale's dissent in *YL v. Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)*.[*]

Michael D. Kirby

Judicial Dissent—Common Law and Civil Law Traditions[**]

The tradition of publishing a Court opinion was introduced to the United States Supreme Court by Chief Justice John Marshall. His legal skill, logical prose style and quick mind won him the support of his colleagues in usually expressing the conclusions of the Court with a single voice. Only later in his long service as Chief Justice did dissenting opinions re-emerge. In Australia, the first Chief Justice of the High Court, Sir Samuel Griffith, had a similarly powerful effect on the original Justices. However, with the appointment in 1906 of Justices Isaacs and Higgins, the unanimity of the Court's early opinions broke down. Doctrinal issues soon emerged in

[*] [2007] UKHL 27, [2007] 3 WLR 112, ¶¶ 36-75.
[**] *Excerpted from* 23 L.Q. REV. 379 (2006).

sharp focus. Many of them were important to the future shape of constitutional and general law in Australia. In the manner of the House of Lords, the contests were thereafter spelt out in differing opinions. This permitted all who were interested to witness intellectual debate conducted in public and not kept behind the Court's closed doors. Readers could then make their own evaluation of the Court's dispositions. . . .

[I]t is a feature of most appellate and constitutional courts of the common law constitutional tradition that they tend to be stronger and less deferential in the wielding of power than the courts of the European tradition have generally been. I do not doubt that this is a product of history. But it is also affected by the different personnel, traditions and training typically found in the higher courts of most common law countries. These, in turn, affect the degree of transparency that is considered normal in disclosing divisions and acknowledging candidly the distinct arguability of opposite conclusions. . . .

The institutional assertion that "the law is the law" and that conflicting views will undermine the authority of a court seem to most common law lawyers hopelessly old-fashioned and disrespectful to the people whom the courts serve. If, in truth, law is often unclear, if words in the Constitution or in parliamentary law are ambiguous and if the common law or its jurisprudence is obscure, is it not preferable to acknowledge this? Judges will do so amongst each other behind closed doors. Do they not owe it to their community to reveal the controversies and any deeply held differences so that, if need be, court decisions can be re-visited and the law reformed? Once it is acknowledged, as it must be, that a superior judge to some extent creates the law, transparency and disclosure of the legitimate parameters of judicial choice become important, whether the judge is operating in [a] common law or civil law jurisdiction. . . .

The notion of law as a rule handed down by people in authority to be obeyed simply because it is propounded as the law, is one that has fewer supporters in common law countries today than was formerly the case. Whether the law is made by Parliament, in the Executive Government or in the courts, the necessity that it be transparently made and openly expressed, explained and justified is now commonly accepted. It is this feature of law in contemporary society that has led, in English-speaking countries, to the growth of an enlarged administrative law; the proliferation of judicial and constitutional review; the enactment of freedom of information, ombudsman and administrative tribunal legislation; and the increased insistence on the necessity of providing reasons for judicial and

administrative decisions.

In this context, the provision of dissenting, or different concurring opinions is simply one more step in the process of governmental transparency. The assertive, seemingly dogmatic, style of judicial reasoning in the traditional civil law countries is rather unsatisfying, even dismaying, to those brought up in the more transparent and discursive approach of the reasoning of common law courts. A judicial *order* on its own will allow no disagreement. It indeed states the law's outcome. But the *reasons* that support the order will, in fact, often be diverse. So what is the justification for keeping the diversity a secret from the litigants and the people?

Even in common law courts, however, there are variations on this theme. For example, in the English Divisional Court, dissenting opinions are not usually given in criminal appeals against conviction or sentence. The reasons for this tradition are obscure. Presumably it is justified by the feeling that an unsuccessful prisoner should not be upset by knowing that one judge saw merit in the appeal. Likewise, a successful prisoner should not be upset by any doubt cast on his or her success (and possibly an order of acquittal) by the opinion of a judge who disagreed and thought the prisoner should remain locked up.

This English tradition of restraint, confined in what may appear a somewhat classist way to the disposition of the appellate affairs of prisoners, has not enjoyed a ready export to other parts of the common law world. It is true that needless dissent will sometimes be suppressed in criminal appeals, typically because of the sheer burden and number of such dispositions. But the English rule of special restraint in criminal and sentencing appeals is not observed, as a matter of practice, in the Australian courts in which I have participated. The provision of dissenting reasons in such appeals is quite common. It is unrestrained by any belief that providing them will upset prisoners, governmental authorities or anyone else. To the contrary, the presence of a dissenting opinion, where a prisoner loses an appeal, is affirmative proof to the prisoner and the public alike that the court has taken the process seriously and treated the prisoner as an equal litigant, along with all the others. . . .

As befits the democratic character of their constitutional arrangements, in common law countries, courts generally, and final courts in particular, perform pedagogical functions. They express reasons and values that can be examined by citizen and non-citizen alike; by lawyers but also by non-lawyers. Through the internet, such opinions are now much

more readily, generally, and instantaneously, available.

Upon constitutional questions, courts are often faced with political issues—not in the partisan sense but in the sense of issues relevant to the structures of government, the accountability of governmental leadership to the people and the values that inform the ways in which individuals are controlled by and under law. In this respect, courts, and especially final courts, contribute to the formation of popular opinion concerning matters relevant to their community's social values. They are thereby engaged in a dialogue with the community they serve.

Reasoned dissents may not predominate in such dialogue in the way that clear majority opinions do. However, reasoned dissent, appealing over the weight of binding orders of the court, may address directly the good opinion and rational consideration of interested members of the community affected. It may promote public discussion in a more vigorous way than would occur if the dissent were suppressed.

Dissent is not, or should not be, a crude appeal to popular majorities, in the manner of partisan politics. An appeal of such a kind would attract the criticism which the opponents of judicial dissent advance in countries such as France and the Netherlands. They ask why members of an institution should be permitted to "shake the faith of the people in the wisdom and infallibility of the judiciary?" The answer to that question is that today, rightly, infallibility is denied to any human institution.

Sometimes disagreement may not extend to the outcome or order favoured by the majority. It may relate to a difference of view about the mode of reasoning, the applicable legal rule, the state of the court's doctrine, the view of the facts or just the way the explanation for the decision should be expressed. Such nuances of reasoning reflect a measure of disagreement amongst judges that is even more common in appellate courts of the Commonwealth of Nations, than outright dissent. They surface in separate concurring opinions delivered at the time of disposition. Such opinions may be provided so as to keep alternative views in play whilst awaiting a different case, or more propitious time, when they can be expressed more decisively.

The activities of institutions, particularly those of government in a democratic polity, must be accountable to the people whom the institution serves. The suppression of dissent or disagreement falling short of dissent in the outcome diminishes this accountability. It thereby weakens, rather than

strengthens, the institution of the courts.

B. Dissent and Judicial Independence

Julia Laffranque
Dissenting Opinion and Judicial Independence[*]

The stability and effectiveness of judicial power in implementing the rule of law is guaranteed by the independence of courts and judges. The independence of courts has been an object of legal and political debate in Estonia for quite a while, especially in connection with Estonia's aspirations towards membership in the European Union. . . .

According to § 146 of the Estonian Constitution, courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws. Independence of judges is guaranteed by the procedures for the administration of justice established by laws and by the secrecy of deliberations in the decision-making process. But how can the latter be consistent with the possibility in a collegial court for a judge to publish a dissenting opinion? Does the dissenting opinion undermine the authority of the court and violate the principle of secrecy of deliberations, or does it strengthen the court's reputation and make the administration of justice more transparent? Is it in conflict with the principle of the independence of a judge, or does it, on the contrary, add to the independence of a judge?

Dissenting opinion and its disclosure is known mainly in the countries of the Anglo-American legal family—for example, England together with Wales and Northern Ireland, Ireland, the United States, Canada, Australia, New Zealand and such countries affected by the Anglo-American system as India, Pakistan, Israel, and some African countries.

In the continental European legal systems, the dissenting opinion is allowed and disclosed only in some countries (in Western Europe: Germany, Spain, Portugal, Greece) and even there it is made available in the published form mostly only in higher or constitutional courts.

The dissenting opinion is completely unknown in countries of the

[*] *Excerpted from* 2003 JURIDICA INT'L 162.

continental European legal family like France, Italy, the Netherlands, Belgium and Austria, where the principles of collegiality and secrecy of deliberations are especially strongly rooted and the results of voting are not disclosed.

Central and Eastern European countries mainly stick to the principle of secrecy of deliberations that is prevalent in continental Europe, being of the opinion that society is not yet mature enough to accept dissenting opinions. However, dissenting opinions are allowed, although only in constitutional courts, in the Czech Republic, Hungary, Bulgaria and Croatia. These countries have (re-)built their system of constitutional review mainly [along] the model of the German Constitutional Court (the so-called Karlsruhe court). [The] justices of the Russian federal constitutional court can also express dissenting opinions. . . .

In Nordic countries, the dissenting opinion was introduced in the Norwegian legal system in 1864; Sweden follows the example of Norway, which is based on the practice of the British House of Lords. [An] attempt to adopt the dissenting opinion was made in the Danish Supreme Court where it now exists in a unique form—as a description of counterarguments inside the court judgment itself. . . .

3.3. Dissenting opinion as a threat to judge's independence

The dissenting opinion, secrecy of deliberations and judicial independence are in mutual, controversial correlation. [Disagreement is] caused by [different understandings of] the independence of a judge. Judicial independence is used as an argument both in favour of and against the dissenting opinion. Those who use judicial independence as a counterargument to dissenting opinions associate judicial independence [with] strictly guaranteed secrecy of deliberations and [they define] independence in terms of impartiality. There is fear of political (and in some countries, in the case of constitutional courts where the judges belong to political parties, also party-related) pressure on judges who publish dissenting opinions, or pressure by publicly influential economic, social or other interest groups and the media. Here we can clearly see how external as well as internal independence intertwine and overlap. [In] addition to external political pressure, dissenting opinions are seen as a risk to the personal internal independence of a judge's career: if a particular judge's dissenting opinion [is disapproved], the judge may not be promoted in office. [In] the Open Society Institute's report on judicial independence in Estonia, it is noted that because members of the Constitutional Review

Chamber are elected and re-elected by the Supreme Court sitting *en banc*, [there is] an incentive for the Supreme Court Constitutional Review Chamber judges seeking re-election to rule in a manner that meets the expectations of their colleagues on the Supreme Court. Re-election of members of the chamber by the Supreme Court *en banc* may thus affect the maintaining and presenting of dissenting opinions by the members of the chamber. . . .

3.4. Dissenting opinion as a guarantee of judge's independence

From the aspect of judicial independence within the court system, dissenting opinions should be seen as expressing the independence of judges, *i.e.*, "independence of a judge from other judges." The dissenting opinion is important for a judge who remains in the minority, because a dissenting opinion expresses the judge's "mental independence" which [is made public]. Dissenting opinion guarantees dignity to judges who remain in the minority and enable them to decide by their conscience and not by the majority. A survey conducted among Estonian judges showed that respondents saw the dissenting opinion as a right of a judge to express his opinion and freedom of conscience. It was also pointed out that a judge cannot sign a decision with which he disagrees, [so that the prohibition of dissenting opinions might] endanger judicial independence. There are also situations where not allowing dissenting opinions would be unethical. For example, it would be unthinkable if in the United States judges could not dissent from majority opinions applying the death penalty. On the other hand, judges must also [set] certain limits on [their own] "mental independence," because after all judges are restricted by law and cannot leave the impression that they base their opinions only on personal value considerations or personal views of the world.

[Dissenting opinions] increase the responsibility of all judges in a court. [They] motivate the majority to take larger responsibility as well as plac[e] responsibility on judges who dissent. Dissenting opinions cause restlessness and such restlessness provides a necessary stimulus for the future by avoiding and routine and critique-free decision-making. A judge of the first instance who makes decisions single-handedly must bear public responsibility for his decisions because [their authorship] is known. Why can't members of a court chamber do the same? Dissenting opinions make judges aware of this responsibility.

Ruth Bader Ginsburg
Remarks on Writing Separately[*]

Public accountability through the disclosure of votes and opinion authors puts the judge's conscience and reputation on the line, and the repercussions are sometimes severe. Justice Blackmun, for example, continues to be targeted for attack because, over sixteen years ago, he carried out an assignment given to him by then Chief Justice Burger; he wrote the Court's opinion on women's access to abortion, *Roe v. Wade,* a 7-2 judgment. The storm following such a decision may sweep away judges who lack the cushion of life tenure. (The majority of our states, I note, still provide for periodic election or reappointment of judges.) Consider the fate of California's once Chief Justice Rose Bird and her two colleagues, Cruz Reynoso and Joseph Grodin, in the well-financed, successful 1986 campaign against their retention on the California Supreme Court. One commentator wrote in relation to that campaign and its focus on single issues:

> Good judges reaching well-reasoned and even precedentially-restrained results in one particularly controversial case are seriously at risk if a majority of the electorate feels strongly enough about the one issue. Justices who lack principle so that they bend to the pressure of popular opinion will be retained. This places too much external pressure upon the justices.

There is security in anonymity as these illustrations attest. But the judge who works under an anonymity cloak "has nothing like the prominence of the common law judge." Judges nameless to the public who write stylized judgments do not command the moral force judges in the United States sometimes demonstrate. Consider the brave performance of certain Fifth Circuit judges and, even more notably, certain district judges in the South in their valiant endeavor to secure compliance with the Supreme Court's school desegregation decision, *Brown v. Board of Education.* I recall, as an example, words written in 1956 by my former D.C. Circuit colleague, Judge J. Skelly Wright. He was at that time a district judge in New Orleans. The words appear in one of his many orders aimed at desegregating the city's public schools. Judge Wright put his name on the line, his personal safety at risk, and the style is plainly his own:

[*] *Excerpted from* 65 WASH. L. REV. 133 (1990).

> The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God.

C. Dissent, Dialogue, and the Law/Politics Distinction

Claire L'Heureux-Dubé

The Dissenting Opinion: Voice of the Future?[*]

Dissenting Opinions and Dialogue

Dissenting opinions have the potential to lay the foundations for future decisions, to be gradually constructed by people who are interested in developing new approaches to existing law. In so doing, they help to generate a fruitful dialogue among the courts, academics, legislative assemblies, and future generations of lawyers. In Canada, this dialogue has played an important role in the development of the law, as academics make a practice of commenting on decisions and arguing the relative merits of opinions, including dissenting opinions. Regardless of whether their comments are intended to clarify the majority opinion in light of the dissenting opinion, or to transform the dissenting opinion into positive law, they are always helpful to the courts and to the legal community, and are often cited in the decisions of the Supreme Court.

Dissenting opinions may also contribute to an ongoing dialogue between the courts and legislative assemblies. Over the past two decades in Canada, for example, there has been a virtually constant dialogue between the federal Parliament and the Supreme Court concerning the prosecution of sexual offences such as sexual assault. More specifically, certain statutory provisions protecting complainants against cross-examination on irrelevant matters such as past sexual history were initially found unconstitutional by the majority of the Court. This gave rise to a dialogue between Parliament

[*] *Excerpted from* 38 OSGOODE HALL L.J. 495 (2000).

and the courts, in which Parliament ultimately relied on both the majority and minority approaches in drafting subsequent legislation on this and other similar issues.

During the early 1980s, Parliament amended the Criminal Code to protect victims of sexual assault against the airing in cross-examination of the intimate details of their prior sexual history. In *R. v. Seaboyer*, the majority of the Court held that the new provisions were unconstitutional in part, because they violated the right of the accused to make full answer and defence.

Parliament legislated again, essentially enacting the guidelines laid down by the majority in *Seaboyer*. Shortly thereafter, however, the Court was called upon to examine a different aspect of the rules of evidence in this type of case, namely, disclosure to the accused of victims' medical and therapeutic records. In the absence of legislative guidance on this issue, the majority in *R. v. O'Connor* established a relatively low threshold for disclosure of this type of evidence. The dissenting opinion formulated a more stringent test, based not only on criteria of relevance and the importance of the accused's constitutional right to make full answer and defence, but also on the constitutional rights of sexual assault complainants to equality and privacy.

Parliament rejected the approach taken by a majority of the Court, which allowed for the admission of facts that were often completely devoid of relevance, and legislated again, essentially adopting the higher threshold for disclosure proposed in the dissenting opinion in *O'Connor*. When the constitutionality of these provisions was challenged in 1999, the Court unanimously concluded that the minority's alternative approach as enacted in the new legislation did not violate the accused's constitutional rights, with one relatively minor reservation expressed by the chief justice.

Dissenting opinions may also generate a dialogue that goes beyond exchanges among the courts, academics and legislatures. They may be used as a valuable educational tool in the law faculties, which focus on studying and discussing judicial decisions in relation to legal doctrine and principles. Students may be asked to evaluate the relative merits of the majority and dissenting opinions, each in light of the other, in order to develop their analytical skills and make them aware of the fact that the law may sometimes allow for several possible solutions to a single problem.

In addition, since dissenting opinions often provide a new

perspective or approach to familiar concepts, they are particularly well suited to initiating a dialogue with future generations who may share such emerging perspectives. It is perhaps not surprising, for example, that the four women who have sat on the Supreme Court of Canada since 1982 have written or supported dissenting opinions more often than average, particularly in interpreting constitutional equality rights, be they directly at issue or indirectly at issue in criminal and tax law cases.

Last but not least, dissenting opinions may contribute to an international legal dialogue, as courts seeking solutions to problems in areas where they do not yet have a wealth of jurisprudence may look to, and choose from, any one of the various approaches developed in majority or minority decisions emanating from other jurisdictions. For instance, a number of dissenting opinions of the Supreme Court of Canada have been cited by the majority of the Constitutional Court of South Africa, in the course of interpreting its new constitution, and specifically the provisions regarding equality rights.

Antonin Scalia
The Dissenting Opinion[*]

In assessing the advantages and disadvantages of separate opinions, one must consider their effects both within and without the Court. Let me discuss the latter first. The foremost and undeniable external consequence of a separate dissenting or concurring opinion is to destroy the appearance of unity and solidarity. From the beginning to the present, many great American judges have considered that to be a virtually dispositive argument against separate opinions. So high a value did Chief Justice Marshall place upon a united front that according to his colleague, Justice William Johnson, he not only went along with opinions that were contrary to his own view, but even announced some. Only towards the end of his career—when his effort to suppress opinions had plainly failed—did he indulge himself in dissents: a total of only nine dissents in thirty-four years. In more recent times, no less a judicial personage than Judge Learned Hand warned that a dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."

I do not think I agree with that. It seems to me that in a democratic

[*] *Excerpted from* 1994 J. SUP. CT. HIST. 33.

society the authority of a bench of judges, like the authority of a legislature, or the authority of an executive officer, depends quite simply upon a grant of power from the people. And if the terms of the grant are that the majority vote shall prevail, then *that* is all the authority that is required—for a court no less than for a legislature or for a multi-member executive. Now it may well be that the people will be more inclined to accept without complaint a unanimous opinion of a court, just as they will be more inclined to accept willingly a painful course decided upon unanimously by their legislature. But to say that the *authority* of a court *depends* upon such unanimity in my view overstates the point. In fact, the argument can be made that artificial unanimity—the suppression of dissents—deprives genuine unanimity of the great force it can have when that force is most needed. Supreme Court lore contains the story of Chief Justice Warren's heroic and ultimately successful efforts to obtain a unanimous Court for the epochal decision in *Brown v. Board of Education*. I certainly agree that unanimity helped to produce greater public acceptance. But would it have had that effect if *all* the decisions of the Supreme Court, even those decided by 5-4 vote, were announced as unanimous? Surely not.

Perhaps things are different when a newly established court is just starting out. Or perhaps they were different, even for a well established court, in simpler, less sophisticated, less bureaucratic times. But I have no doubt that for the Supreme Court of the United States, at its current stage of development and in the current age, announced dissents augment rather than diminish its prestige. . . .

A second external consequence of a concurring or dissenting opinion is that it can help to change the law. That effect is most common in the decisions of intermediate appellate tribunals. . . . At the Supreme Court level [a] dissent rarely helps change the law. Even the most successful of our dissenters—Oliver Wendell Holmes, who acquired the sobriquet "The Great Dissenter"—had somewhat less than ten percent of his dissenting views ultimately vindicated by later overruling. Most dissenters are much less successful than that. Even more rarely does a separate concurring opinion have the effect of shaping the future law—rarely but not never. . . .

The dissent most likely to be rewarded with later vindication is, of course, a dissent that is joined by three other Justices, so that the decision is merely a 5-4 holding. That sort of a dissent, at least in constitutional cases (in which, under the practice of our Court, the doctrine of *stare decisis* is less rigorously observed) emboldens counsel in later cases to try again, and to urge an overruling—which sometimes, although rarely, occurs. And that

observation leads me to the last external effect of a dissenting opinion, which is to inform the public in general, and the Bar in particular, about the state of the Court's collective mind. . . . [D]isclosure of the closeness of the vote provides useful information to the legal community, suggesting that the logic of the legal principle at issue has been stretched close to its utmost limit, and will not readily be extended further. . . .

Of course the likelihoods and unlikelihoods, the fragilities and rock-solid certainties signaled by unanimous or closely divided opinions have a relatively short shelf life. They become stale, so to speak, as the Justices who rendered the opinion in question are, one by one, replaced. And that raises what seems to be one of the undesirable external effects of a system of separate opinions.

It produces, or at least facilitates, a sort of vote counting approach to significant rules of law. Whenever one of the five Justices in a 5-4 constitutional decision has been replaced there is a chance, astute counsel must think, of getting that decision overruled. And worse still, when the decision in question is a highly controversial constitutional decision, that thought occurs not merely to astute counsel but to the President who appoints the new Justice, to the Senators who confirm him, and to the lobbying groups that have the power to influence both. If the decision in question is controversial enough—*Roe v. Wade* (1973), is the prime modern example—the appointment of the new Justice becomes something of a plebiscite upon the meaning of the Constitution in general and of the Bill of Rights in particular, in effect giving the majority the power to prescribe the meaning of an instrument designed to restrain the majority. That could not happen, or at least it could not happen as readily, if the individual positions of all the Justices were not known.

I confess not to be quite as aghast at this consequence of separate opinions as I expect most of my listeners are. It seems to me a tolerable, and indeed perhaps a necessary, check upon the power of the Court in a system in which the adoption of a constitutional amendment to reverse a Court decision is well nigh impossible. As you know, constitutional amendments must be proposed by a two-thirds vote of both Houses of Congress, or by a national convention called for by two-thirds of the States, and then must be approved by three-fourths of the states by either the state legislature or a special convention. In such a system, the ability of the people to achieve correction of what they deem to be erroneous constitutional decisions through the appointment process seems to me not inappropriate. I think that corrective has been overused in recent years but I would attribute that to a

popular legal culture which encourages the people to believe that the Constitution means whatever it ought to mean.

Avoiding the grave temptation to pursue that controversial topic, let me turn to the last, but by no means the least, of the "external" consequences of our system of separate opinions. By enabling, indeed compelling, the Justices of the Court, through their personally signed majority, dissenting and concurring opinions, to set forth clear and consistent positions on both sides of the major legal issues of the day, it has kept the Court in the forefront of the intellectual development of the law. In our system, it is not left to the academicians to stimulate and conduct discussion concerning the validity of the Court's latest ruling. The Court itself is not just the central organ of legal *judgment;* it is center stage for significant legal *debate.* In our law schools, it is not necessary to assign students the writings of prominent academics in order that they may recognize and reflect upon the principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself, and can be studied from that text. . . .

In sum, the system of separate opinions has made the Supreme Court the central forum of current legal debate, and has transformed its reports from a mere record of reasoned judgments into something of a History of American Legal Philosophy with Commentary. I have no doubt that this has contributed enormously to the prominence of the Court and of the United States Reports.

D. Dissent, Individual Conscience, and the Authority of Law

Justice William Brennan of the United States Supreme Court came to the conclusion that the death penalty violated the provisions of the Eighth Amendment of the United States Constitution, which prohibit the infliction of "cruel and unusual punishments." The Court, however, did not agree with this interpretation of the Eighth Amendment. Justice Brennan accordingly made it a practice to dissent from all judgments of the Court affirming the infliction of a sentence of death or denying discretionary *certiorari* review of death sentences. In *McCleskey v. Kemp* (1987), for example, Justice Brennan dissented, stating, among other reasons, that "[a]dhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth

Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, (1976) (BRENNAN, J., dissenting)."

Justice Brennan explicitly defended this form of dissent in his article *In Defense of Dissents*:

William J. Brennan, Jr.
In Defense of Dissents[*]

I must add a word about a special kind of dissent: the repeated dissent in which a justice refuses to yield to the views of the majority although persistently rebuffed by them. For example, Justice Holmes adhered through the years to his views about the evils of substantive due process, as did Justices Black and Douglas to their views regarding the absolute command of the First Amendment. And as I said earlier, I adhere to positions on the issues of capital punishment, the Eleventh Amendment, and obscenity, which I developed over many years and after much troubling thought. On the death penalty, for example, as I interpret the Eighth Amendment, its prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offenses. . . . For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, in other words, "cruel and unusual" punishment in violation of the Eighth Amendment.

This is an interpretation to which a majority of my fellow justices—not to mention, it would seem, a majority of my fellow countrymen—do not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis*, obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of *stare decisis*. Because we Justices of the United States Supreme Court are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations. Of course the

[*] *Excerpted from* 37 HASTINGS L.J. 427 (1986).

judge should seek out the community's interpretation of the constitutional text. Yet, in my judgment, when a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path.

This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that could be done in a single dissent and does not require repetition. Rather, this type of dissent constitutes a statement by the judge as an individual: "Here I draw the line." Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades. But it would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority. None of us, lawyer or layman, teacher or student in our society must ever feel that to express a conviction, honestly and sincerely maintained, is to violate some unwritten law of manners or decorum. We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. As law-abiders, we accept the conclusions of our decision-making bodies as binding, but we also know that our right to continue to challenge the wisdom of that result must be accepted by those who disagree with us. So we debate and discuss and contend and always we argue. If we are right, we generally prevail. The process enriches all of us, and it is available to, and employed by, individuals and groups representing all viewpoints and perspectives.

I hope that what I have said does not sound like too individualistic a justification of the dissent. No one has any duty simply to make noise. Rather, the obligation that all of us, as American citizens have, and that judges, as adjudicators, particularly feel, is to speak up when we are convinced that the fundamental law of our Constitution requires a given result. I cannot believe that this is a controversial statement. The right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.

Through dynamic interaction among members of the present Court and through dialogue across time with the future Court, we ensure the continuing contemporary relevance and hence vitality of the principles of our fundamental charter. Each justice must be an active participant, and,

when necessary, must write separately to record his or her thinking. Writing, then, is not an egoistic act—it is duty. Saying, "listen to me, see it my way, change your mind," is not self-indulgence—it is very hard work that we cannot shirk.

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The Great Dissenter, Justice Oliver Wendell Holmes, might well have had difficulties with Justice Brennan's view of dissent. In a dissent in *Plant v. Woods* (1900), Holmes declared: "When a question has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority and leave the remedy to the Legislature, if that body sees fit to interfere." Chief Justice Taft also had little tolerance for Justices who dissented in the manner of Justice Brennan. In 1928 Taft wrote to his friend Henry Stimson complaining that "the three dissenters act on the principle that a decision of the whole Court by a majority is not a decision at all, and therefore they are not bound by the authority of the decision, which if followed out would leave the dissenters to be the only constitutional law breakers in the country."

Consider in this regard the concurring opinion of Justice Tobriner of the California Supreme Court in *People v. Harris* (1981):

> For the reasons set forth in the dissenting opinions of the Chief Justice and Justice Mosk in *People v. Jackson* (1980), I continue to believe that the death penalty statute under which defendant was convicted is unconstitutional. Until the majority opinion in Jackson is reversed by the United States Supreme Court or is overruled by a majority of this court, however, I consider myself bound by that decision's holding. Because I agree with the present majority's conclusion that under *Murphy v. Florida* (1975), the record in this case does not demonstrate that defendant was denied a fair trial, I concur in the judgment.

Or consider this declaration of President Wildhaber of the European Court of Human Rights in *Gerger v. Turkey* (1999): "Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of *Incal v. Turkey* of 9 June, 1998, I now consider myself bound to

adopt the view of the majority of the Court." Or President Wildhaber's observation in a concurring opinion in *Camenzind v. Switzerland* (1997):

> Given "the limited scope of the search" [w]e might have contemplated following the *Akdivar v. Turkey* judgment by confining the case to its facts and holding that the powers of review provided by the Swiss legal order, while not extensive, could be considered adequate. The reason why we nonetheless chose to vote with the majority is that the Court's decision on this point is based on its settled case-law and it is important that that case-law be adhered to if a minimum standard for an effective and genuine protection of human rights across Europe is to be established.

Consider also this excerpt from a speech of Lord Reid in the House of Lords in the case of *Knuller (Publishing, Printing, and Promotions) Ltd. and others v. Director of Public Prosecutions* (1973):

> It was decided by this House in *Shaw v. Director of Public Prosecutions* (1962) that conspiracy to corrupt public morals is a crime known to the law of England. So if the appellants are to succeed on this count, either this House must reverse that decision or there must be sufficient grounds for distinguishing this case. The appellants' main argument is that we should reconsider that decision; alternatively they submit that it can and should be distinguished.
>
> I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act. We were informed that there had been at least 30 and probably many more convictions of this new crime in the ten years which have elapsed since Shaw's case was decided, and it does not appear that there

> has been manifest injustice or that any attempt has been made to widen the scope of the new crime. I do not regard our refusal to reconsider Shaw's case as in any way justifying any attempt to widen the scope of the decision and I would oppose any attempt to do so. But I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.
>
> I hold that opinion the more strongly in this case by reason of the nature of the subject matter we are dealing with. I said in Shaw's case and I repeat that Parliament and Parliament alone is the proper authority to change the law with regard to the punishment of immoral acts. Rightly or wrongly the law was determined by the decision in Shaw's case. Any alteration of the law as so determined must in my view be left to Parliament.

E. Dissent, Civility, and Political Influence

Oliver Wendell Holmes was always very careful to insist that dissents be civil. In writing dissents, he stressed, "[w]e are giving our views on a question of law, not fighting with another cock." Before agreeing to join a Brandeis dissent, for example, Holmes once insisted that Brandeis remove a sentence asserting that "[t]he Court gives no reason for declaring [the Federal Gift Tax Act] to be unreasonable." Holmes explained, "I think it better never to criticize the reasoning in opinions of the Court and its members. I feel very strongly about this. Of course it is OK to hit them by indirection as hard as you can." Holmes added, "If you will modify these expressions so as to avoid the personal touch I am with you, with delight." Holmes edited another Brandeis dissent "to avoid the dogmatic air when one is in a minority." "Dissenting Judges often say 'This Court' etc.," Holmes observed. "It has an air of horror or contempt and I dislike the phrase extremely. I hope you will change it." Although Holmes experienced the "pleasure in writing" dissents as flowing from the power to "say just what you think" without "having to blunt the edges and cut off the corners to suit someone else," it was a pleasure that did not derive from debating with the Court, but rather from the free pursuit of legal principles, the

articulation of "some proposition broader than it is wise to attempt except in a dissent."

Many contemporary dissents, however, do not seem so scrupulously civil. The decline in civility was noted by Roscoe Pound over fifty years ago.

Roscoe Pound

Cacoethes Dissentiendi*: The Heated Judicial Dissent*[*]

[T]here is a responsibility in writing dissenting opinions. The opinion of the court involves responsibility in that it declares the law for a particular state or situation of fact for the jurisdiction in which it is delivered. A dissenting opinion involves responsibility to afford a useful critique of the opinion of the court when it is to be used as a precedent. Unless it can be so used, the dissenting judge can satisfy his conscience by the bare announcement of his dissent. . . .

Another feature of the dissenting opinion appears in the reports from time to time, namely, a taking advantage of the opportunity for publicity which has much value for the elective, short-term judge nominated by direct primary. The judge of an appellate court, as compared with the judge of a trial court, has little chance to catch the public eye. But in a primary election, publicity is a decisive element. . . .

[An] improvement in the mode of selection and tenure of judges [began] a generation ago and is now going forward in the country generally. [In] 1924 the American Bar Association promulgated Canons of Judicial Ethics. Canon 19, paragraph 3, has to do with dissenting opinions. It reads:

> 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 different of opinion on fundamental principle, dissenting opinions should be

[*] *Excerpted from* 39 A.B.A. J. 794 (1953).

discouraged in courts of last resort.[**]

One might have thought this hardly needed. Good sense and good taste and the opinion of the profession should have sufficed. Unhappily they have not wholly eliminated an unfortunate type of dissenting opinion. The opinions of the judge of the highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court. . . . That they should linger in the Law Reports is not good for public respect for courts and law and the administration of justice. . . .

In the last ten volumes of the California Reports (30-39 Cal. 2d) one of the justices writes a dissenting opinion in an average of six cases to a volume and one case in eighteen of the total number of cases reported for six years. But this is the least of the matter. We are told in one of them that "[t]he people have the right to expect that the members of this court will possess the courage and integrity necessary to declare unconstitutional any legislation which contravenes the rights of the people as set forth in the equal protection clauses of both constitutions. This court should invoke these constitutional guarantees to protect the rights of those who are wronged by such legislation and *should not be servile to* any *interest or influence regardless of the power it wields*." [Italics mine except for the word any.] In the same dissenting opinion we may read: "To say that I cannot agree with such sophistry is a gross understatement." Again we are told that the interpretation of a statute by the majority of the court "is to make nugatory by a process resembling sleight of hand the beneficial purpose intended by the legislature." Again: "I would say that the doctrine laid down in the majority opinion in the case at bar is based upon the philosophy of bureaucratic communism."

Perhaps the high-water mark of judicial imitation of forensic advocacy is reached by the same judge in *Sanguinetti v. Moore Dry Dock Co*. (1951). Here in twenty-two pages of vigorous dissent we are told that the majority "reached a new low in search for a reason to reverse a judgment," that there was "not a scintilla of reason or common sense in such a holding," that it was "so lacking in consideration of the realities of

[**] Editor's Note: Canon 19 was omitted from the ABA's revised Code of Judicial Conduct in 1972. The Reporter explained that "the Committee rejected the detailed discussion of judicial opinions, philosophy of law, and judicial idiosyncrasies and inconsistencies in old Canons 19, 20, and 21 as being neither helpful nor, for the most part, matters of ethical conduct."

the situation that it may be said to be naïve," that "the reactionary philosophy of the majority opinion is so out of harmony with present day concepts of trial procedure that it resembles some of the skeletons of the dead past" and that "it should be apparent to every unprejudiced mind, as it is to me, that the majority, in seizing upon this motion as the sole ground for a reversal of the judgment in this case, is simply creating a mythical error which exists only in hypertechnical illusion." Finally he sums up: "In essence what these four judges have done here is to blindly announce a court-made rule which not only finds no support in history, precedent, experience, custom, practice, logic, reason, common sense or natural justice but is in utter defiance of all of these standards." The doctrines announced by his colleagues are denounced as "absurd," "transcending the height of absurdity" and lacking any "shred of reason, logic or common sense," "wholly unsound and utterly lacking in either factual or legal foundation." He tells us that if there is a scintilla of reason or logic behind the doctrine of the majority it is not apparent to him and he doubts whether it would be "to any unprejudiced mind."

[C]onstitutions and justice according to law are today under attack throughout the world. The separation of powers and submission of legal-political questions to the judgment of independent courts proceeding under the checks long established in Anglo-American judicial history are decried by many. Maintenance of our characteristic American constitutional-legal polity demands that the courts hold, as they have held in the past, the respect and confidence of the public. What amounts to attacks upon our courts from within, however well intentioned and motivated only by sincere convictions as to the precise content and application of particular legal precepts are highly unfortunate at this time if they ever had a place in the common-law judicial process. Such must be my excuse for calling attention particularly to the dissenting opinions of one whom I know to be a highly conscientious judge of long experience. Some other opinions from other parts of the land might have been spoken of. But a conspicuous example from a good court best makes a point of great importance for the administration of justice in the United States.

F. Dissent and Jurisprudence: Two Case Studies

i. Dissent in the United States Supreme Court under Chief Justice Taft

William Howard Taft was Chief Justice of the United States during the period between June 30, 1921, and February 3, 1930. Taft was a notorious opponent of dissents. During his time on the Court he participated in some 1583 decisions and dissented in only 19. He authored or joined the opinion for the Court in 98.7 percent of its decisions. In 1922 he wrote to his fellow Justice John Hessin Clarke that "I don't approve of dissents generally, for I think that in many cases, where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way." The period of Taft's Chief Justiceship offers a good case study of how the institution of dissent once functioned in the United States Supreme Court.

Robert Post

The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court[*]

III

Figure 5 illustrates how sharply unanimity rates have fallen between the Taft Court and the 1990s. In the 1921-1928 Terms, 84% of the Court's opinions were unanimous; by contrast, only 27% of the Court's opinions were unanimous during the 1993-1998 Terms. It has justly been observed that this "increase in the frequency of the issuance of separate opinions is a central event in the history of the Court's opinion-delivery practices."

[*] *Excerpted from* 85 MINN. L. REV. 1267 (2001).

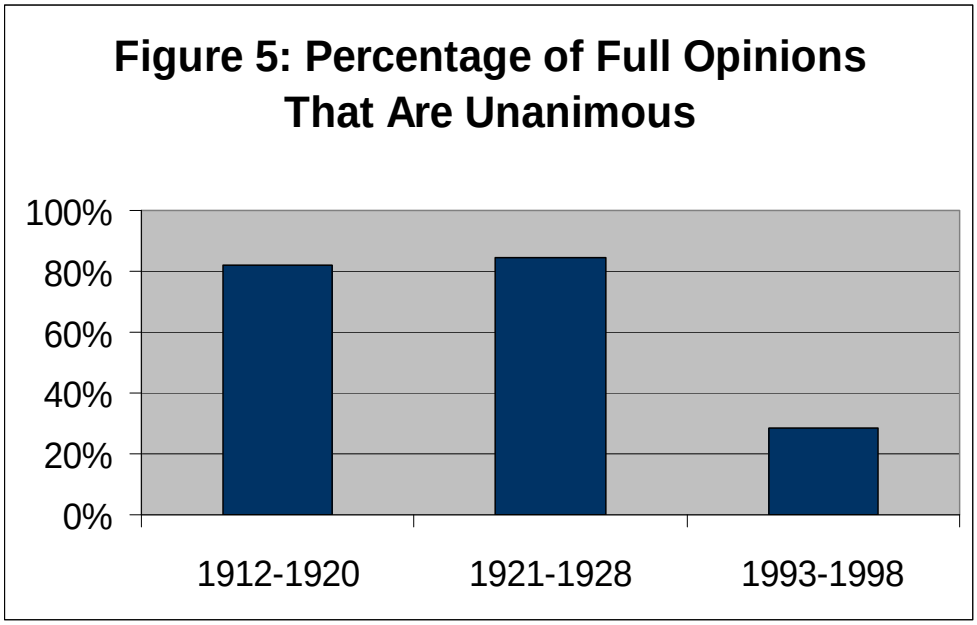
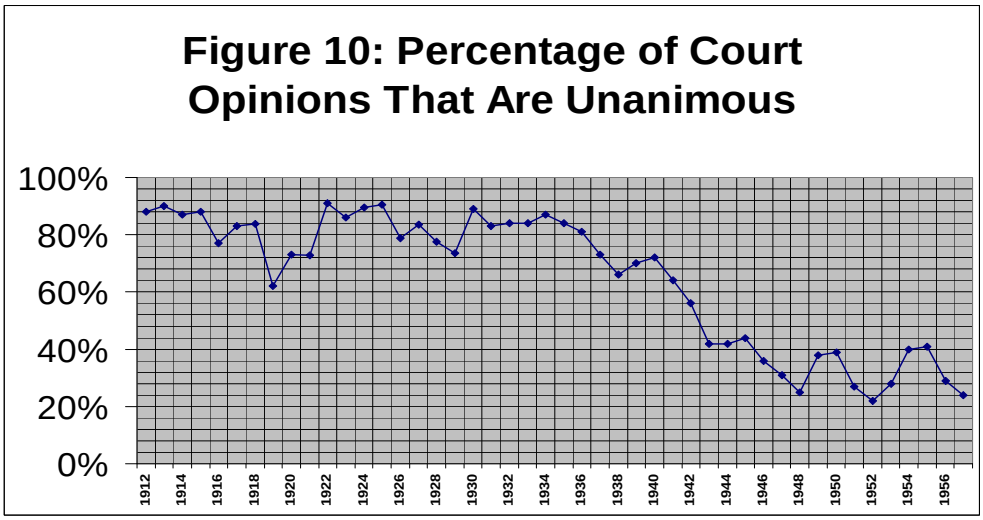


Figure 10, which traces the decline of unanimity term by term from 1912 to 1957, allows us to examine this transformation somewhat more carefully.



One possibility [of explaining this drop in unanimity] is that the Court's docket during the 1920s was less divisive than today. There is some plausibility in contrasting the contemporary Court, which publishes a relatively small number of opinions in highly-selected, controversial, and significant cases, with the Taft Court, which published many more opinions

in routine and "trifling" cases because its jurisdiction largely consisted of cases which it was required to decide under its large mandatory jurisdiction. This hypothesis is sometimes phrased in terms of the Judiciary Act of 1925, which shifted the Court's docket away from trivial cases forced on the Court by its mandatory jurisdiction and toward the more important but controversial cases that could be chosen through discretionary writ of *certiorari*. . . .

The 1925 Act had dramatic effects. In the 1921 Term, 19% of the Court's opinions were issued in cases that came to the Court through the writ of *certiorari*. By the 1928 Term this proportion had almost tripled, so that 55% of the Court's opinions were issued in such cases. The striking fact, however is that there is no apparent connection between this change in the Court's jurisdiction and the unanimity of its opinions. [D]uring the 1921-1928 Terms, 83% of the opinions written in cases reaching the Court through its mandatory jurisdiction were decided unanimously, whereas 87% of the opinions written in cases that reached the Court through the discretionary writ of *certiorari* were unanimous. . . .

There was nevertheless an important difference between mandatory and discretionary jurisdiction, which can be made visible if we compare the Justices' private views of cases with their willingness publicly to express dissent. We are fortunate to have preserved Justice Butler's docket books for the 1922-1924 Terms, and Justice Stone's docket books for the 1924-1929 Terms. These docket books record how the Justices voted to decide cases in the privacy of their conference. We can use the docket books to compare these private conference votes with the votes that the Justices were willing publicly to publish. If we consider only the 1922-1928 Terms, the docket books allow us to tally the votes in some 1200 of the 1381 published full opinions issued by the Court during these Terms. These 1200 opinions, which for ease of reference I shall call the "conference cases," seem representative. As published, 86% of the conference cases were unanimous, as were 86% of the total set of 1381 opinions. . . .

Of the 1028 conference cases that were ultimately decided unanimously by a published opinion of the Court, 58% were also unanimous in conference, 30% required a switch in vote in order to obtain ultimate unanimity, and a further 12% required Justices to overcome uncertainty in order to achieve unanimity. Within the complete set of 1200 conference cases the unanimity rate, as measured by a unanimous vote at conference, was only 50%. The unanimity rate for the published opinions of the conference cases was by contrast 86%. This establishes that it was

common practice during the Taft Court for Justices to change their votes between conference and the publication of an opinion. In the complete set of 1200 published conference opinions, a Justice changed his vote to join the Court opinion 680 times. . . .

If the Court's voting at conference is disaggregated by jurisdiction, it is clear that the difference between discretionary and mandatory jurisdiction did in fact affect unanimity. If we look only at the published opinions of the conference set, 84% of the cases reaching the Court through its mandatory jurisdiction were unanimous, whereas 87% of the cases reaching the Court through its discretionary jurisdiction were unanimous. But if we scrutinize instead the Court's voting at conference, the unanimity rate for the former was 55%, while it was only 41% for the latter. . . .

The most striking point in the data, however, is the huge discrepancy between the level of unanimity in conference (50%) and the level of unanimity in published opinions (86%), which clearly reflects an institutional aversion to dissent. Justice Van Devanter put the matter well: "Unanimity of opinion is very desirable and is always sought, but never at the sacrifice of strong conviction."[215] This norm of agreement is expressed in case after case in the extant record of circulated opinions. Justice Butler, for example, responded to a Stone opinion with a short disquisition on the subject of dissent:

> I voted to reverse. While this sustains your conclusion to affirm, I still think a reversal would be better. But I shall in silence acquiesce. Dissents seldom aid us in the right development or statement of the law. They often do harm. For myself I say: "Lead us not unto Temptation."

To Holmes, Butler announced, "I voted the other way & remain unconvinced, but dissenting clamor does not often appeal to me as useful. I shall acquiesce."[218] To yet another draft opinion, he responded, "I voted the

[215] Van Devanter continued, "[w]hatever may be the effect upon public opinion at the moment, freedom to dissent is essential, because what must ultimately sustain the court in public confidence is the character and independence of the judges." *Id.*

[218] In the same case, Butler wrote privately to Van Devanter,

> You and I voted to reverse. The opinion does not change my view of the matter. I still think the ordinance as applied here unreasonable & arbitrary. I also think... that evidence was erroneously excluded. But it is doubtful whether dissenting opinion or the mere noting of disagreement would do any good; and, unless you incline the other way, I am disposed to acquiesce. What say you?

other way and am still inclined that way, but acquiesce for the sake of harmony & the Court."

Brandeis concurred in an opinion of Stone, noting that "I think this is woefully wrong, but do not expect to dissent." In response to the draft of a Holmes opinion, Brandeis remarked, "I think the question was one for a jury—but the case is of a class in which one may properly 'shut up.'" To the draft of another unanimous Stone opinion, Holmes commented, "I incline the other way. If B[randeis] who I believe voted as I did writes, . . . probably I shall concur with him. If he is silent, I probably shall . . . shut up." Sutherland wrote to Brandeis, "I thought otherwise, but shall probably acquiesce." To the draft of a unanimous Stone opinion, Sutherland replied, "I had a different view, and shall withhold final determination in order to see what the other stubborn members have to say." Without registering a dissent, Sutherland responded to a Holmes opinion, "Sorry, I cannot agree."

[What] is fascinating about these various communications is that they do not so much express a "norm of consensus," as a norm of acquiescence. The Justices preserve their differences, but they each assume that in the absence of strong reasons, these differences should be put aside so that the Court can present a united front to the public,[238] an image of unity expected to produce "the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."

[The] norm of acquiescence facilitated the achievement of institutional solidarity. The Justices must have believed that it was their institutional responsibility to join an opinion for the Court. [The] norm of acquiescence permitted individual Justices to negotiate potential conflicts between their own intellectual perspectives and their perceived obligation to contribute to "solidarity of conclusion and the consequent influence of judicial decision."

[I]f judicial opinions are understood to influence the legal system

Van Devanter wrote Holmes, "I do not agree. But as the matter is open to discussion, I shall not object, but acquiesce." In another Holmes opinion, Butler wrote to Holmes, "I voted the other way; but yielding to the weight of reason and votes, I acquiesce."

[238] Thus Holmes consistently averred that "I rather shudder at being held up as the dissenting judge and more or less contrasted with the Court." "I dislike even the traditional 'Holmes Dissenting.'" "I rather grieve to be made to appear as chiefly occupied in dissenting. That is not my main business." "I do not like being made to appear as a dissenting judge, though no doubt I have dissented more than some because I represent a minority on some very fundamental questions, upon which both sides should be heard."

through the enunciation of definite and stable principles, upon which legal actors can rely, [potential] dissenters are cast into an exceedingly awkward position. Whether a potential dissenter looks to the effect of his dissent on the parties to the case, or to its effect on the future evolution of the law, dissent potentially undermines the certainty and confidence which is a principal virtue of judicial decisionmaking. And if *stare decisis* functions, as it should, to fix and establish a Court's opinion as regnant law, dissent seems merely ineffectual. As Justice Edward White put it, "[t]he only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort." A potential dissenter is thus relegated to registering his conscientious personal difference from the judgment of an opinion.[247] That is why, in its effort to discourage dissent on courts "of last resort," Canon 19 of the ABA's 1924 Canons of Judicial Ethics focused primarily on the exhortation that a judge 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 cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."

The norm of acquiescence that is visible in the Taft Court fits comfortably with this jurisprudential perspective. If the institutional justification for dissent is unclear; if dissent carries potentially large deleterious effects for the establishment of law, both with respect to the parties and to the legal public; if the benefits to a dissenter are chiefly personal; then a norm of acquiescence offers a face-saving way for a dissenter to mediate between private intellectual disagreement and participation in the common goal of creating effective law.

It should come as no surprise, therefore, that those who opposed judicial dissent at the turn of the century typically appealed to a jurisprudential account of law that stressed fixity and finality. A 1905 article in *The Green Bag* argued that "[t]he fundamental security of all peoples lies, not in the justice, but in the certainty, of their laws," from which it deduced that "the Dissenting Opinion is of all judicial mistakes the most injurious."[249] "There never should be a dissenting opinion in a case

[247] Stone sometimes represented his practice of dissent in exactly these terms. So, for example, he once wrote to T.R. Powell, "One of my colleagues was once greatly surprised when I told him that I did not write a dissent to convince him. He then asked, 'What do you write it for?' I replied: 'So that others will not think that I agree with you, and of course I have to sleep with myself every night and I like to rest well.'"

[249] The article continues:

decided by a court of last resort," propounded the *Albany Law Journal* in 1898. "No judge, lawyer or layman should be permitted to weaken the force of the court's decision, which all must accept as an unappealable finality."

> It is a maxim of the law that it is to the interest of the public that there should be an end to litigation. It certainly is to the interest of the public that when a question is settled by the highest tribunal, it should remain settled for all time. The result of a dissenting opinion is simply to open up for future discussion, bickering and litigation the question which should then be finally settled by that tribunal. Somebody must settle the question; it must be settled somewhere; that tribunal has been selected as the final arbiter, and when it once settles it, it should remain settled forever.[252]

One can discern an echo of this position in Holmes's announced reticence "to express his dissent, once he's 'had his say' on a given subject." Holmes believed that "[t]here are obvious limits of propriety to the persistent expression of opinions that do not command the agreement of the Court." If a case or a legal principle were important enough, he was willing to dissent, to articulate an understanding of the law different from that announced by the Court. But once his understanding was rejected, Holmes adopted the view that he would not continue to reiterate his own perspective. Only in the most consequential circumstances, as for example in the area of freedom of speech, would he candidly repeat a position in the teeth of dispositive judicial resolution. And then he would remark, as he did in his dissent in *Gitlow v. New York*, that "the convictions that I expressed

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> Obviously, if the Dissenting Opinion is injurious at all, it will be most unfortunately so in those cases which are of the greatest public moment. Yet it is the almost unbelievable fact, that it is the uniform justification of dissenting judges that the importance of the case warrants and demands their dissent.

[252] The article adds, "The decision should be that of the court, and not of the judges as individuals. The judges should get together and render a decision settling the points in controversy."

> 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. They give a judge an opportunity of exhibiting his individual views and opinions. But what good does that do? What cares the public for the judge's individual views, except in so far as, by reason of his position, they assume the force of law? The only concern of the public is with the decision of the court as a court, so that they may know what it is, and know how to govern themselves.

From this perspective, dissent was not only useless, it was also destructive of the law itself.

in [*Abrams*] are too deep for it to be possible for me as yet to believe that it and *Schaefer* . . . have settled the law." In the absence of such deep conviction, Holmes implied, acquiescence in a settled rule of law would be necessary to ensure respect for the value of judicial finality.

If Holmes's conception of dissent was compatible with a strong norm of acquiescence, Brandeis struggled to articulate a conception of dissent that undercut the jurisprudential foundations of the norm. Brandeis sought to distinguish circumstances in which judicial finality was a significant jurisprudential virtue from those in which it was not. "In ordinary cases," he said to Frankfurter in 1923, "there is a good deal to be said for not having dissents." "You want certainty & definiteness & it doesn't matter terribly how you decide, so long as it is settled. But in these constitutional cases, since what is done is what you call statesmanship, nothing is ever settled—unless statesmanship is settled & at an end."

This is an unusually suggestive passage, because it explicitly ties the norm of acquiescence to an account of how law achieves its purposes, and it offers a discriminating explanation of the difference between ordinary law, where the value of finality is highly consequential, and constitutional law, where it is not. Brandeis's explanation of the diminished importance of finality in constitutional law does not turn on the primacy of constitutional justice, but rather on the fact that constitutional law is a form of "statesmanship," and statesmanship requires continuous flexibility and growth. It is no act of statesmanship to announce a rule and expect it, in the words of the *Albany Law Journal*, to "remain settled forever."

Brandeis advanced an image of constitutional law as requiring the continuous "capacity of adaptation to a changing world." In a draft dissent he made this point explicitly: "Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth. . . . Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever developing people." Fittingly enough, Taft, whose view of dissent was very different from that of Brandeis, insisted that this passage be omitted before he would join Brandeis's dissent. Taft believed that the "Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual." For Taft the fundamental point of constitutional law was precisely to fix these rights and to render them "settled."

The jurisprudential difference between Brandeis and Taft has important consequences for the norm of acquiescence. If the law is regarded

as continuously and properly evolving, the costs of acquiescence increase, because assent to a mistaken opinion affects the future development of the law. So far from merely expressing conscientious personal disagreement, dissent constitutes, in the famous words of Charles Evans Hughes, "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."

If the virtue of law is conceived to lie in its flexibility and adaptability, rather than in its stability and firmness, a potential dissenter must weigh the "dissatisfaction" that a dissent may engender against his obligation to future generations wisely to shape the development of the law.[271] Once the institutional structure of the Court decisively oriented its opinions toward the development of the law and its reception by the general legal public, and once members of the Court began to regard "growth" as "the life of the law," the norm of acquiescence was undermined from within. By the end of the 1940s, when, as Figure 10 indicates, the norm of acquiescence had utterly collapsed, a Justice like William O. Douglas, perhaps the most consummate dissenter in the history of the Court, could affirm that "philosophers of the democratic faith will rejoice in the uncertainty of the law and find strength and glory in it."[273] And it is

[271] In 1928 Justice Harlan Stone wrote to Felix Frankfurter:

> I always write a dissent with real reluctance, and often acquiesce in opinions with which I do not fully agree, so you may know how strongly I have really felt in order to participate in so many dissents as I have recently. But where a prevailing view rests upon what appears to me to be false economic notions, or upon reasoning and analogies which will not bear analysis, I think great service is done with respect to the future development of the law, in pointing out the fallacies on which the prevailing view appears to rest, even though the particular ruling made should never be reversed.

Frankfurter answered this letter by affirming, "I also share your conviction as to the 'great service' which is rendered by dissenting opinions for the future development of the law."

By the 1930s, Stone had become entirely comfortable with this position. *See* Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC'Y 78, 78 (1942) ("While the dissenting opinion tends to break down a much cherished illusion of certainty in the law and of infallibility of judges, it nevertheless has some useful purposes to serve. . . . Its real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law."); Letter from Harlan Fiske Stone to T.R. Powell (Dec. 16, 1935) ("Of course I agree with you that no amount of criticism will affect the courts today, but it is likely to have a profound effect on the courts of the next generation.").

[273] William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1948). Douglas continued:

undoubtedly the case that the virtual disappearance of unanimous Court opinions, which is in part a consequence of this very jurisprudential view of the law, helped in turn to produce a law that was in fact more uncertain and labile.

IV

In Part III, I argued that institutional norms of unanimous decisionmaking can reveal something significant about the Court's changing apprehension of the jurisprudential nature of law. In this Part of my Lecture, I shall consider what practices of opinion writing can tell us about the Court's understanding of its own institutional authority. . . .

A major justification for the norm of acquiescence was the need to preserve the authority of the Court. When progressives in the 1920s attacked judicial review, they pointed to dissent as evidence that the Court's decisions were not compelled by legal necessity and that they therefore represented a form of political judgment best left to "the legislature." At issue in this form of attack, as Taft rightly understood, was "the prestige of the Court," which derived from its prerogative to pronounce law. Unanimity preserved the appearance of legal compulsion, which is why Canon 19 recited that "solidarity of conclusion" was prerequisite to preserve the "influence of judicial decision." It was precisely this sense of "influence" that Chief Justice Warren sought to summon thirty years later when he struggled to make *Brown v. Board of Education* into a unanimous decision.

The norm of acquiescence aspired to achieve the "influence" of unanimity for as many of the Court's decisions as was possible. The norm was justified not only by a particular account of law, but also by the effort

> Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a sine qua non to judicial survival under either system. . . .
>
> When we move to constitutional questions, uncertainty necessarily increases. A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it. . . . And so it should be. For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it. *Stare decisis* has small place in constitutional law. The Constitution was written for all time and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow, legalistic notions that dominated the thinking of one generation.
>
> So it is that the law will always teem with uncertainty.

to maintain the institutional authority of the Court. . . .

The relationship between judicial authority and the norm of acquiescence was recognized early on. In 1898 the *Albany Law Journal* conceptualized dissent as appealing over the head of the Court directly to "the people." But, the *Journal* asked, "what can the people do?"

> A dissenting opinion is to some extent an appeal by the minority—from the decision of the majority—to the people. What can the people do? They can't alter it; they can't change it; right or wrong, they must respect and obey it. Why shake the faith of the people in the wisdom and infallibility of the judiciary? Upon the respect of the people for the courts depends the very life of the Republic.

The passage is remarkable because it constructs such a strict opposition between the "courts," which pronounce law, and the "people," whose duty is to "respect and obey" the law. Dissent is useless, the *Albany Law Journal* argues, because the attitudes of the people bear no connection to the construction of law. This sharp distinction is underwritten by a rigid contrast between law and politics. Discontent with judicial decisionmaking is deemed irrelevant because courts are imagined as implementing the law, and the law is conceived as entirely distinct from popular will.

Such a crude distinction between courts and the people, between law and politics, is very difficult to sustain in a democracy. But if the authority of the Court flows from its prerogative to pronounce law, and if the law declared by the Court depends to some extent upon the popular will, then a norm of acquiescence which precludes a potentially dissenting Justice from appealing to the people can come to seem merely arbitrary and autocratic. This is because "the reputation and prestige of a court"—the influence and weight that it commands—depend on something stronger and more substantial than an illusion of "absolute certainty and of judicial infallibility." The reputation and prestige of the Court must instead depend upon the Court's institutional ability correctly to discern the law, which is to say correctly to discern so much of the popular will as underlies the law. To the extent that popular will is itself formed through processes of public discussion in which the Court itself plays a part, the suppression of dissent can come to seem equivalent to the arbitrary foreclosure of public dialogue. The logic advanced by the *Albany Law Journal* is thus radically inverted.

By the 1940s, after the constitutional crises of the New Deal focused

national attention on democratic control of the Court, there were Justices who were prepared to argue that democracy itself justified the practice of addressing dissents to the general public. William O. Douglas explicitly conceptualized dissent as a form of political speech, so that a judge's right and obligation to dissent was like the freedom of speech exercised by any citizen:

> Disagreement among judges is as true to the character of democracy as freedom of speech itself. . . .
>
> Democracy, like religion, is full of sects and schisms. . . . No man or group of men has a monopoly on truth, wisdom or virtue. An idea, once advanced for public acceptance, divides like an amoeba. . . .
>
> The truth is that the law is the highest form of compromise between competing interests; it is a substitute for force and violence . . . It is the product of attempted reconciliation between the many diverse groups in a society. The reconciliation is not entirely a legislative function. The judiciary is also inescapably involved. When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views. Judges are to be honored rather than criticized for following that tradition, for proclaiming their articles of faith so that all may read.

Because "no . . . group of men has a monopoly on truth," Douglas conceives Justices of the Court as "proclaiming their articles of faith," rather than as participating in the institutional and authoritative pronouncement of the law. The distinction between law and politics is effaced, as is any account of the distinct institutional authority of the Court. From this perspective it is only a short step to conceive dissent as, in the words of Justice Brennan, a contribution "to the marketplace of competing ideas." There is no doubt that some such transformation has contributed to the transformation of the Taft Court's norm of acquiescence into an ethic "of individual expression." To the extent that the norm of acquiescence was understood to uphold the Court's prestige as the unique voice of the law, the collapse of the norm can illuminate the shifting boundary between law and politics.

ii. Dissent in the Contemporary United States Supreme Court

Consider, in light of the preceding materials, this recent dissent by Justice Antonin Scalia in the case of *Lawrence v. Texas* (2003) in which the United States Supreme Court struck down, per Justice Anthony Kennedy, a Texas law criminalizing sodomy between consenting adults of the same sex. Why might Justice Scalia speak so disparagingly of the Court on which he sits?

Lawrence v. Texas
Supreme Court of the United States
539 U.S. 558 (2003)

JUSTICE SCALIA, with whom the CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in

most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress; that in some cases such "discrimination" is *mandated* by federal statute; and that in some cases such "discrimination" is a constitutional right.

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v. Toronto,* (Ontario Ct. App.). At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes

the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring"; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

G. Dissent and Judicial Power

M. Todd Henderson

From Seriatim *to Consensus and Back Again: A Theory of Dissent*[*]

When John Roberts acceded to the position of Chief Justice of the United States, he stated that one of his top priorities was to reduce the number of dissenting opinions issued by members of the Court. Roberts believes dissent is a symptom of dysfunction. This belief is shared with many Justices past and present, the most famous of which is his predecessor John Marshall, who squelched virtually all dissent during his 35 years as Chief Justice. Is dissent a symptom of a dysfunctional Court or of a healthy one? Is dissent essential to getting the best possible legal rule or is it likely to lead to murky or bad legal rules?

[This] paper argues that there is no abstract answer to the question

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of how courts should decide cases or deliver opinions. Issuing majority and dissenting opinions is not a natural condition or even the most effective, efficient, or rational system for making law. Moreover, the elimination of dissents would not move the Court in the direction of a more efficient or perfected state of discourse. Instead, the style of appellate discourse reflects the power-accumulating tendencies of courts and the law generally. There is in fact no neutrally efficient answer to the question of how courts should communicate the results of cases and controversies with litigants, the bar, and the public at large. Style reflects power, and the Court's choice of style is about the Court's power. . . .

A specific change in the delivery of opinions designed to achieve precisely this purpose—increasing the power of "Law"—has happened at least three times on a grand scale: (1) the change from traditional *seriatim* opinions to an "opinion of the court" in England circa 1760; (2) a similar change in the United States Supreme Court upon the ascendancy of John Marshall to Chief Justice in 1801; and (3) the development of a tradition of writing separately during the New Deal era of the Supreme Court, which has persisted to the present. In each of these examples, the change of discourse was a pure power-play designed to increase the role of law in shaping the norms of society. . . .

[For] almost a thousand years, decisions of multi-member courts in England were delivered orally by each judge *seriatim* and without any prior intra-court consultation. . . . The unedited and unabridged compilations [of transcribed *seriatim* opinions] were massive and in no sense portrayed a coherent picture of the law. Lawyers and judges had a difficult time even figuring out what the legal rule from a case was. . . . This had many bad effects, but the lack of clarity did not become a crisis until the rise of commerce in the mid-seventeenth century.

As commerce became more demanding of law, the hodgepodge of courts (e.g., courts of law, courts of equity, law merchant courts, ecclesiastical courts, etc.) regulating commerce only added to the misfit between common law adjudication and the needs of business. This manifested itself in two ways. First, different courts made different rules, creating uncertainty for businesses. There were over 70 law "courts" operating in London in the late eighteenth century, and these were administered by almost 800 judges. . . . Even when we narrow the number of courts down to the most important ones, this still leaves three—Common Pleas, Exchequer, and King's Bench—all of which had overlapping jurisdiction. Decisions from these courts were not binding authority on

other courts, meaning there were (at least) three relevant sources of legal precedents for any particular dispute. . . .

Second, even within a specific court jurisdiction, the use of *seriatim* opinions added a layer of unnecessary confusion to the opinions of that court. Instead of a binary win-loss character, opinions at the time were a collection of "for" and "against" arguments. To determine whether one had won or lost a case, and, more importantly what the rule of the case was and how strong the precedent was, it was necessary to count heads who had voted for a particular argument or line of reasoning. In complex commercial disputes, this was not an easy matter. . . .

From the perspective of eighteenth-century merchants what was needed was someone or something to bring more certainty to commercial dealings, to simplify legal proceedings and to create a simple set of rules that could be applied to all transactions. According to [Lord] Mansfield [Lord Chief Justice of the King's Bench], the law of business "ought not to depend on subtleties and niceties, but upon rules easily learned and easily retained because they are dictates of common sense."

[B]ut Mansfield needed a mechanism to deliver certainty. He found it in the "opinion of the court." The reform of the common law of commerce was possible only with an assertion of judicial power through a united court speaking in a single voice. No longer would multiple courts and numerous judges produce different opinions subject to nuance and ambiguity. A single court would hear and decide the fundamental issues of commercial law; decide them once and for all without dispute or ambiguity, and provide the certainty and stability needed for commercial transactions. . . .

Prior to Mansfield's discursive change, very few commercial cases came before law courts such as the King's Bench. As a result of the consolidation of power through the focusing of legal discourse, Mansfield created a forum that was conducive to handling commercial cases, and "business flowed into his court." The number of "commercial cases" handled by the King's Bench increased more rapidly than the overall growth rate of the docket as a whole. . . .

But the change from *seriatim* opinions to opinions of the court was short-lived. On the retirement of Mansfield, Lord Kenyon put an end to the practice, and the judges returned to the practice of *seriatim* opinions. This tradition [was] preserved until very recently in all multimember English

courts. . . .

[F]or the first decade of its existence. . . the [United States] Supreme Court was neglected and ignored by lawyers, politicians, and the public. The Court was not provided with a chambers and the job of chief justice was refused by several prominent statesmen. According to the first chief justice, John Jay, in its first ten years the Court "lacked energy, weight, and dignity." Everything changed with appointment of John Marshall as chief justice in 1801. . . .

In an expression of raw political power, Marshall abandoned the tradition of *seriatim* opinions and established an "Opinion of the Court" that would speak for all justices through a single voice. This change was viewed as an "act[] of audacity" and "assumption[] of power." Marshall used his leadership skills, the power of persuasion, and other tactics lost to history to convince the other members of the Court that they should abandon the Court's accepted practice of issuing *seriatim* opinions. . . . Cases were now decided by private conference in which the justices achieved a compromise position. An opinion, commanding an unknown vote, was drafted by an anonymous justice and then issued under the name of "John Marshall" who signed for the Court: "For the first time the Chief Justice disregarded the custom of delivery of opinions by the Justices *seriatim*, and, instead, calmly assumed the function of announcing, himself, the views of that tribunal." Marshall's great discursive revolution . . . would cause fundamental shifts in the power of American government. . . .

This innovation—a paradigmatic shift in legal discourse—initiated a new era of Supreme Court power. The result was a focusing of the power of the national judiciary, and consequently, the shift in the locus of power from the nonlegal to the legal, and from the states to the federal government. This evolution in the *function* of law was enabled through a change in the *form* in which law is established and delivered. In 1801, the form of legal discourse transmogrified to adapt to Law's new role in the emerging modern world. . . .

In fact, it was not until 1804 when President Jefferson appointed Justice William Johnson, who would be known as the "First Dissenter," that the first dissenting opinion was recorded. Jefferson recognized this change in discourse as a blatant attempt to counteract the results of the congressional and presidential elections, and to increase the power of the judiciary. "The Federalists," he wrote "retreated into the Judiciary as a stronghold, the tenure of which renders it difficult to dislodge them." In

order to counter the lack of political accountability in the Court, Jefferson urged Republican appointed judges to revert to the practice of *seriatim* opinions. Most famously, a series of letters between Jefferson and Johnson in 1822 in which the former urged the latter to dissent in nearly every case. This urging was somewhat successful at breaking Marshall's grip on the Court. . . . [T]he number of dissenting opinions increased in the later years of the Marshall Court as Jefferson appointees began to disrupt the practice of unanimity. After ten years of near unanimity, the next 25 years saw an increased number of dissenting opinions. . . .

Although the number of separate opinions increased slightly after Marshall resigned from the Court, Marshall's practice of unanimity dominated the Supreme Court for over 100 years. . . .

The long-standing practice of virtual unanimity was abandoned as abruptly as it was begun. With the ascendancy of John Harlan Stone to chief justice in 1941, the Court began a trend writing separate opinions in most cases. . . . Several possibilities may explain the rise, but one stands out in historical perspective. . . . Law was now politics to a great extent, and Stone was willing to assert the Supreme Court as a political branch. Stone achieved this revolution at the Court by increasing the use of dissenting opinions just as Marshall implemented his revolution by introducing the unanimity consensus. . . .

As Jefferson noted when advocating the writing of separate opinions, dissent allows judges in the future to overrule bad law based on the reasoning of their predecessors, in essence allowing the Court, and thus the law and lawyers, to achieve a more political role by essentially mollifying the losing parties and encouraging a continuing legal discourse over social issues. Of course, achieving unanimity on contentious political issues might have been preferred by the winners *ex post*, but if the issues were too contentious and the opposition too strong to achieve any broad consensus, *ex ante* both sides of the debate would prefer the option value imbedded in a world with dissent. And any consensus would in fact undermine the ability of the law to remain the locus for the determination of the truth of such questions. Dissent actually allows the Court to continue in its active role post-legal realism. . . .

The Supreme Court is a normalizing entity within the larger perspective of modernity: like all other forms of modern power, the Court is about the power of domination; the power of lawyers and judges and citizens over others—the "govermentalization" of society. The current

practice of dissent [achieves] . . . exactly the same results as Marshall's consensus norm—an increase in Court power. To achieve . . . legal power, the Court has adopted various discursive practices throughout its history depending on the circumstances of the society at the time. When Marshall took control of the Court, there existed a power vacuum at the national level. The consensus norm was a way by which the Court could achieve not only power vis-à-vis the other branches of government, but also power in the form of "governmentalization."

[D]issent is not only necessary to ensure the legitimacy of the Court, but gives law the authority to resolve controversial social issues—it ensures a particular type of Court legitimacy. Just as the opinion of the court was necessary to increase the power of the Court during the Marshall era, dissent is the strategy that enables the Court and the law in general to maintain its institutional position of power and normalization given the highly political nature of the cases the Court decides today. Dissent ensures legal control over society just as the unanimity norm was necessary to achieve the same result given the context of the early nineteenth century. In this light, unanimity and dissent are means to achieve the same ends—increased power and a greater role of normalization for courts and lawyers.