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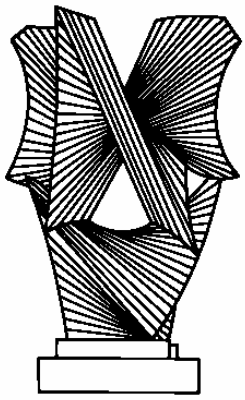

FROM *SERIATIM* TO CONSENSUS AND BACK AGAIN: A THEORY OF DISSENT

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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.[1] Roberts believes dissent is a symptom of dysfunction.[2] This belief is shared with many justices past and present, the most famous of whom is his predecessor John Marshall, who squelched virtually all dissent during his 35 years as Chief Justice.[3] One of their arguments is that dissent weakens the Court by exposing internal divisions.[4] The Court would be better, perhaps more efficient at deciding cases and making law, if it spoke with one voice. This is a common refrain in American constitutional history. Justice Louis Brandeis famously wrote that "[i]t is more important that the applicable rule of law be settled than that it be settled right," stating that he would join opinions he disagreed with just for the sake of settling the law.[5] Other justices have called dissents "subversive literature"[6] and "useless"[7], and, we presume, acted just like Brandeis.

Another reason for the hostility to dissent is that dissent enables the majority to be bolder in its decision, because it is not forced to compromise. In a recent speech at Georgetown Law School, Chief Justice Roberts explained that "[t]he broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds."[8] Of course, this does not tell us the why this is good. We can guess it has something to do with Bickel's "passive virtues" and Sunstein's one-case-at-a-time minimalism. But whatever the reason, Roberts, like Marshall before him, believes that limiting dissent will help him achieve his unstated goals.

To other past and present justices, most famously Chief Justice Harlan Stone and Justice William Brennan, dissent is a healthy, and even necessary, practice that

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[1] *See* Hope Yen, *Roberts Seeks Greater Consensus on Court*, Wash Post, May 21, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html; *see also*, Chief Justice John Roberts, Address to Georgetown University Class of 2006 (May 21, 2006) *available at* http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144.

[2] *See* Address to Georgetown University, Class of 2006, (cited in note 1).

[3] *See* Part III.C. As discussed below, Marshall used leadership, example, and other techniques to discourage dissent and build a collegial and consensus Court. There was some dissent, but as shown herein, it was trivial.

[4] Learned Hand believed that dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends." Learned Hand, *The Bill of Rights* 72 (1958).

[5] Burnet v Coronado Oil & Gas Co, 285 US 393, 406 (1932) (Brandeis, J., dissenting).

[6] In an interview, Stewart characterized dissents in this way, quoting an unnamed law professor of his. *See* Robert Bendiner, *The Law and Potter Stewart An Interview With Justice Potter Stewart*, American Heritage, *available at* http://www.americanheritage.com/articles/magazine/ah/1983/1/1983_1_98.shtml ("Q: Isn't it a matter of concern, then, that the government should tempt people into committing an offense? A: It's a matter of great concern to me. I wrote a dissenting opinion in a similar case, but it was a dissenting opinion, and when I went to law school we had a professor who said dissenting opinions are nothing but subversive literature.").

[7] *See* Northern Sec Co v United States, 193 US 197, 400 (1904) (opinion of Justice Oliver Wendell Holmes, the "Great Dissenter").

[8] *See* Yen, *Roberts Seeks Greater Consensus on Court*, Wash Post (cited in note 1).

improves the way in which law is made.[9] We get better law, *ceteris paribus*, with dissent than without.[10] Their counter position rests in part on two ideas: first, dissents communicate legal theories to other justices, lawyers, political actors, state courts, and future justices, and have sometimes later won the day as a result of this; and second, dissents are essential to reveal the deliberative nature of the Court, which in turn enhances its institutional authority and legitimacy within American governance. Justice Brennan describes the first idea as justices "contributing to the marketplace of competing ideas" in an attempt to get at the truth or best answer.[11] Chief Justice Charles Evans Hughes captured this latter point when he observed that dissent, when a matter of conviction, is needed "because what must ultimately sustain the court in public confidence is the character and independence of the judges."[12]

So who is right? Is dissent a symptom of a dysfunctional Court or of a healthy one? Is dissent essential to getting the best possible legal rule or does it lead to murky or bad legal rules? Throughout its history, the Supreme Court has sometimes issued predominantly unanimous opinions, while at other times it has often issued separate opinions. Since the trend is toward the latter, one might conclude that there has been learning and evolution—that the practice today is better than the practice in the past. But the almost thousand-year history of separate opinions by English courts gives us reason to doubt this. Another possibility is that judicial practices are tailored to the times. If we believe this, then we must ask what it is about the times that leads to any particular practice.

I conclude that there is no simple answer to the question of how courts should decide cases or deliver opinions. Issuing dissenting opinions is not a natural condition or even the most effective, efficient, or rational system for making law. But the elimination of dissents would not move the Court in the direction of a better state of discourse. Instead, the style of appellate decisionmaking reflects the power-accumulating tendencies of courts and the law generally. There is no neutral answer to the question of how courts should communicate their decisions. Style reflects power, and the Court's choice of style is about the Court's power.

This is not a new idea in philosophy: Michel Foucault and others tell us that truth is not determined in a vacuum, but rather is revealed only through an exercise of power.[13] So too here. The Court has no army, no guns, and no bureaucrats to enforce its will, so its power must come from somewhere else.[14] Its power resides in the only place where the Court communicates with those on the outside—its opinions.[15] The content of

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[9] *See* William J. Brennan Jr, *In Defense of Dissents*, 37 Hastings L J 427, 438 (1986) (defending dissents on multiple grounds and calling dissent a "duty"); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L Rev 1185 (1992) (presenting several arguments justifying the current practice of frequent dissenting opinions); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash L Rev 133 (1990) (same).

[10] Cass Sunstein makes a more general case for the value of dissent in all aspects of decision-making in a recent book. *See* Cass R. Sunstein, *Why Societies Need Dissent* 210-11 (2006) ("Organizations and nations are far more likely to prosper if they welcome dissent and promote openness.").

[11] Brennan, 37 Hastings L J at 438 (cited in note 9) ("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.").

[12] Charles Evans Hughes, *The Supreme Court of the United States* 67-68 (1928).

[13] Here I draw on Foucault's "power/knowledge" dynamic. *See* Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, 1972-1977 (1980).

[14] Hand, *The Bill of Rights* (cited in note 4).

[15] The power of the Supreme Court manifests itself in many forms, including in structural Prestige and the reputation of individual justices, but is expressed through only one form: the written legal opinion.

opinions is an essential element of this power, but so is the style or manner in which they are issued. And because decisions are an exercise of power, we should expect the manner in which the Court communicates its decisions to reflect the Court's power.[16] In other words, the presence or absence of separate opinions depends on the goals of the Court.[17]

To test this hypothesis, I briefly examine the history of dissent.[18] I show that the manner in which appellate law is made has changed several times throughout Anglo-American legal history in an attempt to increase the power of courts over other forms of dispute resolution. The Supreme Court, and its predecessors in England, sometimes issued dissents and sometimes spoke largely with one voice. In each case, the choice about which style to use was made with an eye toward bringing more business or more interesting business or more influential business to the court.

A change in the delivery of opinions designed to increase the power of "Law" has happened at least three times on a grand scale: (1) the change from *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, which has persisted to the present.[19] In each of these examples, the change of discourse was a power-play designed to increase the role of law in shaping the norms of society. England's abandonment of *seriatim* opinions was designed to increase the reach of law into the regulation of commercial activity; the Supreme Court's similar change in the era of Marshall was intended to increase the role of the Court generally and to assert the authority of the judiciary in the fledgling days of American democracy; and the rise of dissent in the New Deal era was necessary to expand the influence of the Court and Law in deciding disputes previously addressed by other, extra-judicial means.

Those seeking to control "truth" in each instance used a change in discourse to achieve power within their society for themselves, their class, or their group.[20] This does not necessarily mean that there were explicit or even conscious plans by those making

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[16] As is the case for automobiles, architecture, toothbrushes, and most other things in life, for Legal opinions, form follows function. Architect Louis Sullivan of the Chicago School made the phrase "form follows function" famous by christening a new style of architecture for sky scrapers that emphasized exposing the structural realities of buildings instead of hiding them behind adornments. *See* Louis Sullivan, *The Tall Office Building Artistically Considered*, Lippincott's Magazine, Mar 1896.

[17] This raises the obvious question of how we can speak of the goals and objectives of "the Court" when it is composed of individuals and when we normally don't think of multi-member bodies in this way. The idea here is that the Court is just a proxy for the overall sociological and subconscious forces at work.

[18] Foucault would call this a "genealogical" study of dissent. Genealogy is the process of looking to the past for an explanation or greater understanding or appreciation of the present. By looking at the reasons (underlying or overt) dissent is encouraged, tolerated, or squashed at a given time by courts, genealogy may provide us with the perspective to call the conventional wisdom about dissent into question.

[19] The evolution of appellate discourse may be roughly analogous to the theory of "punctuated equilibrium" in evolutionary biology. *See* Niles Eldredge & Stephen Jay Gould, *Punctuated equilibria: an alternative to phyletic gradualism*, in T.J.M. Schopf, ed, Models in Paleobiology, 82-115 (1985). Changes in style, tone, approach, length, etc. occur gradually over the years, and then there is a sudden change precipitates a dramatic reordering of the predominate discourse. In this view, the changes of Mansfield and Marshall were the legal equivalents of the asteroids that destroyed the dinosaurs and the trilobites. The theory has been applied in the public policy context. *See* Frank Baumgartner, et al., *The Destruction of Issue Monopolies in Congress*, 87 Am Pol Sci Rev 673 (1993) (showing that government policies in some areas are characterized by long periods of stability, and are disrupted occasional but rare shocks).

[20] Lawrence M. Friedman, *A History of American Law* 29 (1985) ("In modern times, law is an instrument; the people in power use it to push or pull toward some definite goal.").

the change. The Court and the individual justices did not necessarily intend the consequence, but they were affected by sociological forces beyond their ken.

This paper is organized as follows. Part I explores the relation between discourse and power, and how this impacts our conceptions of truth. The goal is to put the opinion delivery practices of the Supreme Court in the context of their larger role in formulating the legal framework through which truth in our society is determined. Part II examines the Anglo-American history of dissenting opinions. The takeaway is that dissent and unanimity norms are merely tools used to increase the power of the Court and law. Part III describes current practices, focusing on the change from the Rehnquist to the Roberts Court.

Roberts's desire to move the Court toward unanimity might be seen as a countermove in this historical vector of more power for courts and law. His discursive move, which doesn't appear to be working, is also about the Court's power, but it may be about *decreasing* the Court's power. Although somewhat unique in the history of the Court, his attempt to deemphasize the Court's role in social disputes appears to be consistent with his jurisprudential philosophy. Here again, we see that discourse is power, whether for greater or lesser.

I. Discourse, Power & Truth

Law is to a great extent what judges say it is,[21] and how they say it, is one of the primary sources of legal authority. In our society law is often synonymous with power, and it greatly influences the pursuit of "truth."[22] Not only do laws define the locus of acceptable conduct, but they also set the framework in which truth is determined. Whether the issue is the veracity of a litigant's claim or the impact of a business merger on consumer well being, law establishes the rules whereby competing claims of truth are weighed. This was not always the case. In other societies, at other times, various forms of truth existed outside or above the law. Religion or magic often was the source.[23] Law has displaced these forces so that "the characteristic of our Western societies [is] that the language of power is law."[24]

But the law does much more than this. Law constructs much of modern discourse. It authorizes some to speak and some views to be taken seriously, while marginalizing or excluding others. The law frames discourse that affects all citizens through the creation of "episteme"—historically enduring discursive regularities that act as perception grids within which thought, communication, and action can occur. Court rules, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the

[21] H.L.A. Hart, The Concept of Law 138 (1961) ("A supreme tribunal has the last word in Saying what the law is and, when it has said it, the statement that the court was 'wrong' has no Consequences within the system: no one's rights or duties are thereby altered.").

[22] Here we see the intuition of Max Weber, whose famous speech to Munich University students, *Politics as a Vocation*, introduced the concept that the state has a monopoly on the legitimate use of physical violence. *See* Daniel Warner, *An Ethic of Responsibility in International Relations* 9-10 (1991).

[23] It is well known that religious or pseudo-religious entities have historically been rivals of law. *See, for example*, Friedman, *History of American Law* at 52, 65 (cited in note 20) ("[C]hurches . . . worked . . . as rivals of courts."). In England, this tradition survived well into the 19th Century, and it is arguably still true in some advanced nations, and definitely true in other societies. *See id* at 202 ("In England [in the 1800's], ecclesiastical courts had jurisdiction over marriage and divorce, and the church had an important role in family law.").

[24] Foucault, *Power/Knowledge* at 201 (cited in note 13).

delivery of opinions are all legal "grids" within which truth is produced. In other words, discourses generate truth. As Foucault writes:

> Each society has its regime of truth, its 'general politics' of truth: that is, the type of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[25]

Law is the "general politics" of the modern era, and legal opinions are the fundamental discourse of this politics. Initially lower courts establish the rules for how the truth will be determined in a particular case. Then appellate courts act as an additional guardian of a particular form of truth by acting as a normalizing influence over the lower courts. The Supreme Court fills this same normalization role vis-à-vis the appellate courts. The result is the creation of a regularized and legalized form of truth.[26]

Appellate judges determine the boundaries of what is proper and improper for individuals in particular cases, for lower courts, and for the practice of law in general.[27] This legal grid is not usually transparent or obvious to the lay public, but it is the locus of acceptable legal behavior within which society is required to function. Things or actions inside this set of behaviors are accepted as true and proper; those outside are punished. This is true not only for specific legal rules (for example, briefs submitted within a set period of days are accepted, those outside are not), but also for society more broadly (for example, burning a flag is protected "speech," while burning a cross is generally not).[28] In other words, judges—and especially appellate judges—determine what is "normal" and what is "abnormal" in our society in subjects ranging far beyond the narrow world of the courtroom. In this way, law is a normalizing force and a judicial opinion is a normalizing act.[29]

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[25] *Id* at 131.

[26] This concept of "truth" is divergent from any conventional definition. Historically the word "truth" was synonymous with "fact" or "actuality." In this traditional world, truth is neutral and reveals itself only when the corrupting forces of power are absent. Perhaps this understanding of truth explains why for most of Anglo-American history legal judgments were made in public, openly and extemporaneously by each judge, where there was no possibility of "backroom dealing." This type of discourse was used under the guise of trying to avoid (or show) the influence or coercion of power. But truth cannot exist independently of power. In the police station, the courtroom, the state house, the workplace, and throughout modern society, law is the power that enables the production of knowledge and the determination of truth.

[27] The law does more than allow truth to be revealed in a certain way. Law is one of the most powerful discourses in that it claims not only to reveal the truth, like science, but also to consecrate it as the Law, the sole source of legitimate physical power. In this context, an appellate opinion is a source of truth and a representation of power, not so much as an evaluation of the "facts" of a particular case, but rather what "facts" are acceptable within the legal grid that the court creates. It is up to the lower courts to determine the truth, but the appellate court enables the truth to be discovered in a particular way.

[28] This is not exactly correct. Burning a cross and burning a flag are both protected to some extent; what differentiates the treatment of these two acts of speech is the existence of threat in the former case. Cross burning can be prohibited *only* when it is a threat. In theory, the state could prohibit flag burning if it was viewed as a threat, but this is much more difficult to imagine. The end result in most cases will be that burning a flag is OK, while burning a cross is not.

[29] *See* Michel Foucault, *Discipline and Punish* 187-92 (1975) (using hospitals as a prototypical example of the growth of normalization through record keeping and other forms of documentary power).

Appellate opinions achieve this role of normalization in several ways. First and foremost, the opinion seals the fate of the parties before the court and establishes a precedent for actors in future cases. In addition, the opinion delineates the bounds of acceptable reasoning for lower courts. This control is exercised not only over the substantive decision, but also over details of procedure, including what witnesses may testify and what evidence judges and juries may consider. Finally, the opinion will set the broad boundaries of acceptable legal conduct and argument: law students learn by reading appellate opinions; lawyers plan cases and strategies by studying appellate opinions; and judges decide cases by following previous appellate opinions. The content, the structure, and tone of judicial opinions influence all these players in the practice of law. Courts therefore determine the scope of their own authority through their discourse.

This discourse among litigants, judges, lawyers, academics, students, and the public is greatly influenced by the manner in which appellate opinions are issued. The most important influence on this discourse is the presence or absence of separate opinions. There are many ways of deciding and announcing the result of a legal dispute: there could be a collection of opinions from each judge without an opinion of the court as a whole (*seriatim* opinions, as was the tradition in England for hundreds of years); there could be a single unsigned opinion with no permitted dissent (unanimous, *per curiam* opinions issued without a public vote, as is the current practice in civil law countries such as Germany and France)[30]; or there could be an opinion of a majority of the judges (either signed or unsigned) along with any concurring or dissenting opinions (as is primarily the practice in American federal and state courts).[31]

The structure of appellate opinions is an integral part of the creation of legal truth grids. A unanimous opinion (9-0) by the Supreme Court will foster a much different reaction than a 5-4 decision with several scathing dissents. Unanimous opinions settle the law. Lower courts may try to carve out small areas of disagreement within the legal grid, but the message of the Court is that this issue is decided and will not be reconsidered any time soon. No foreseeable changes in Court personnel or attitude are likely to change the votes of five justices. By contrast a 5-4 decision will send quite a different message to lower courts and to lawyers who want to challenge the precedent. Challenges may be fruitful when a change in the Court's membership makes the vote uncertain or when a compelling case forces one or two justices to reconsider their vote. Therefore, dissenting opinions are more likely to create uncertainty.
This uncertainty will produce a much different process for determining "truth."[32]

The resulting discourse – be it ambiguous, disputed, apparently unassailable, or obscure – determines, or at least greatly influences, our conception of legal "knowledge" and the determination of legal "truth." Throughout history the process of deciding cases, of establishing how the "truth" will be determined, has changed, and with it the legal discourse has changed. *Seriatim* opinions were common at certain times and in certain

[30] Continental law (and the law in Japan, China, and other non-Anglo-American countries) is not made by judges but is contained mostly in written statutory codes. In the common law system, in contrast, a great deal of law is made by the opinions of judges. Friedman, *History of American Law* at 22 (cited in note 20).

[31] For an analysis of the difference between these styles, *see* Ginsburg, *Speaking in a Judicial Voice* at 67 (cited in note 9); Ginsburg, *Remarks on Writing Separately*, at 133 (cited in note 9).

[32] This analysis is true, of course, only in a legal system in which judges express their differences in public through concurring and dissenting opinions. In France and Germany, all opinions carry the same discursive impact because disagreement is not published.

nations, while unanimous opinions dominated at other times and in certain countries or legal systems. But what determines the shape of appellate discourse and why do we see different types of discourse at different times and across different societies?

II. A Brief History of Dissent

There are only three widely used ways in which multi-judge courts have delivered judicial decisions over nearly a thousand of years of Anglo-American jurisprudence. The first is the *seriatim* delivery of the judgment of each judge individually. This practice prevailed in Great Britain for nearly all of its history, from the time of William the Conqueror to the present day. It also was common in U.S. courts (both state and federal) at the Founding. The second is delivering an "opinion of the court," with no publicly revealed vote or separate opinions. This practice has been used twice: by Lord Mansfield of the King's Bench in England and (more or less) by John Marshall of the United States Supreme Court. Finally, the modern practice in the United States is a hybrid, in which an opinion of a majority of the court is issued, but judges decide individually whether to "write separately."

A. The English Experience

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.[33] The opinions, the sum of which would amount to the legal rule in the case, were not even published until the early seventeenth century. Prior to that time, case reports were the written compilation of the notes of prominent lawyers at the trial, who recorded, to the best of their ability, the proceedings of the court and the orally delivered opinions of the judges. Because more than one lawyer might take notes on a particular case, there were often multiple, and perhaps conflicting, reports. These reports, covering a huge swath of English legal history dating back to at least the reign of King Edward I and going forward to at least the reign of Henry VIII, were originally published in raw form, and were used by lawyers as source material and precedent. The unedited and unabridged compilations were massive and did not present a coherent picture of the law. Lawyers and judges had a difficult time even knowing the legal rule from a case.[34] "Precedent" was virtually unknown because it implies the existence of a set of judgments available to parties and judges. Abridgements of leading cases appeared by the late fifteenth century,[35] but the quality varied tremendously, and no systematic court "reports" were issued until Edward Coke published his case notes in 1609.[36] (There were

[33] *See, for example*, William H. Rehnquist, *The Supreme Court* 40 (2001).

[34] William Murray, who practiced before the Court of Chancery in the mid-Eighteenth Century (when reporting was still poor in equity courts), wrote: "It is a misfortune attending a court of equity, that the cases are generally taken in loose notes, and sometimes by persons who do not understand business, and very often draw general principles from a case, without attending to particular circumstances, which weighed with the court in the determination of these cases." James Oldham, *English Common Law in the Age of Mansfield* 366 (2004).

[35] The first abridgment was made by Nicholas Statham, Baron of the Exchequer under Edward IV, in around 1470. 8 *The Cambridge History of English and American Literature*, Chapter XIII sec. 9, (1907) ("As the number of the Year Books increased, it became convenient to make classified abridgments of their leading cases. The first of these was made, about 1470, by Nicholas Statham, baron of the exchequer under Edward IV").

[36] Edward Coke, who served as Chief Justice of the Court of Common Pleas and then the King's Bench, became the first English jurist to publish his opinions in 1609. His cases became Volume I of the English Reports.

no "official" case reports until the late eighteenth century, and the regular practice of issuing official court reports of cases did not become regular until the mid-nineteenth century.) The "poverty of the law reports," as C.H.S. Fifoot writes, contributed to the lack of clarity of the law.[37] This had many bad effects, but, as shown below, the lack of clarity did not become a crisis until the rise of commerce in the mid-Seventeenth Century.

Even after Coke and his contemporaries formulated the issuance of official reports of judicial decisions, the practice of each judge delivering his opinion *seriatim* continued. Although tradition and a sense of efficiency sustained this practice, we can only speculate as to its origins. One possibility is concern about concealed power. Oral delivery by each individual judge may be a more accountable method of deciding cases than decisions made in seclusion, because judgments made in the open and without explicit caucus among the judges may be less likely to be (or appear to be) infected by corruption or collusion or the influence of the monarch. As critics complained after certain American courts departed from the *seriatim* tradition, forcing individual judges to give their account provided a basis to hold judges accountable, which in turn gave them an incentive to work hard and do well.[38]

The long and unbroken tradition of delivering opinions *seriatim* was changed unilaterally with the ascendancy of William Murray, known as "Lord Mansfield," to the position of Lord Chief Justice of the King's Bench in 1756.[39] Mansfield introduced a procedure for generating agreement and consensus among judges and then issuing caucused opinions. The judges met collectively in the secrecy of their chambers, worked out their differences into a compromise decision, and then wrote what was to be delivered as an anonymous and unanimous "opinion of the court." Mansfield made this dramatic change in an attempt to bring clarity to the law in order to bring English commercial law in line with prevailing practices in trades and in other countries.[40] He succeeded. Jim Oldham, the world's leading Mansfield scholar, summarizes his accomplishment: "[Mansfield] established the basic principles that continue to govern the mercantile energies of England and America down to the present day."[41]

During the Middle Ages and until Mansfield, the law governing business affairs—known as "the law merchant"—was administered by special lay courts at "fairs" set up on

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These were his personal account of the cases, and they are generally considered to be misleading, often reporting what he wanted the result or reasoning to be instead of what it actually was. *See, for example,* J.H. Baker, *New Light on Slade's Case,* 29 Cambridge Law J. 213 (1971) (showing how Coke's reporting introduced inaccurate distortions into the law).

[37] *See* Cecil H.S. Fifoot, *Lord Mansfield* 89 (1936).

[38] *See* text accompanying notes 93-109. Thomas Jefferson, a strong critic of the "opinion of the court," wrote: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning." *Letter from Thomas Jefferson to Thomas Ritchie* (Dec. 25, 1820), *in* Paul L. Ford, ed,10 *The Writings of Thomas Jefferson* 169, 171 (1899).

[39] Murray served as Lord Chief Justice from 1756 to 1788. The King's Bench was one of three common law courts in England at the time. Although there were rival courts of various royal and nonroyal statures, the King's Bench was the most important common law court in the land. Appeals were possible but largely unknown, and therefore the King's Bench had the ultimate say in most matters, especially those of a commercial nature.

[40] Friedman, *History of American Law* at 133 (cited in note 20). Mansfield recognized the importance of the law merchant, which was based largely on commercial customs in practice in some areas since the Middle Ages, and incorporated it into general rules of application within the larger common law.

[41] Oldham, *Law in the Age of Mansfield* at 10 (cited in note 35).

trade routes, in trade centers, or that traveled across Europe.[42] The law merchant was distinct from the common law because it was international in scope and based largely on trade-specific customs that were unique to the commercial setting. The law merchant consisted primarily of semi-codified customs that developed over the course of many years and many thousands of transactions.[43] It also existed in various treaties and legal codes set out by scholars and merchants in trade centers, like Rhodes, Barcelona, and Visby.[44]

In many cases, this customary law differed from the more structured formalities of English common law.[45] For example, the common law gave tremendous advantages to parties enforcing a written contact "sealed by the party against whom the claim was made," but in fair courts this rule was generally waived.[46] In general, the customs and practices of trades were the law of commerce on the Continent, which was foreign to judges, juries, and judgments in English courts. Lord Holt, who preceded Mansfield as chief justice, noted when describing why the "law" should be insulated from the influence of merchants: "no protagonist, however influential, [should] be permitted to dictate the terms upon which his dispute should be resolved."[47] In this respect, England differed substantially from the continent of Europe, where trade guild law was well incorporated into the body of general law.[48] As could be expected, this procedural difference made law courts less valuable for resolving commercial disputes.

The unprecedented growth in trade and commerce during the Eighteenth Century made the usefulness of courts in settling commercial law disputes an especially acute problem. In the fifty years before Mansfield became chief justice and for the fifty years after, international commerce became essential to the success of England's expanding empire.[49] As Dr. Samuel Johnson noted in 1756, the same year Mansfield was called to the bench, "there was never from the earliest ages a time in which trade so

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[42] Edmund Heward, *Lord Mansfield: A Biography of William Murray, 1st Earl of Mansfield (1705-1793) Lord Chief Justice for 32 Years 99* (1979); Friedman, *History of American Law* at 28 (note 20) ("There were many types of merchant courts, including the colorful courts of piepowder, a court of the fairs where merchants gathered."). Recent scholarship casts doubt on the view that the law merchant was a system of private ordering among merchants that was somehow superior to modern commercial law. *See, for example,* Emily Kadens, *Order within Law, Variety within Custom: The Character of the Medieval Merchant Law*, 5 Chi J International L 38, 63 (2004) (describing the law merchant as a "layer of laws and practices that included legislative mandates, broad-reaching customs, and narrow trade usages).

[43] For a modern example, *see* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich L Rev 1724 (2001) (describing the private commercial law used by merchants in the cotton industry).

[44] In the famous case, *Luke v Lyde*, Lord Mansfield cited to various laws of the sea, including Rhodian Laws, the Consolato del Mere (Barcelona), and the laws of Visby. *See* Bridget Murphy, *Luke v Lyde*, 2003 Auckland Univ L Rev 2 (2003).

[45] Edward Coke, who preceded Lord Mansfield on the King's Bench by 150 years, declared in 1608 that "the Law Merchant is part of this realm," *see* 1 Edward Coke, *Institutes of the Laws of England* 182a (1648), but this did not mean that customary commercial law was fully incorporated into the common law or that common law courts stepped aside and let merchant courts settle disputes. A century and a half after Coke made this statement the common law was largely ignorant and disrespectful of the Law Merchant. *See* W.S. Holdsworth, *The Rules of Venue, and the Beginnings of the Commercial Jurisdiction of the Common Law Courts*, 7 Colum L Rev 551, 561-62 (1914) ("It was not till the common law obtained in Lord Mansfield a judge who was a master of [foreign writings on commercial customs] that the rules deducible from the many various commercial customs which had come before the courts were formed into a coherent system, and completely incorporated with the common law.").

[46] *See* Heward, *Lord Mansfield* at 100-01 (cited in note 44).

[47] Fifoot, *Lord Mansfield* at 9 (cited in note 38).

[48] *See* Heward, *Lord Mansfield* at 99-101 (cited in note 44).

[49] *See* P. Marshall, *The Eighteenth Century* (1988) 53 (noting during the period 1697 to 1815 exports increased much faster than population growth or economic growth as a whole).

much engaged the attention of mankind, or commercial gain was sought with such general emulation."[50] At this time "the place of the Law Merchant in English law was considerably unsettled . . . [because] very few general rules and principles had been established to which isolated decisions could be adjusted."[51] English courts were not viewed as being equipped to offer a valuable service to commercial parties. The inadequacy of common law courts is apparent from commentary by merchants at the time. One influential guide for merchants noted that "[t]he right dealing merchant doth not care how little he hath to do in the Common Law."[52] Others advocated the establishment of specialty courts, impugning the law courts for not understanding commercial issues and creating confusion with their opinions.[53]

The divergence between formal and informal law, between common and commercial law, was a problem *for law courts* since their inadequacy simply pushed commercial disputes to other forums of dispute resolution. Courts were, from the perspective of business interests, overly formal and out of touch with the reality of commerce. The growth of commercial transactions in number, size, and complexity only exacerbated the problem.[54] 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 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.[55] Although this plethora of courts gave plaintiffs a wide range of options to find the best venue for their claim, the lack of a centralized or systematic reporting system made the mishmash of courts a nightmare for anyone looking for clear legal rules. Even with a modern database like Westlaw, English judges and litigants at the time would have had difficulty determining the rule for any particular case. The plight of businessmen planning their affairs without legal counsel would have been nearly hopeless.

Even when we narrow the number of courts to the most important ones,[56] this still leaves three—Common Pleas, Exchequer, and Kings' Bench—all of which had

[50] *See* Fifoot, *Lord Mansfield* at 4 (cited in note 38).

[51] Murphy, *Luke v. Lyde* at 4 (cited in note 45).

[52] John Marius, *Advice Concerning Bills of Exchange* (Early English books On-line, Electronic Reproduction Ann Arbor, Michigan 1999).

[53] John D. Cary, *An Essay on the State of England in Relation to Its Trade* (Printed by W Bonny 1695, Early English books On-line, Electronic Reproduction Ann Arbor, Michigan 1999) (advocating "Courts of Merchants... for the speedy deciding all differences relating to Sea Affairs, which are better ended by those who understand them, than they are in Westminster-Hall."); *see also* Josiah Child, *A Discourse About Trade* (Printed by A Sowle 1689, Early English books On-line, Electronic Reproduction Ann Arbor, Michigan 1999) ("it is well if, after great expenses of time and money, we can make our own Counsel (being Common Lawyers) understand one half of our Case, we being amongst them as in a Foreign Country.").

[54] For example, during the time when Lord Mansfield was Chief Justice the number of cases involving promissory notes or bills of exchange increased about 100 percent per year, over three times the increase in cases overall. Heward, *Lord Mansfield* at 53 (cited in note 44).

[55] *See* Patrick Colquhoun, *A Treatise on the Police of the Metropolis* 383-88 (5th ed.) (describing 9 supreme courts, 4 ecclesiastical courts, 17 courts for the City of London, 8 courts for the City of Westminster, 14 courts for the part of the city lying in County of Middlesex, 8 courts in the Borough of Southwark, 18 courts for small debts, one court of oyer and terminer, 4 courts of general and quarter sessions of the peace, 10 courts for the police petty matters, and 5 corners' courts. These were overseen by 753 judges. *Id* at 389. This does not include the innumerable merchants' courts, private arbitration proceedings, and other methods for resolving disputes.

[56] These three courts were the primary source of the Common Law during this period, despite being responsible for only a small percentage of cases. *See* Oldham, *Law in the Age of Mansfield* at 12 (cited in note 35).

overlapping jurisdiction.[57] Decisions from these courts were not binding on other courts,[58] meaning there were (at least) three relevant sources of legal precedents for any particular dispute. According to Oldham, "[t]he horizontal structure of the English general courts, with three common law courts, each court operating largely independently of the others, inhibited growth of the notion of binding precedent."[59] In addition, separate equity courts, specifically the Court of Chancery, existed as an alternative to law courts. Although the equity courts had limited jurisdiction, they were available for many commercial law disputes. To complicate matters, equity courts typically had even worse reporting than the law courts.[60]

It is not surprising that these many courts competed with each other for business. They did so not only for the reputational benefits, but for cash, since judges were paid by the case.[61] According to a recent study, judges therefore had an incentive to rule in favor of plaintiffs because they were the party that chose the venue in most common law cases.[62] Plaintiffs also had an incentive to choose a venue that increased their prospects, regardless of the impact on future cases, which could be brought in other courts. If a business wanted to enforce a contract without a sealed, written document, it could bring an action at a merchant fair instead filing a formal pleading with a law court. And if a business had an equitable action to bring—for example, that a contract should be enforced despite technical defects—it would have to do so in Chancery, where this argument was allowed, as opposed to the law courts. In this way, the various courts competed for the business of commercial dispute resolution. By making favorable rules or procedures, courts could attract more disputes (taking market share from competing courts) and perhaps encourage more suits due to reduced transaction costs (growing the pie).

Second, even within a specific court jurisdiction, the use of *seriatim* opinions added a layer of confusion. Instead of manifesting a binary win-loss character, opinions 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. In complex commercial disputes, this was not an easy matter. Moreover, interpreting past cases to plan future arguments was also exceedingly complex given the plethora of opinions on every subject and the often highly nuanced differences among them. Accordingly, during this period the law became much more "confusing and remote to merchants and businessmen."[63] Thus the nascent

[57] These courts, comprised of four judges each, had overlapping jurisdiction, and therefore competed for cases. As Daniel Klerman argues in a recent paper, competition was fierce, since judges were paid by the case. *See* Daniel M. Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 Univ Chi L. Rev 1179, 1189-90 (2007).

[58] Oldham, *Law in the Age of Mansfield* at 366 (cited in note 35) ("Decisions from another court would be looked to only as advisory or as a means of persuasion.").

[59] *Id* at at 365.

[60] William Murray, who practiced before the Court of Chancery in the mid-Eighteenth Century (when reporting was still poor in equity courts), wrote: "It is a misfortune attending a court of equity, that the cases are generally taken in loose notes, and sometimes by persons who do not understand business, and very often draw general principles from a case, without attending to particular circumstances, which weighed with the court in the determination of these cases." Oldham, *Law in the Age of Mansfield* at 366 (cited in note 35).

[61] *See* Klerman, *Jurisdictional Competition* at 9-11 (cited in note 58) (showing that fees paid to judges per case were substantial and sufficient to bias their decisions in favor of plaintiffs, who chose the venue)

[62] *Id*.

[63] Friedman, *History of American Law* at 95 (cited in note 20).

commercial law of England was uncertain, exactly the opposite of what businesses needed to thrive.

From the perspective of eighteenth century merchants what was needed was someone or something to bring more certainty to commercial dealings, simplify legal proceedings, and create a simple set of rules that could be applied to all transactions.[64] According to Mansfield, 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 . . ."[65]

From the perspective of courts what was needed was a way to bring the business of commercial regulation to law courts—to increase the market share of law courts.[66] Mansfield's strategy was to make the decisions of his court (i.e., his product) more attractive to potential litigants (i.e., potential customers). To do this, Mansfield adopted the best practices of competitors. He created a set of general principles based on the valuable services that rival courts offered business litigants. These general principles included the requirement of good faith (from equitable courts) and the use of trade custom (from the law merchant or fair courts). Mansfield believed that the international nature of commerce meant that commercial law must be the "same all over the world"[67] and that England therefore had to move its formal law in the direction of traditional practices in other countries. "He . . . encouraged the development of legal rules that would support a commercial economy that was increasingly dependent on paper credit and that was vigorously involved in international trade."[68] Related to this was his view that legal rules should be understood by those "who must obey [them]."[69] The normative underpinning of Mansfield's revolution was certainty: "the great object in every branch of law, but especially in mercantile law, is certainty."[70]

But 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. Mansfield's expertise and clarity provided a certain statement of the law that drew cases to his court—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.[71]

The arc of the famous case *Luke v. Lyde* is instructive. After a merchant ship was captured at sea and then recaptured, the privateer, ship owner, and captain litigated, in

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[64] *Id* at 58 ("The merchant's idea of a good legal system was one that was rational and efficient, conforming to his values and expectations – traits that neither lay justice neither the baroque extravagances of English procedure [at law courts] supplied.").

[65] Hamilton v Mendes, 2 Burr 1214 (1761).

[66] Friedman, *History of American Law* at 18 (cited in note 20). Mansfield wanted not only to take cases from other courts, but also from the legislature. *See* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 211 (1997) (describing Mansfield as engaged in a "project of defending . . . traditional modes of adjudication against the perceived vices of legislation.").

[67] Pelly v Royal Exchange Assurance Co., 1 Burr 341, 347 (1757).

[68] Oldham, *Law in the Age of Mansfield* at 365 (cited in note 35).

[69] *Id* at 124.

[70] Milles v Fletcher, 1 Doug 231, 232 (1779).

[71] Mansfield's application of equitable principles to commercial disputes was extremely controversial. In fact, Mansfield's successors – such as Kenyon, Thurlow, and Eldon – all opposed this reform, and it was not until 1873 that the Supreme Court of Judicature was established and endowed with both equitable and legal powers. *See* Judicature Act of 1873, § 24.

the absence of a formal contract, what was owed to whom. Mansfield originally heard the case alone in the assizes of Devonshire, but he removed it to London for a hearing before the whole court of the King's Bench so that he could make it "a Case" or a more useful precedent for other merchants.[72] According to Burrow's account:

> [Mansfield] said he always leaned (even where he had himself no doubt) to make cases for the opinion of the Court; not only for the greater satisfaction of the parties in the particular case but to prevent other disputes, by making the rules of law and the ground upon which they are established certain and notorious.[73]

The new "truth" about commercial law could be discovered only by an exercise of power – the power to change the discourse of the law, to change the form to adapt to the new function. Mansfield's success can be measured in several ways. For one, as a result of his legal innovations, Mansfield's court flourished. Prior to Mansfield's discursive change, very few commercial cases came before law courts such as the King's Bench.[74] 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."[75]

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. For example, the number of commercial cases handled by the King's Bench grew by 30 percentage points more than all other cases during Mansfield's time on the bench.[76] More specifically, the number of cases involving promissory notes, which are essential elements for international trade, rose five fold from about 3 per year during the beginning of Mansfield's tenure to about 15 per year at the end. Cases involving "bills of exchange" and various monetary disputes saw similar increases, while common law standards, like trover and trespass, increased at much lower rates.[77]

Another measure of Mansfield's success is his impact on legal thinkers and legal aggregators of the day. Blackstone, the greatest of these, wrote, just nine years after Mansfield became chief justice, that "the learning relating to . . . insurance hath of late years been greatly improved by a series of judicial decisions, which have now established

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[72] *See* James Oldham, *Review: From Blackstone to Bentham: Common Law versus Legislation in Eighteenth-Century Britain*, 89 Mich L Rev 1637, 1645 n 32 (1991).

[73] Luke v Lyde, 2 Burr 882, 887, 97 Eng Rep 614, 617-18 (KB 1759).

[74] Fifoot, *Lord Mansfield* at 13 n 1 (cited in note 38).

[75] Heward, *Lord Mansfield* at 173 (cited in note 44). Other factors contributed to the success of the King's Bench at attracting cases to the court. Mansfield was a very hard worker and, by all accounts, operated his court with a ruthless efficiency. *See* Oldham, *supra* note 36 at 5 ("H] e took particular care that this should not create delay or expense to the parties; and therefore he always dictated the case to the Court, and saw it signed by counsel, before another case was called; and always made it a condition in the rule, "that it should be set down to be argued within the first four days of the term.").

[76] According to Heward, the number of commercial cases (for example, "goods sold and delivered," "money," "promissory notes," "policy of assurance," and "bills of exchange") grew 105 percent, from 217 during the period 1761-1765 to 444 during the period 1776-1780, where as the total number of other cases grew from 75 percent (134 to 235) over the same periods. *See id* at 105-06.

[77] Trover, or an action for the taking of property, went from 32 to 44, trespass from 7 to 16. *See id.*

the law."[78] Judge Buller, writing seven years after Mansfield stepped down, described the impact:

> Before [Mansfield] we find that in Courts of law all the evidence in mercantile cases was thrown together . . . and they produced no established principle. From that time we all know the great study has been to find some certain general principles...not only to rule the particular case then under consideration, but to serve as a guide for the future.[79]

Writing with more historical perspective, Oldham writes that Mansfield was one of the two "most important judicial figures in the law of bankruptcy,"[80] and the elucidator of the fundamental legal principles of insurance and negotiable instruments, where his chief contribution was "cogency."[81] Mansfield brought, "with considerable success," merchant customs "harmoniously" into the common law.[82] Mansfield accomplished the reform of commercial law—in fact, the capture of commercial regulation by law—in part through an alternation of legal discourse.[83] Clarity, which commerce demanded as a precondition for using law courts, was achieved by changing opinion delivery practices in a way designed to unify the judicial voice.

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.[84] The reason for Kenyon's decision can be found in his theory of judging. Kenyon believed in a traditional common law approach to deciding cases; he viewed law and equity as separate and considered an incremental approach, rather than a broad, theoretical one, as the way to reach the best results.[85] Kenyon seldom wrote opinions and rarely gave reasons for his judgments, preferring to decide cases one at a time on the narrow facts before him, rather than announce broad legal rules.[86] This stands in stark contrast with Mansfield's attempt to fuse common law and equity and to announce principles of law from cases in an attempt to increase court power.[87] As one account describes Kenyon's legacy, he is most remembered for

[78] *See* 2 William Blackstone, *Commentaries on the Laws of England* *461.

[79] Lickbarrow v Mason, 2 TR 63, 74; 100 ER 35 (1787).

[80] Oldham, *Law in the Age of Mansfield* at 107 (cited in note 35).

[81] *Id* at 124, 163.

[82] *Id* at 365, 368.

[83] *Id* at 365 ("[Mansfield] strove with considerable success to absorb the customs of merchants into the common law.").

[84] Until recently they delivered their opinions seriatim, each Lord reading aloud his judgment and the reasons for it. The Lords no longer routinely deliver five separate opinions, although they do more frequently announce separate opinions than our Supreme Court. J.H. Baker, *Introduction to English Legal History* 204-11 (1990).

[85] *See* George T. Kenyon, *The Life of Lloyd, First Lord Kenyon, Lord Chief Justice of England* 391(1873) (noting that Kenyon favored the traditional common law approach over Mansfield's attempt to fuse law and equity and discern abstract theories from cases); *see also* John Lord Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest Till the Death of Lord Tenterden* 96 (1874) (noting Kenyon's preference for a traditional common law, case-by-case approach).

[86] *See id* at 390-91. Here we see a similarity with the views of Chief Justice Roberts and his views about the role of the Supreme Court. Roberts also appears to be trying to innovate in opinion delivery practices to achieve his goals, just as Kenyon did. *See* Part IV.

[87] *See id* at 391 (noting that Kenyon favored the traditional common law approach over Mansfield's); *see also* Campbell, *Lives of the Chief Justices of England* at 96 (cited in note 85).

"restor[ing] the simplicity and rigour of the common law."[88] These views about judicial minimalism were known to Mansfield, who worried so much about Kenyon's views and the impact they would have that he lingered on the King's Bench long after he planned retirement in the hopes that someone other than Kenyon would be appointed to succeed him.[89] Kenyon's restoration of *seriatim* persevered until very recently in all multimember English courts.[90]

B. Early American Practices

England's long tradition of *seriatim* opinions crossed the Atlantic along with much of the common law during the formative stages of American judicial development.[91] Early American jurists learned the law by studying the English common law, and therefore adopted many of its practices and institutions. In addition, many of the state courts were established before Mansfield's discursive innovation, so in every state court and in the early years of the Supreme Court, American judges continued the practice of *seriatim* opinions.[92]

But Mansfield's change was evident to American courts and judges, so in some cases it was emulated. In several states, Mansfield's practice was adopted as a way to increase the power of the courts vis-à-vis the other branches of government. Jurists in these states saw how Mansfield had increased the power of his court at the expense of other forms of power, and were eager to emulate this power grab. For example, in Virginia soon after the Revolution, Judge Edmund Pendleton became the chief judge of the court of appeals.[93] Pendleton admired Mansfield and "considered him as the greatest luminary of law that any age had ever produced."[94] Pendleton introduced Mansfield's practice of "making up opinions in secret & delivering them as the Oracles of the court."[95]

This practice was widely criticized by Thomas Jefferson and other Republicans. Due to this political pressure, upon the ascension of Judge Spencer Roane to Judge Pendleton's seat on the bench some years later, the practice ceased and the tradition of *seriatim* opinions was quickly reinstated.[96] Roane shared Jefferson's view about the role

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[88] *Id*.

[89] *See* Kenyon, *The Life of Lloyd* at 166 (cited in note 85).

[90] The Law Lords, who serve as the Supreme Court of Great Britain in some cases, routinely delivered opinions seriatim, with each of the five judges announcing an individual judgment with reasons. *See* Louis Blom-Cooper & Gavin Drewry, *Final Appeal: A Study of the House of Lords in Its Judicial Capacity* 81-82, 523 (1972). This practice recently waned. *See also* Paterson, *The Law Lords* 109-10 (1982) (noting that the Lords no longer routinely deliver five separate opinions).

[91] Friedman, *History of American Law* at 112 (cited in note 20) ("To fill the gap [in American law at the beginning], English materials were used, English reports cited, English judges quoted as authority.").

[92] *See* Scott D. Gerber, ed, *Seriatim: The Supreme Court Before John Marshall* (1998); *see also* David P. Currie, *Review of Seriatim: The Supreme Court Before John Marshall*, 105 Am Hist Rev 1301, 1301 (2000) (noting that "the justices of the time deliver[ed] their opinions seriatim.").

[93] *Letter from Thomas Jefferson to Justice William Johnson* (Oct. 27, 1822), *in* Merrill D. Peterson, ed, *Thomas Jefferson: Writings* 1460-63 (1984).

[94] *Id*. Mansfield was a hero to many early colonial lawyers, so it is not surprising that his experiment with unanimous, anonymous opinions would be something they were willing to try. *See* Friedman, *History of American Law* at 109 (cited in note 20) ("One of the cultural heroes of the American legal elite was England's Lord Mansfield.").

[95] *Id*.

[96] *See* Donald G. Morgan, *The Origin of Supreme Court Dissent*, 3 William & Mary Quart 353, 354 *(*1953) ("In Virginia. . . Judge Pendleton, taking Mansfield as his model, had instituted the secret, unanimous opinion in the state bench; his successor, Judge Roane, had abolished the practice.").

of the judiciary, which is best expressed in a letter he sent to Roane after the decision in *Marbury v. Madison*: "The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."[97]

Thomas Jefferson's role in returning to *seriatim* opinions in Virginia courts is not surprising, because he was a vocal critic of courts and the threat to democracy an aggrandizement of judicial power posed.[98] This battle against Judge Pendleton in Virginia foreshadowed a battle with John Marshall over the same issue regarding the way the Supreme Court delivered opinions. In fact, this single issue would become one of the predominant political issues of the age, embroiling the nation's legal system for a decade and threatening the political stability of the young nation.[99] The winners of the battle—Marshall and the Federalists—would use their victory over the form of legal discourse to build much of what we recognize as the American legal system. The Supreme Court and its relation with the other branches of government looks the way it does today because of Marshall's ability to carry the day with respect to how legal opinions should be issued from the bench.

Jefferson praised the *seriatim* system of announcing the law for four reasons: (1) it increased transparency and led to more accountability; (2) it showed that each judge had considered and understood the case; (3) it gave more or less weight to a precedent based on the vote of the judges; (4) and it allowed judges in the future to overrule bad law based on the reasoning of their predecessors.[100] The overarching rationale for Jefferson's preference was to limit what he viewed as the undemocratic power of courts.

First, Jefferson argued for a return to *seriatim* opinions to increase the transparency of the decision making process in order to reign in the power of the judiciary. In Jefferson's view, the practice of issuing an "opinion of the court" insulated any single justice from criticism. In this way, "judicia[l] perversions of the Constitution will forever be protected."[101] Opinions of the court were the shield that insulated the justices from obloquy and perhaps even impeachment. Jefferson described the practice of issuing opinions as an entire court without a public vote as a "most condemnable" practice in which the justices "cook[ed] up a decision in caucus and deliver[ed] it by one of their members as the opinion of the court, without the possibility of our knowing how many, who, and for what reasons each member concurred."[102] In Jefferson's opinion it was not only the particular decisions that were to be condemned but also the process, which "smother[ed] evidence" and allowed the justices to decide important questions without "justify[ing] the reasons which led to their opinion."[103]

Second, Jefferson worried that judges were lazy, aloof, or otherwise absent from decision making on important legal questions. Jefferson reasoned that requiring a judge

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[97] *Letter from Thomas Jefferson to Spencer Roane*, (Sept. 6, 1819), *in* Paul Leicester Ford, ed, *The Works of Thomas Jefferson* (1904-5).

[98] *See generally* Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971).

[99] *See generally* James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2003). Jefferson and Marshall battled repeatedly over the extent of judicial power in the early Republic. *See, for example, id* at 285 (noting that Jefferson criticized Marshall's opinion in *Cohens v Virginia*, writing to Judge Spencer Roane: "The great object of my fear is the federal judiciary. . . . Let the eye of vigilance never be closed.").

[100] In this final capacity, dissenting opinions act as an "antiprecedent" that allows future judges to base their decision to overrule the previous opinion based on established legal reasoning

[101] *Letter from Thomas Jefferson to James Pleasants* (December 1821), *in* 10 Paul Leicester Ford, ed, *The Writings of Thomas Jefferson* 198-99 (1892-99).

[102] *Id.*

[103] *Id.*

to write out his argument for each case would provide sufficient incentive for each judge adequately to consider the legal merits of the case. Jefferson wrote:

> Let [each judge] prove by his reasoning that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment independently and unbiased by party views and personal favor or disfavor.[104]

Third, Jefferson wrote that multiple opinions not only "communicated [the law] by [the judges] several modes of reasoning, it showed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent."[105] Jefferson wanted a vote. "Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? . . . it would show whether the opinions were unanimous or not and thus settle more exactly the weight of their authority."[106]

This practice of dissent by vote only was occasionally practiced in the early years of the Court[107] and has been advocated by some modern commentators.[108] To Jefferson, who was fearful of the aggrandizement of power in the judiciary,[109] this would allow the legislature or other courts to respond appropriately to the decision—follow it, evade it, or bypass it with legislation or constitutional amendment—based on the "strength" of the opinion. Dissent, with or without opinion, would serve this function.

Finally, Jefferson acknowledged that temporal communication between current and future judges allowed for bad law to be overturned more easily.[110] Jefferson knew of English cases in which decisions had occasionally been overruled based on "dissents" in previous *seriatim* opinions. Jefferson acknowledged this when he wrote that "[i]t sometimes happened too that when there were three opinions against one, the reasoning of the one was so much the most cogent as to become afterwards the law of the land."[111] This is the most powerful justification for dissent. In fact, Jefferson was foreshadowing to an extent the future of the Supreme Court and the power of dissenting opinions when he called for this sort of deliberation from judge to judge across time. To take just two of the many examples from Supreme Court history, dissents in cases such

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[104] *Letter from Thomas Jefferson to Justice William Johnson* (March 4, 1823), *in* 7 Henry A. Washington, ed, *The Writings of Thomas Jefferson* 278-79 (1853-54).

[105] *Letter from Thomas Jefferson to Justice William Johnson* (Oct. 27, 1822), *in* Merrill D. Peterson, ed, *Thomas Jefferson: Writings* 1460-63 (1990).

[106] *Letter from Thomas Jefferson to Justice William Johnson* (Jun. 6, 1823), *in* 7, Henry A. Washington, ed, *Writings of Thomas Jefferson* at 293-98 (cited in note 100).

[107] For example, in *Herbert v Wren*, 11 US 370 (1813), Justice Johnson dissented from the opinion of the Court, but did not state his reasons.

[108] Richard A. Posner, *The Federal Courts: Challenge and Reform* 174 (1996).

[109] Thomas Jefferson strongly disagreed with Alexander Hamilton's characterization of the judiciary as the "least dangerous branch." *See* Clinton Rossiter, ed, *The Federalist Papers*, (No. 78), 392-399 (Alexander Hamilton) (1999).

[110] Of course dissenting opinions can be used to overturn "good" law too.

[111] Letter from Thomas Jefferson to Justice William Johnson (October 27, 1822) *in* Merrill D. Peterson, ed, *Thomas Jefferson: Writings* 1460-63 (cited in note 100).

as *Lochner v. New York*[112] and *Plessy v. Ferguson*[113] were instrumental in changing the law many years in the future.[114]

For these reasons perhaps, but more likely out of tradition, the Supreme Court, like most of the state courts, initially emulated the *seriatim* practice of their brethren on England's highest courts. The fact that decisions of the Supreme Court were issued as a collection of separate opinions, with each justice issuing an opinion with reasons for the decision, also limited the Court's power. Just as in the King's Bench before and after Mansfield, this style of opinion delivery created substantial uncertainty and instability in the law. [115]

Calder v. Bull, a classic case from the pre-Marshall Supreme Court, demonstrates this perfectly.[116] Decided in 1798, the Court considered whether a statute passed by the Connecticut legislature overturning a state court probate decision violated the ex post facto clause of the federal Constitution.[117] Four justices wrote opinions on the ex post facto issue, and the holding was therefore highly confused. The modern interpretation of the collection of *seriatim* opinions is that the constitutional clause applies only to retroactive punishment, but, according to David Currie, "the practice of seriatim opinions . . . . make[s] it difficult to say that this was the holding of the Court . . . ."[118] Currie goes on to conclude that "*Calder* illustrates the uncertainty that can arise when each Justice writes separately . . .,"[119] and that "[t]he practice of seriatim opinions . . . . weakened the force of the [Court's] decisions."[120]

The result of this practice was a weak and divided Court unable to assert any real authority.[121] Although the Federalists, including the first chief justice, John Jay, wanted to assert the Court's power to ensure the supremacy of federal law, Anti-Federalist antipathy toward the federal judiciary continued to dominate the political scene.[122]

The weakness of the Court was demonstrated by the negative reception of many of its early opinions. Characteristic of the hostility to the Court during this period was the reaction of the Anti-Federalists to the Court's opinion in *Chisholm v Georgia*.[123]

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[112] Lochner v New York, 198 US 45 (1905).

[113] Plessy v Ferguson, 163 US 537 (1896).

[114] The overruling of laissez-faire constitutionalism based on Justice Holmes's dissent in *Lochner* was the first time in Supreme Court history that a fundamental jurisprudential doctrine was overruled on the basis of a prior dissenting opinion. Similarly, it was Justice Harlan's lone dissent in *Plessy* that would later provide much of the eloquent ammunition against "separate but equal" laws. With the words, "the Constitution is color blind, and neither knows nor tolerates classes among citizens," Harlan set the stage for *Brown v Board of Education*, 347 US 483 (1954), and much of the civil rights movement. This is the power of dissent, for good or bad.

[115] As noted by Professor David Currie, *seriatim* opinions may be beneficial in that they may provide more information germane to predicting future outcomes. *See* David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 14, n 61 (1985) ("Yet seriatim opinions actually may give us a better basis for predicting later decisions.").

[116] 3 US 386 (1798).

[117] *Id* at 387 (interpreting article I, section 10).

[118] Currie, *Constitution in the Supreme Court* at 44 (cited in note 110).

[119] *Id* at 45.

[120] *Id* at 55.

[121] Furthermore, the circuit riding duties of the justices eroded the spirit and moral of the Court, contributing to its ineffectiveness. These duties were especially draining of the justices' energy because of the difficulty of traveling during this era. When John Jay referred to a lack of "energy" on the Court, it was riding circuit that was the likely culprit. Thus Congress, state legislatures, and state courts were the dominant policy makers during this period.

[122] *See, for example,* Ellis, *Jeffersonian Crisis* at 12 (cited in note 94) ("Throughout George Washington's first administration the federal judiciary tried to avoid becoming engaged in political controversies or becoming entangled in questions outside its immediate jurisdiction.").

[123] Chisholm v Georgia, 2 US 419 (1793).

Chisholm held that a state was not immune to suit by a private citizen in federal court.[124] Legislators in Georgia responded to this decision by introducing a constitutional amendment to restrict the power of federal courts to hear suits against states brought by citizens of other states. This amendment quickly became the Eleventh Amendment to the Constitution.[125] With this severe blow to the institutional power of the Court, Chief Justice Jay abandoned his leadership of the Court in order to become governor of New York.[126] When asked by President John Adams to resume his duties in 1800, Jay refused on the grounds that the Court lacked any prestige or authority and would be unable to earn the "public confidence and respect."[127]

Following Jay's departure and the brief leadership of John Rutledge,[128] Oliver Ellsworth was appointed as chief justice. Ellsworth was an advocate of a stronger central government. In order to increase federal power, Chief Justice Ellsworth attempted to initiate a policy of handing down opinions *per curiam*—anonymous and unanimous opinions that would emulate Mansfield's opinion of the court. Ellsworth believed that by issuing decisions that would speak for the Court as a whole without dissent, the power of the Court, and thereby the power of the national government, would be increased. This reform was unsuccessful in part, because of the lack of political will on the part of those opposed to *seriatim* opinions, in part because Ellsworth's tenure as chief justice was brief due to illness, and undoubtedly for other reasons as well.[129] The seed, however, that would allow the growth of national power had been sowed.

When Ellsworth left office, the future of the Court was not clear. This was in part because the Supreme Court's very existence was questioned at the Founding. Although eventually established as a tri-equal branch of government, the creation of a national court was contested at the Constitutional Convention of 1787. The delegates realized the need for a stronger national government than existed under the Articles of Confederation but many representatives considered the existing state courts as sufficient for interpreting national laws and thought the federal judiciary to be a potential "source of tyranny."[130]

In the end, Federalists, who envisioned a national judiciary to settle interstate disputes, were victorious.[131] The Supreme Court was their reward. By modern standards this was a substantial expression of national power, but for the first decade of its existence it remained untapped as the Supreme Court was largely ignored by lawyers,

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[124] *Id*.

[125] US Const Amend XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."). This was one of only two constitutional amendments that was adopted explicitly to repudiate a Supreme Court decision—the other being the 16th Amendment (federal income tax) which was in response to the Supreme Court's decision in *Pollock v Farmers' Loan*, 158 US 601 (1895), which declared the federal income tax of 1894 unconstitutional.

[126] Similarly, Robert H. Harrison refused an appointment to the Court in 1789 to become chancellor of Maryland. *See* Friedman, *History of American Law* at 133 (cited in note 20).

[127] Richard Morris, *John Jay, the Nation, and the Court* (1967). Jay "left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as a court of laws resort of the justice of the nation, it should possess." 4 *The Correspondence and Public Papers of John Jay* 285 (1893).

[128] John Rutledge was appointed by President Washington in 1795. Rutledge participated in two cases as chief justice before his nomination was defeated in the Senate in December of 1795.

[129] *See* William G. Brown, *The Life of Oliver Ellsworth* (1905).

[130] *See* Rakove, *Original Meanings* at 186 (cited in note 67) (describing the position of the Anti-Federalists as articulated by "Brutus," a New York writer responding to the Federalist Papers).

[131] *See id*.

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."[132] Everything changed with the appointment of John Marshall as chief justice in 1801.

C. The Era of Unanimity

In 1800, the year of Ellsworth's retirement from the Court, the Federalists, who had dominated politics since 1789, were on the way out. The Federalists were advocates of a strong central government, were skeptical of state powers, and distrusted direct democracy. By contrast, Jefferson's Republicans emphasized the decentralized authority of the states and the people. With the defeat of Federalist John Adams by Jefferson in the election of 1800, the power of the central government seemed to be on the wane. The outgoing Federalists, however, were not content to entrust the Constitution to Jefferson's Republicans.

Realizing that they were about to lose control of the only two branches of government with any power, the Federalists looked to secure control of the third branch as a possible bulwark of national power. The branch that they seized, however, needed serious reform in order to be strong enough to counteract, or at least curtail, the power of the new president and the Republican-controlled Congress. During its first 16 terms, the Court heard only about 60 cases, only about 10 were of any significance, and when the government moved to Washington in 1800, the Court had "no library, no office space, no clerks or secretaries," and heard cases on the first floor of the Capitol, "adjacent to the main staircase."[133] For these reasons, and because the power of the Court to interpret the Constitution was not clear at this time, Alexander Hamilton described the judiciary as "beyond comparison the weakest of the three branches."[134]

1. The Marshall Court

The Federalist reform came in two forms: the outgoing Federalist Congress passed the Judiciary Act of 1801, and lame duck President Adams appointed John Marshall as chief justice. Each of these acts was intended not merely to secure Federalist control of the Court, but to increase the power of the Court at the expense of the legislative and executive branches.

The Judiciary Act doubled the number of circuit courts (from three to six) and created 16 new judgeships.[135] This was intended to do two things to increase Federalist control over the judiciary. First, it gave outgoing President Adams a chance to populate the federal courts with Federalists. Second, it eliminated the circuit-riding duties of Supreme Court justices, who previously had sat on both the Supreme Court and on the

[132] Morris, *John Jay* at 81 (cited in note 123). *See also*, Robert P. Frankel, Jr., *Judicial Beginnings: The Supreme Court in the 1790s*, 4 History Compass 1102, 1104 (2006).

[133] Jean Edward Smith, *John Marshall: Definer of a Nation* (1996).

[134] Clinton Rossiter, ed, *The Federalist Papers* (No. 78), at 464-65 (Alexander Hamilton) (1999).

[135] The Sixth Circuit only got one additional judge. The Act also created 10 new district courts, overseen by existing district court judges, who were federalists. These were the famous "midnight judges." *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 Minn L Rev 1710, 1719- 21 (2007) (describing the Judiciary Act of 1801 as the "Midnight Judges Act").

three circuit courts. This was designed to increase the Court's prestige and to increase the desirability of being a Supreme Court justice.

Riding circuit was a major impediment to an energetic and collegial Court. Relieved of their duties to travel and sit on other courts, the justices could live together in Washington, develop strong relationships, and work in a more united way on important issues, giving the Court the "energy" that Jay claimed it lacked. This reform was not effective, however, because the Republican-controlled Congress repealed the Act in 1802, and Supreme Court justices continued to ride circuit until 1869.

The Federalist plan to control the judiciary therefore rested principally on the appointment of John Marshall as chief justice of the United States. This was not lost on Marshall. The day Jefferson was inaugurated, Marshall wrote to Charles Cotesworth Pinckney: "Of the importance of the judiciary at all times, but more especially the present I am fully impressed. I shall endeavor in the new office to which I am called not to disappoint my friends."[136]

Marshall was an "ardent nationalist." He wrote that "I was confirmed in the habit of considering America as my country and Congress as my government. . .. I had imbibed these sentiments so thoroughly that they constituted a part of my being."[137] Despite his firm belief in the national government, Marshall was a reluctant political actor. Marshall entered politics following Shays' Rebellion of 1786 only because he felt that the nation was in danger of collapse.[138] Marshall viewed Republican control of the government as dangerous to his conception of the nation. The "gloomy views"[139] of Federalists upon Jefferson's ascendancy were captured in a letter Marshall wrote to a Congressman from Massachusetts at the time: "I feel that real Americanism is on the ebb."[140] Marshall carried his national spirit to the Court.

Unlike the failed attempt with the Judiciary Act, this tactic of the Federalists proved to be a tremendous success. Marshall found a ready historical example of how courts could increase their power in the experience of Lord Mansfield, who was a "cultural hero of the American legal elite" at that time, and whose reform in the early 1760s was recent history for the Founders.[141] Marshall increased the power of the Court vis-à-vis the other branches of government by dramatically altering the way the Court decided and announced its opinions, just as Mansfield had done, and for the same reasons.

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.[142] This change was viewed as an "act [] of audacity" and "assumption [] of power."[143] Marshall used his leadership skills and the power of

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[136] *Letter from John Marshall to Charles Cotesworth Pinckney* (Mar. 4, 1801), *in* 6 *The Papers of John Marshall* 89 (1990).

[137] John Stokes Adams, ed, *John Marshall: An Autobiographical Sketch* 9-10 (1937).

[138] Smith, *John Marshall* at 5 (cited in note 129).

[139] J. Beveridge Jr., *The Life of John Marshall* 15 (1919) ("Of all the leading Federalists, John Marshall was the only one who refused to 'bawl,' at least in the public ear; and yet, as we have seen and shall again find, he entertained the gloomy views of his political associates.").

[140] *Letter from John Marshall to Harrison Gray Otis* (Aug. 5, 1800), *in* 4 *The Papers of John Marshall*, at 204-05.

[141] Friedman, *History of American Law* at 109 (cited in note 20).

[142] *See, for example*, Rehnquist, *The Supreme Court* at 40 (cited in note 34) ("Marshall, in what one of his biographers calls 'an act of audacity,' changed this tradition in the Supreme Court of the United States so that an opinion for the Court was delivered by only one of the justices.").

[143] Beveridge, *Life of John Marshall* at 16 (cited in note 135).

persuasion to convince the other five members of the Court that they should abandon the practice of issuing *seriatim* opinions. Cases were now decided by private conference in which the justices reached 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."[144] Marshall's great discursive revolution, which would cause fundamental shifts in the power of American government, began boldly with the Court's decision in *Talbot v. Seeman*.[145]

Although the question presented in *Talbot* was on its face a simple admiralty issue regarding payments owed in cases of salvage, the context of the case required the Court to take sides in a political debate about a raging "quasi-war" with France. The ship involved in the case was the "Amelia," which was owned by Seeman, a resident of a neutral city-state in the war between England and France. The ship, an armed merchant ship carrying some English goods, had been captured by the French and then recaptured by Talbot, the captain of the American frigate "Constitution."[146] Talbot sued seeking salvage rights—half the value of the cargo. Seeman argued that the ship was neutral and in no danger of being condemned by the French, and that there was no service rendered and therefore no salvage rights owed.

The controversy required the Court not only to decide the narrow question about whether the risk of condemnation was sufficient to justify payment to Talbot, but also to interpret conflicting congressional and presidential actions regarding America's role in the quasi-war with France. In short, the Court was being asked to make a highly political statement in the guise of a salvage case.

The case required the Court to decide two questions: (1) was the seizure by Talbot legal, and (2) did Talbot provide a valuable service to Seeman. Federalists, who were proponents of the war with France, argued strongly for Talbot; Republicans, who wanted to avoid foreign entanglements and defended neutral shipping, supported Seeman.[147] The Court answered both questions in the affirmative, but did so in a manner designed to placate everyone, thereby allowing the Court to increase its power. Marshall convinced the other justices that:

> [i]f a complex, politically charged case like *Talbot* could be resolved with a single opinion, not only would the holding enjoy greater legitimacy, but the identity of the Supreme Court as [the] nation's highest tribunal would become manifest and its prestige would be enhanced enormously.[148]

The Court's decision reveals not only the compromise the Court needed to reach to speak with one voice but also the need to prevent a political backlash against the

[144] *Id.*

[145] 5 US 1 (1801).

[146] This is the famous "Old Ironsides." *See* http://www.ussconstitution.navy.mil.

[147] To add to the mystique of the case, on appeal from a district court ruling for Talbot, Federalist Alexander Hamilton represented Talbot, while Republican, and Hamilton's archenemy and eventual murderer, Aaron Burr represented Seeman.

[148] Smith, *John Marshall* at 293 (cited in note 129).

Court's new power play. The Court held for Talbot (a victory for the Federalists), but it reduced Talbot's salvage claim to one sixth of the ship's value (down from the traditional half) and then allowed Seeman to deduct his costs from this amount (a rarity), making the damages nominal (a victory for the Republicans). Marshall established the power of the Court to decide whether congressional statutes authorized seizure of vessels of foreign powers and what role the executive had in foreign policy,[149] while insulating the decision (and thus his assertion of power) from critics. Acceptance of the decision, which Jefferson and the Republicans did reluctantly, opened the door for the Court to assert, just two years later, the power of judicial review in *Marbury v. Madison*.

Thus was born the "Opinion of the Court," which, in a revised form, survives to this day. The Court now had weight and dignity as well as energy, and it was not subject to political sniping. John Jay's challenge was met, and the Court was able to assert itself as a tri-equal branch of government.[150] 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, a 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.

* * *

During his first ten years as chief justice, Marshall "wrote" 90 percent of the opinions for the Court.[151] The only opinions that were not issued under his name during this period were in cases in which Marshall tried the case below while riding circuit,[152] had a personal interest in the case,[153] or dissented from his fellow justices.[154] Although Marshall dissented occasionally, he generally led by example and acquiesced to the compromise position. This is demonstrated by comparing Marshall with his successors. As shown on Table A, in the history of the Court, Marshall is the chief justice least likely to dissent.

TABLE A: Dissenting Behavior of Chief Justices

Chief Justice	Dates of Service	Number of Cases	Number of Chief Justice Dissenting Opinions	Dissent Proportion (percent)
Marshall	1801-1835	1187	3	0

[149] In an oft quoted passage, the Court wrote: "The whole powers of war being, by the Constitution of the United States, vested in Congress, the Acts of that body can alone be resorted to as our guides in this enquiry." *See* Talbot v Seeman, 5 US at 28.

[150] *See* William J. Brennan Jr., *In Defense of Dissents*, 37 Hastings L J at 427 ("This change in custom at the time consolidated the authority of the Court and aided in the general recognition of the Third Branch as co-equal partner with the other branches. Not surprisingly, not everyone was pleased with the new practice.").

[151] Opinions were issued under Marshall's name in all cases in 1801, 1805, and 1806; in 91 percent of cases in 1803; 89 percent in 1804; 90 percent in 1807, 83 percent in 1808; 88 percent in 1809; 73 percent in 1810; and 58 percent in 1812. Over the next 23 years, Marshall accounted for only about 40 percent of opinions. This remains about four times as many opinions as are written by Chief Justice Rehnquist.

[152] *See, for example,* Stuart v Laird, 5 US 299 (1803).

[153] *See, for example,* Martin v Hunter's Lessee, 14 US 304 (1816).

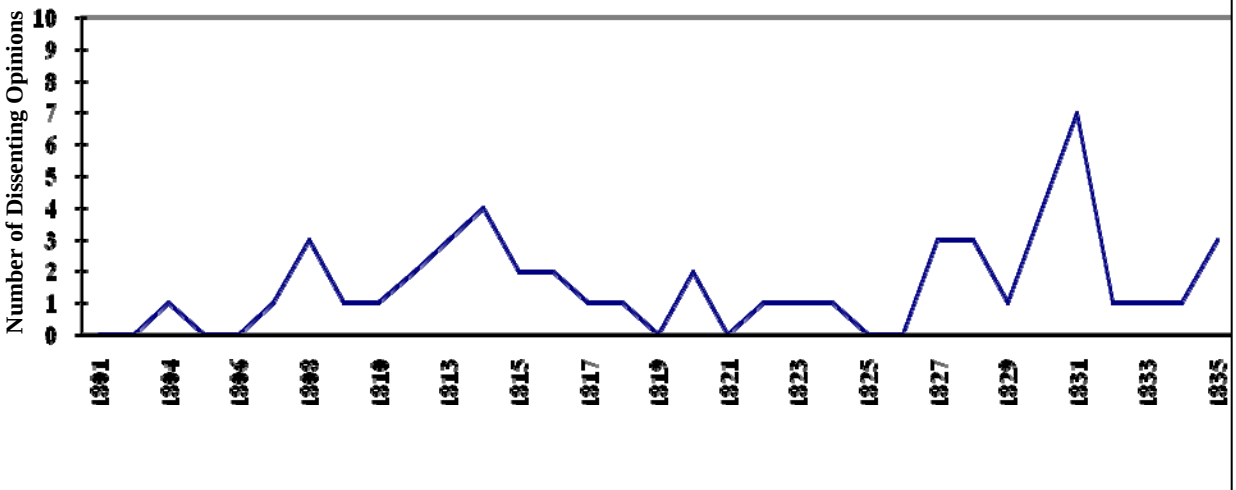
[154] *See, for example,* Bank of the U.S. v Dandridge, 25 US 64 (1827).

Taney	1836-1863	1708	38	2
Chase	1864-1873	1109	33	3
Waite	1874-1887	2642	45	2
Fuller	1888-1909	4866	113	2
White	1910-1920	2541	39	2
Taft	1921-1929	1708	16	1
Hughes	1930-1940	2050	46	2
Stone	1941-1945	704	95	13
Vinson	1946-1952	723	90	12
Warren	1953-1968	1772	215	12
Burger	1969-1985	2755	184	7
Rehnquist	1986-2005	2131	182	9
Roberts	2005-present	104	3	3

Source: Westlaw SCT database

Marshall's plan was a dramatic success. From 1801 to 1835, justices filed very few dissenting opinions from the hundreds of opinions of the Court (Figure 1), and the Court decided such fundamental legal issues as the supremacy of federal law, judicial review,[155] the implied powers of the national government,[156] the Court's power over state court decisions implicating federal questions,[157] and federal power over interstate commerce[158] without much dispute, open challenge, or reversal by the political branches.

Figure 1: Dissenting Opinions in the Supreme Court During the Marshall Court (1801-1835)



Source: Westlaw Supreme Court database (SCT-OLD)

[155] Marbury v Madison, 5 US 137 (1803).

[156] McCulloch v Maryland, 17 US 316 (1819).

[157] Martin v Hunter's Lessee, 14 US 304 (1816) (Marshall recused himself because he was personally involved in this case; Joseph Story wrote the opinion); Cohens v Virginia, 6 Wheaton 264 (1821).

[158] Gibbons v Ogden, 22 US 1 (1824).

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.[159] 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."[160] 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.[161] Most famously, in a series of letters between Jefferson and Johnson in 1822, the former urged the latter to dissent in nearly every case. This was somewhat successful at breaking Marshall's grip on the Court. As shown on Figure 1, the 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.

Notwithstanding the increase in the number of dissents, there was still only one dissent in about every twenty-five cases decided during the Marshall Court, the lowest percentage in the history of the Court. The dissenting opinions of the Marshall Court are listed in the Appendix. Notably, of the 52 dissenting opinions issued during the Marshall Court, Jefferson appointees William Johnson and Brockholst Livingston authored almost 60 percent.[162] Although law at the time of the Marshall Court was considered less political than it is today, even at this early time dissent was seen as a political act. Still, Johnson sided with Marshall far more often than not, joining the Opinion of the Court 96 percent of the time.[163] According to legal historian Lawrence Friedman, even Johnson was under Marshall's "spell."[164]

Although Marshall effectively controlled the discourse of the Court, he did not dominate its "thinking."[165] Instead, Marshall effectively led the Court. Marshall established and maintained an atmosphere during conferences that was conducive to compromise. After a decision was reached, Marshall managed the public and political perception through the issuance of unanimous and anonymous opinions. The opinions carried greater authority and individual justices were shielded from outrage or impeachment charges.[166]

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[159] *See* Herbert v Wren, 11 US 370 (1813). Johnson's first dissent was tentative: the report states that he dissented but "did not state his reasons." *Id* at 382.

[160] Charles Warren, *The Supreme Court in United States History Vol 1*, 193 (1926).

[161] For example, many of Jefferson's letters cited above were correspondence between Jefferson and Justice Johnson in which Jefferson extolled the virtues of traditional seriatim opinions.

[162] Johnson and Livingston (Jefferson appointees) authored 20 and 9 respectively; Thompson (Monroe appointee) authored 6; Baldwin and McLean (Jackson appointees) authored 6 and 2 respectively; Story and Duvall (Madison appointees) authored 4 and 1; Chase (Washington appointee) authored 3; Marshall and Washington (Adams appointees) authored 3 and 1.

[163] Johnson heard approximately 977 cases during his time on the Court (1805-1833); he dissented or wrote seriatim 39 times (or in 4% of cases). *See* David G. Morgan, *The Origin of Supreme Court Dissent*, 10 William & Mary Quart 353, 377 (1953).

[164] Friedman, *History of American Law* at 128 (cited in note 20).

[165] Herbert A. Johnson, *The Chief Justiceship of John Marshall*, 1801-1835 51 (1997) (noting that there is "undeniable evidence that Chief Justice Marshall did not dominate his colleagues; the domination theory has been so thoroughly refuted that Professor David Currie referred to it as the story of 'John Marshall and the six dwarfs.'").

[166] Although the call to impeach a Supreme Court justice for a particular decision seems outrageous today, during this era, such charges were frequently threatened and occasionally levied against judges. For example, in 1805 Associate Justice Samuel Chase was impeached by the House and tried in the Senate. The ground for the impeachment was Chase's handling of several criminal trials in which he tried to implement the Adams Administration's attempts to silence political foes. However, the charges against Chase were shown to be politically

This "authority" was simply assumed by Marshall, and it has remained virtually unquestioned for over 200 years. Many powerful individuals have tried to usurp it – President Jefferson tried to impeach Justice Chase; President Jackson refused to enforce decisions with which he disagreed; President Lincoln refused to enforce a writ of habeas corpus issued by Chief Justice Taney; several presidents either increased or proposed enlarging the Court to alter its power;[167] and numerous representatives and senators have proposed curtailing Supreme Court power through legislation[168] – but none has succeeded in undoing the institutional authority created in large part by Marshall's discursive change.

Marshall was able to achieve the power of unanimity and effectuate a fundamental change in legal discourse based, at least in part, on his personal leadership skills. Marshall was revered for his ability to lead and to relate to others. Biographers describe him as able to "inspire confidence and trust" and "able to elicit a warm and supportive response from others."[169] In a famous quote, fellow justice Joseph Story responded to questions about Marshall's motives on the Court: "I love his laugh— it is too hearty for an intriguer."[170] Whether Marshall had a strategy or whether he was an "intriguer," is a question without an easy answer. Jefferson famously accused Marshall

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motivated and he was acquitted in the Senate. Judge Charles Pickering was not so lucky. A Federalist judge who "had committed no 'high crimes and misdemeanors'" but was "a drunk, seriously deranged," and overtly political in his handling of cases was impeached and convicted in 1804. *See* Friedman, *History of American Law* at 129-30 (cited in note 20). This impeachment, like that of Alexander Addison, a Federalist judge from Pennsylvania who "harangued grand juries on political subjects" and was impeached and removed from office in 1803, was Jefferson's attempt to create a "bogeyman" to threaten judges into good behavior. *Id* at 129. Historians believe that it was largely effective, much like Roosevelt's "court packing plan" 150 years later. *Id* at 129, 132 ("The failure of [the Chase] impeachment was not a clear-cut victory for either side. . . . The judges won independence, but at a price. Their openly political role was reduced.").

[167] The number of Supreme Court justices was originally set at six. *See* Judiciary Act of 1789, 1 Stat 73 (1789). Changes in the number of justices have been made or proposed many times for political reasons. For example, when Jefferson was elected in 1800, the outgoing Federalist Congress reduced the number of justices to five, but this was increased to six and then seven by Republicans in Congress to give Jefferson two appointments. Andrew Jackson got two appointments when the Court grew to nine in 1837. Anti-slavery forces increased the Court to ten, but then after the Civil War, the Republicans reduced the number to seven to ensure Democrat Andrew Johnson would not get any appointments. When a Republican, U.S. Grant, was elected in 1868, the Republicans gave him two new justices to appoint, expanding the Court back to nine. His nominees quickly made an impact, voting to reverse the Court's recently created precedent in the *Legal Tender* cases. More recently, Franklin Delano Roosevelt's Court-packing plan did not succeed in increasing the number of justices, but it did cause enough justices to reverse opposition to the New Deal to achieve the results intended.

[168] For example, Senator Charles Sumner of Massachusetts was concerned that the Supreme Court would hold Congress' reconstruction laws unconstitutional, so he introduced a bill in 1869 that would dramatically curtail the Supreme Court's jurisdiction: "The judicial power extends only to cases between party and party . . . and does not include the President or Congress, or any of their acts . . . and all such acts are valid and conclusive on the matters to which they apply; . . . and no allegation or pretence of the invalidity thereof shall be excuse or defense for any neglect, refusal, or failure to perform any duty in regard to them." *See Congressional Globe*, 41st Congress, 2nd Session, at 2895 (1869). Senator Lyman Trumbell of Illinois proposed a similar, albeit more narrow, limitation on the Court in 1868 and 1869, arguing that the reconstruction acts were "political in character" and the Court had no jurisdiction to pass upon them. *See* 40th Congress, 2nd Session, at 1204, 1428, 1621 (1868); *see also* 41st Congress, 2nd Session, at 3**,** 27, 45, 96, 152, 167 (1869). Senator Richard M. Johnson of Kentucky proposed giving the Senate appellate jurisdiction in cases in which the government was a party, allowing the Senate to effectively overrule Supreme Court opinions. *See* Annals of Congress, 17th Congress, 1st Session, Dec 12, 1821, Jan 14 and 15, 1822. In response to the Supreme Court's rejection of much progressive legislation in the pre-New Deal period, Senator Robert M. LaFollette, Sr. of Wisconsin proposed a constitutional amendment that would allow two thirds of the Senate to overrule any decision of the Court. *See* Congressional Record, 67th Con2nd at 9073, Reprint of LaFollette's speech before the American Federation of Labor

[169] Johnson, *Chief Justiceship* at 121 (cited in note 161).

[170] Smith, *John Marshall* at 291 (cited in note 129).

of deliberately manipulating the Constitution to achieve his own ends,[171] and some modern observes agree, viewing his early opinions as highly political.[172]

Marshall had nationalist tendencies, but so did his predecessor Chief Justice Ellsworth and many of his successors. But only Marshall was able to implement these tendencies so effectively in practice. What made Marshall different was his ability to assert the type of personal leadership necessary to achieve the goal of strong national power. But there were many "conditions of possibility" that enabled this change. Marshall and his fellow justices were able to achieve considerable unanimity because of their similar socioeconomic backgrounds. Justices were drawn entirely from the cadre of practicing lawyers or the government elite. All of the justices were propertied gentlemen and each had a strong sense of nationalism, a concern for private property rights, and accepted traditional principles of the legal profession of the era.[173] In addition, for the first several decades of Court history, the justices all lived in the same boardinghouse in Washington. This living arrangement added to the collegial nature of the Court and helped foster similar views among the justices. Whatever the exact mix of reasons, Marshall was able to increase the power of the Court in no small part through a change in the discourse of the Court.

2. The Continuing Tradition

Unlike the experience with the "opinion of the court" in England, in this country the unanimity consensus continued to a great extent even after Marshall left the Court in 1835. Although the number of separate opinions increased slightly after Marshall resigned, the practice of unanimity dominated the Supreme Court for over 100 years (Figure 2).

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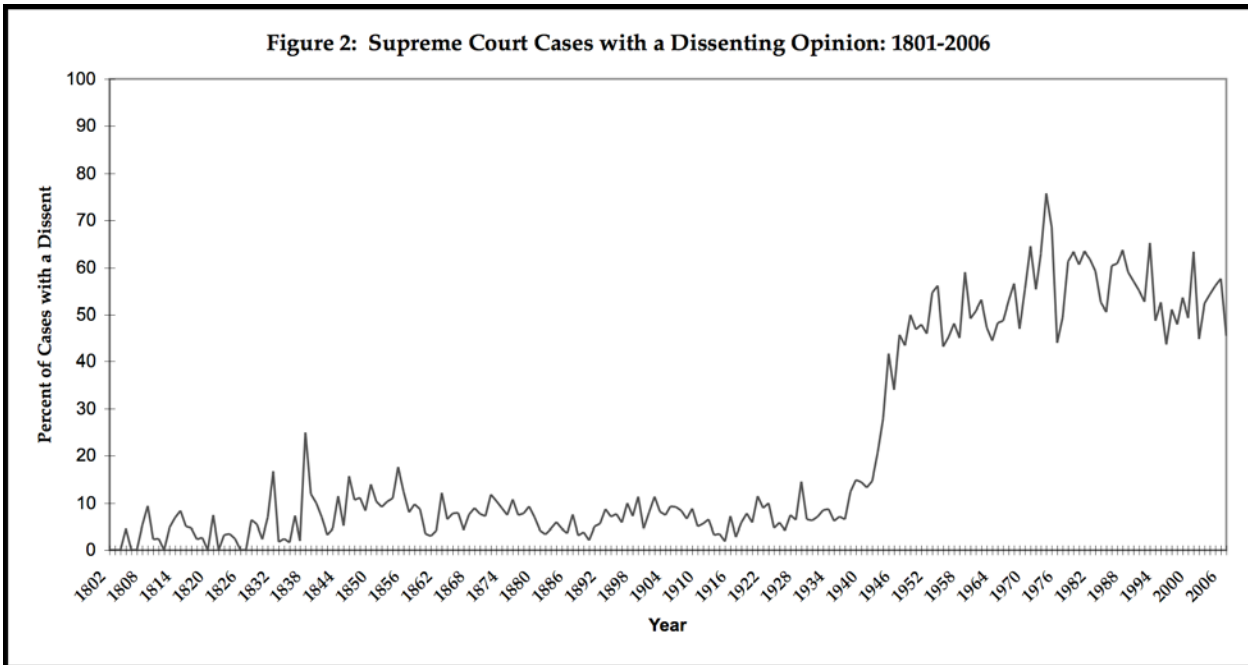
[171] "In Marshall's hands the law is nothing more than an ambiguous text to be explained by his sophistry into any meaning which may subserve his personal malice." *Letter from Jefferson to Madison* (May 25, 1810) *in* M. Smith, ed, *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison* 64 (1995).

[172] *See, for example,* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U Chi L Rev 443 (1989); John V Orth, Book Review: *John Marshall and the Rule of Law*, 49 SC L Rev 633, 636 (1998) ("Marshall did seem to have a strategic vision of forcing . . . the national government to govern the nation.").

[173] Johnson, *Chief Justiceship* at 96-97 (cited in note 161).



The unanimity discourse of Marshall changed over time. By 1814, Marshall did not sign the vast majority of opinions, but instead authored only about 50 percent. This was still significant (compared to the approximately 15 percent of opinions authored by Chief Justice Rehnquist during his tenure), but it represented a changing of the guard. Furthermore, Jefferson appointees, who were hostile to Marshall, were beginning to assert their power, and other factors led to a decline in the collegiality of the Court. For example, by 1827, under pressure from Republicans and because newly appointed justices established their own residences in Washington, the "boardinghouse Court" was abolished. This undermined attempts to maintain unanimity.[174] As factions developed within the Court, the percent of cases with a dissenting opinion increased from four percent under Marshall to nearly ten percent under his immediate successors.

Despite these changes, the period from the end of Marshall's tenure in 1835 to the beginning of Harlan Fiske Stone's appointment in 1941 saw little change in the discourse of Supreme Court opinions.[175] Table B shows the frequency of dissenting opinions during each chief justiceship.

TABLE B: Dissenting Proclivity

Chief Justice	Dates of Service	Percent of opinions with a Dissent
Marshall	1801-1835	4
Taney	1836-1863	9
Chase	1864-1873	9
Waite	1874-1887	6

[174] *Id* at 110-11.

[175] "Yet, neither [Justice] Johnson nor any alter Justices could or would undo Marshall's work. Doctrine changed; personalities and blocs clashed on the Supreme Court; power contended with power; but these struggles all took place within the fortress that Marshall had built." Friedman, *History of American Law* at 134 (cited in note 20).

Fuller	1888-1909	7
White	1910-1920	5
Taft	1921-1929	7
Hughes	1930-1940	9
Stone	1941-1945	27
Vinson	1946-1952	48
Warren	1953-1968	50
Burger	1969-1985	59
Rehnquist	1986-2005	56
Roberts	2005-Present	47

Until 1941, the rate of dissent remained relatively constant at less than ten percent. Two primary factors seem to explain this result. First, the traits and leadership of the chief justices who succeeded Marshall; and, second, the legal atmosphere of the period and the type of cases heard by the Court.

As for leadership, each chief justice from Marshall to Stone came from similar backgrounds,[176] had remarkable leadership skills, and was committed to unanimity. Melville Fuller (1888-1910) was an "excellent social leader . . . blessed with conciliatory and diplomatic traits."[177] Justice Oliver Wendell Holmes characterized Fuller as a great chief justice because of his ability to conduct the business of the Court without much dissent.[178] Likewise, Chief Justice Edward White (1910-1920) was a former Senate majority leader blessed with a "genial temperament and adroit logrolling skills that permitted him to mend fences and reinforce consensus norms in Court."[179] Following White was the legendary consensus builder, William Howard Taft (1921-1929). Taft "hated dissenting opinions, wrote very few himself, and made every effort to dissuade others from writing them."[180] Taft explained, "I don't approve of dissents generally, for I think 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."[181] Taft imparted this tendency to his successor Charles Evans Hughes (1930-1940). Hughes discouraged dissent in order to shield internal divisions from public view.[182]In a personal letter to another justice, Hughes explained why he would join the majority opinion despite his strong reservations about the outcome: "I choke a little at swallowing your analysis; still I do not think it would serve any useful purpose to expose my views."[183]

In terms of case characteristics, most of the cases heard by the Court during this period were straightforward common law or admiralty cases that were less contentious

[176] Marshall, like his successors, was first and foremost a lawyer. He spent a career representing business interests in Virginia, and, like most contemporaries of the bench and bar, was a significant property owner. *See* Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* 74 (1996).

[177] Sheldon Goldman, *Constitutional Law and Supreme Court Decision-Making* 178 (1982).

[178] *Id* at 178-79.

[179] James Watts, *Edward Douglas White, in* 3 Leon Friedman & Fred Israel, eds, *The Justices of the United States Supreme Court 1789-1969* (1969).

[180] Edward White, *The American Judicial Tradition* 180 (1976).

[181] Walter Murphy, Elements of Judicial Strategy 61 (1964).

[182] Henry Abraham, The Judicial Process 230 (1986).

[183] *Id* at 224.

than most modern cases.[184] *Talbot* was the rare admiralty case that posed contentious political questions. Most Supreme Court cases were not like *Talbot*. Most of the Court's decisions were able to garner consensus in part because the common law provided numerous precedents. Federal courts did not have general federal question jurisdiction to hear matters arising under the Constitution and laws of the United States until 1875. It was not until after *Erie* in 1938, when federal common law was abandoned, that the Court would routinely handle difficult, and politically sensitive, constitutional issues.[185] This change from a common law court of last resort to a constitutional court caused a dramatic increase in the percentage of cases with a dissenting opinion. In its first 150 years, the Court rarely dealt with disputes involving civil liberties, as we understand them today. The first cases to uphold civil liberties were *Ex parte Milligan*[186] and *Ex parte*,[187] which were not decided until 1866. There would be more contentious cases during the next few decades, including the upholding of "separate but equal laws" in *Plessy v. Ferguson*[188] in 1896 and free speech cases during World War I,[189] but the Court's cases were generally not politically contentious in the modern sense until the New Deal.

D. The Rise of Dissent

The long-standing practice of virtual unanimity was abandoned as abruptly as it was begun. With the ascendancy of Harlan Fiske Stone to chief justice in 1941, the Court began a trend of writing separate opinions in most cases (Figure 2). Several possibilities may explain this change, but one stands out. Stone tolerated and even encouraged dissent out of personal preference and practice. Stone was the first academic appointed to hold the position of chief justice, and this background made him more likely to encourage open debate. This academic pedigree combined with his personality, which favored debate and confrontation, were evident in his frequent dissents as an associate justice. This proclivity to dissent continued when Stone was appointed chief justice—Stone was much more likely to dissent himself compared to his predecessors and remains the chief justice most likely to dissent (Table A). Just as chief justices from Marshall to Taft encouraged unanimity by their own practice of acquiescing in opinions

[184] Of the nearly 400 cases decided by the Supreme Court between 1801 and 1833, less than 50 (or about 12 percent) were "constitutional" cases according to Professor David Currie. *See* Currie, *Constitution in the Supreme Court* at 65-193 (cited in note 110) (collecting and treating these cases; number counted by author). The most common cases during this time were traditional common law cases: property (17 percent), admiralty/prize cases in which the Court was an instance court (15 percent), procedure (15 percent), family law (10 percent), and contracts (9 percent). Chief Justice Rehnquist also describes 19th Century Supreme Court jurisprudence as largely run-of-the-mill by today's standards, noting that the Court spent considerable time during the 1860's and 1870's on railroad bond cases. *See* Rehnquist *The Supreme Court* at 90-91 (cited in note 34).

[185] Erie Railroad Co v Tompkins, 304 US 64 (1938). Prior to 1938, many constitutional questions of great import were decided, but the Supreme Court docket consisted mainly of routine common law and admiralty cases. Some of the more famous dissents of the early period arose in the tough constitutional questions. *See, for example,* Lochner v New York 198 US 45 (1905), Scott v Sanford 60 US 393 (1857), and Plessy v Ferguson 163 US 537 (1896).

[186] 71 US 2 (1866).

[187] 71 US 333 (1866).

[188] 163 US 537 (1896).

[189] *See, for example,* Abrams v. United States, 250 US 616 (1919) (holding that an amendment to the Espionage Act of 1917 that made it a crime to criticize the government did not violate the First Amendment). *Abrams* is no longer good law. *See* Brandenburg v. Ohio, 395 US 444 (1969) (holding that the government cannot punish potentially inflammatory speech unless it threatens "imminent lawless action").

with which they did not fully agree, so did Chief Justice Stone and his successors lead by example by issuing a substantial number of dissenting opinions themselves.

It is Stone's leadership that scholars argue caused the end of the consensus norm.[190] For example, the most prominent study of dissent in the political science literature, concludes that, as in the case of John Marshall and the rise of the unanimity norm, it was the leadership of Chief Justice Stone that was most responsible for the change.[191] Other possible explanations examined by the authors were the change in docket from mandatory to discretionary review, the shift in the type of cases argued before the Court, the internal politics of the Court, and large-scale changes in the Court's personnel at the time. Let us look at some of the theories considered and rejected:

First, the authors examined the role of the Judiciary Act of 1925 and the move to a discretionary docket. Although it is possible that this would create more dissent because only difficult cases would be granted *certiorari*, the authors conclude that this change was not responsible for the increase in dissents. They base this on the fact that the rise in dissents did not occur until 1942, many years after passage of the Act.[192] The time gap may be sufficient evidence that the direct or only cause of the change was not the Judiciary Act. It does not, however, eliminate the change in jurisdiction as a "condition of possibility" that contributed to the change in discourse.

Another explanation considered and rejected by the authors was the increase in the Supreme Court caseload. The authors reject this explanation because of timing. Although they observe a dramatic increase in caseload results in less time to build consensus and construct compromises, they conclude that the growth in the caseload was not dramatic until the 1960's, 20 years after the rise of dissent. But the authors' data confuse the rise in *federal cases*, which started in the 1960s, and the rise in the number of Supreme Court cases, which occurred much earlier and then subsequently decreased. The data presented in Figure 3 show a growth in Supreme Court cases following the Civil War and then a decrease by the time of the Stone Court (1941-45).

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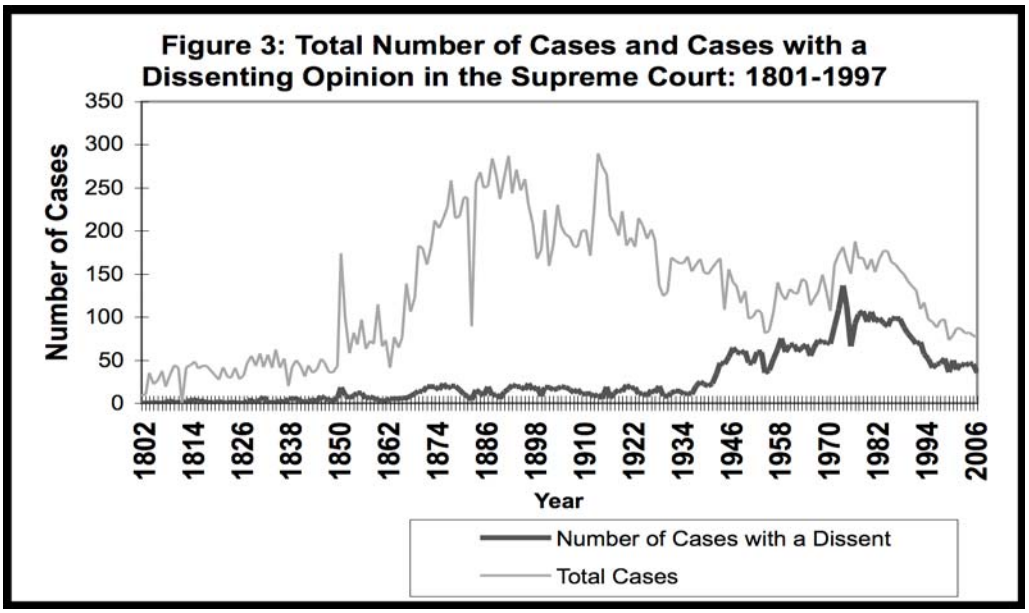
[190] Thomas Walker, *et al.*, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J Pol 361, 362 (1988).

[191] *Id.*

[192] *Id* at 364-65.



The data suggest that the change in the number of cases is inversely related to the number of dissenting opinions. The five-fold increase in Supreme Court decisions in the 1860's was not accompanied by an increase in dissenting opinions. By contrast, the drop in the number of Supreme Court cases following the Judiciary Act of 1925 corresponds well with the increase in dissenting opinions. In addition, the Rehnquist Court heard fewer cases per year than any Court of the last 100 years, but nearly 50 percent of all opinions had a dissent; the Roberts Court appears to be following a similar pattern. This inverse relation suggests that it was more likely the change in the type of cases that resulted in more dissenting opinions rather than the change in the number of cases.

The authors also briefly considered this possible explanation when they compared the type of cases heard by the Stone Court and its predecessor, the Hughes Court. The authors concluded that there was not a significant increase in the type of cases they describe as "dissent prone." But their analysis ignored the fundamental change in the role of the Court post-*Erie*. By the time of Stone's appointment as chief justice, the Court was becoming a constitutional rather than a common law court. Certainly, the increase in contentious cases in the 1940s made for a more fertile ground for dissent. It was at this time that "the cutting edge debate [of] constitutional law shifted from . . . economic regulation . . . to claims of civil liberties violations on behalf of various kinds of dissidents."[193] The growth in dissent-prone cases was caused in part by the fact that during this time the Court issued a series of decisions that extended the protections of the Bill of Rights to the states through the Fourteenth Amendment.[194] But

[193] Rehnquist, *The Supreme Court* at 174-75 (cited in note 34).

[194] The "incorporation" of the Bill of Rights via the Fourteenth Amendment is a controversial constitutional question. In a recent essay, David Strauss notes that the issue "went from being a subject of intense controversy--probably the most controversial issue in constitutional law between the mid-1940s and mid-1950s, and one of the most controversial for a decade or more thereafter--to being a completely settled issue." *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale LJ 1717, 1746 (2003). Although the first right to be incorporated, the Takings Clause, occurred in the late Nineteenth Century, *see* Chicago, Burlington & Quincy Railway Co. v Chicago, 166 US 226 (1897), the period around Stone's tenure saw the greatest activity of incorporation by the Court. *See* Gitlow v New York, 268 US 652 (1925) (incorporating freedom of speech clause); Near v Minnesota, 283 US 697 (1931) (incorporating freedom of the press clause); Powell v Alabama, 287 US 45 (1932) (incorporating right to assistance of counsel in capital criminal cases); DeJonge v Oregon, 299 US 353 (1937) (incorporating freedom

like the possible causes noted above, this explanation cannot be viewed in a vacuum. Both the law and society were in great flux at this time. The rise of New Deal constitutionalism replaced the long history of *Lochner* constitutionalism, and Holmes's dissent in *Lochner* came to be revered after it became the law of the land in 1937. Dissent had proved to be a powerful weapon for change. Furthermore, this era saw the rise of legal realism. During the majority of Supreme Court history, the Court had acted as a sort of an Oracle of the Law. In the grand formal style, the justices would, through their internal debate, derive the correct answer or the "truth" of the law.

This idea that there was a discoverable and objective truth behind the law began to evaporate in legal academic circles by the 1920s. Although Holmes had argued in his Lowell Lectures on the common law in 1881 that many extralegal matters affect the law more than abstract logic or natural law, it was not until forty years later that this would become a mainstream idea in the legal academy. Coincidentally, the rise of legal realism was centered at Yale and Columbia during the late teens and early 1920s when future Chief Justice Stone was dean of the Columbia Law School (1910-1923). Stone was educated in, and as dean participated in the creation of, a vastly different legal world than that known by his predecessors. The broad social forces that led to the New Deal, the rise of legal realism, and the change in the cases heard by the Court greatly contributed to Stone's attitudes about law and about how "truth" should be determined.

By 1941, the Court was also populated with a more diverse (at least intellectually diverse) group of justices than at any earlier time. During the 1920's when Stone ascended to the Court, the legal realists and the new process for deciding the law were well represented on the Court by Justice Brandeis. Brandeis, like Holmes, was revered for his powerful dissents and his passion for change in the law. Dissenting in *Gilbert v Minnesota*, Brandeis first suggested that the liberties protected by the Fourteenth Amendment should include civil liberties as well as property rights.[195] This period of history was a wellspring for change in the law and it was at the Supreme Court that the reformers were able, by building upon the reasoning of past dissenting opinions, to effect their revolution.

Chief Justice Stone admired the practice of dissent and its recent history in the Court. He knew the power of Holmes and Brandeis to shape the law through dissent, and he encouraged the practice.[196] Therefore, compared to earlier chief justices who sought compromise and unanimity, Stone could be seen as an ineffective "leader."

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of assembly clause); Cantwell v Connecticut, 310 US 296 (1940) (incorporating free exercise of religion clause); Everson v Board of Education, 330 US 1 (1947) (incorporating establishment of religion clause); In re Oliver, 333 US 257 (1948) (incorporating public trial right); Wolf v Colorado, 338 US 25 (1949) (incorporating unreasonable search and seizure clause). The incorporation parade paused for a decade or so before resuming in the civil-rights era of the Sixties and Seventies. *See* Gideon v Wainwright, 372 US 335 (1963) (incorporating right to assistance of counsel in all felony cases); Pointer v Texas, 380 US 400 (1965) (incorporating right to confrontation of adverse witnesses); Klopfer v North Carolina, 386 US 213 (1967) (incorporating right to speedy trial); Washington v Texas, 388 US 14 (1967) (incorporating right to compulsory process to obtain witness testimony); Duncan v Louisiana, 391 US 145 (1968) (incorporating trial by impartial jury); Rabe v Washington, 405 US 313 (1972) (incorporating notice of accusation). Some rights have not been incorporated (yet). *See* Curtis v Loether, 415 US 189 (1974) (addressing right to jury trial in civil cases); Presser v Illinois, 116 US 252 (1886) (rejecting incorporation of 2nd Amendment).

[195] *See* Gilbert v Minnesota, 254 US 325 (1920).

[196] The most startling example of this power comes from the cases *Minersville School District v Gobitis*, 310 US 586 (1940), and *West Virginia Board of Education v Barnette*, 319 US 624 (1943). In *Gobitis*, Chief Justice Stone dissented from an 8-member majority holding that Jehovah's Witnesses could be expelled from public school for failing to salute the flag during the Pledge of Allegiance. Gobitis, 310 US at 601-02. In the very next term, five justices were persuaded by Stone's dissent, and voted to overrule *Gobitis* in a case again involving Jehovah's Witnesses and the Pledge. Barnette, 319 US at 642

Under his leadership, conference debates among the justices were often heated and filled with controversy.[197] Stone argued that "[t]he right of dissent is an important one and has proved to be such in the history of the Supreme Court . . . I do not think it is the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting in individual cases."[198] The "history" that Stone was referring to was the recent vindication of Holmes's dissent in *Lochner*. Stone was a new breed of lawyer at the helm of the law's most powerful entity during a fundamental change in our understanding of legal reasoning. Law was now more like politics, and Stone was willing to assert the Supreme Court as a political branch. Stone achieved this revolution in pat by encouraging the use of dissenting opinions, just as Marshall implemented his revolution by introducing consensus. The means were different, but the ends were the same.

Stone increased the power of the Court, and thus achieved the same results as Marshall, but for different reasons and in different circumstances. Both Marshall and Stone sought a more active role for the Court. To increase the power of the Court specifically and the law generally, Stone encouraged debate and controversy, rather than suppressing it as Marshall was required to do, to accomplish the same end. Only by empowering the Court to act even *without unanimity* could Stone extend the reach of the Court from primarily economic matters into the realm of civil liberties.

It is not necessary to say that Stone *knew* that increasing tolerance for dissent would have the impact it did on the Court's role. The practice no doubt seemed natural and reflected the mood of the times and of the justices then on the Court. But when viewed in light of the other discursive changes, it seems clear that these explanations are just "conditions of possibility" that undergird the true explanation for the practice.

After Stone's brief tenure as chief justice, the unanimity rule was dead for good—in spite of immediate steps to reverse the trend. To replace Stone as chief justice, President Truman chose Fred Vinson, who was known for his sociable and likable personality.

> Although Truman admired Vinson's record . . . his personality was the most important factor influencing the decision to appoint him . . . His sociability and friendliness, his calm, patient, and relaxed manner, his sense of humor, his respect for the views of others, his popularity with the representatives of many factions, and his ability to conciliate conflicting views and clashing personalities and to work out compromises were qualities that Truman admired. Even more important, those personal qualities seemed to the President to fit the needs of the situation inside the Supreme Court. Dissension and dissent were on the rise . . . Vinson seemed capable of unifying the Court and thereby improving its public image.[199]

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[197] David Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, *in* Joel Grossman & Richard Wells, eds, *Constitutional Law and Judicial Policy Making* (1980).

[198] Alpheus Mason, *Harlan Fiske Stone: Pillar of the Law* 608 (1956).

[199] Richard Kirkendall, *Fred M. Vinson*, *in* 4 Leon Friedman & Fred Israel, eds, *The Justices of the United States Supreme Court 1789-1969* 2641 (1969).

But the other eight justices had all been influenced by Stone and were proponents of legal realism. They were aware too that dissent had enabled them to expand their role and power over policy issues. Once the genie was out of the bottle, it was impossible to put it back in.[200] Instead of working toward compromise and consensus, the Vinson court became known as "nine scorpions in a bottle."[201]

The "failure" of Vinson need not be viewed as a personal failure of leadership. The context in which each of these chief justices tried to lead was different for a variety of reasons. Even Marshall would not have achieved unanimity in the Supreme Court of Vinson's day. The Vinson Court and the Marshall Court both existed during a period of legal revolution. At the time of Marshall, however, the Court and the justices were certain about the role of law. Marshall redirected the Court toward a more active political role. Had Marshall been chief justice in Stone's time, he likely would have lead the change from unanimity to the dissent norm. In both cases, it was the end result—increased authority for the law and the Court—that was important, not the means.

In contrast to the end of the Marshall Court, during the Stone and later Courts, the dispute was not only about the political nature of the Court, but about the broader role of law in society. Achieving unanimity in this context is much more difficult and might have had the opposite effect. The justices, despite somewhat similar backgrounds, had very different perspectives on such social issues as the rights of women, segregation, and abortion. In addition, the Court does not act in a political vacuum. The issuance of unanimous, *per curiam* opinions "deciding" particularly thorny issues might provoke extra-judicial or even extra-legal responses. Justice Frankfurter portended the surge in dissents in one of his first opinions, written in 1939. Frankfurter praised the *seriatim* tradition in England, calling it a "healthy practice," but noting that the Court's workload prohibited the justices from doing it in every case.[202] He suggested that the Court use the *seriatim* approach "when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court."[203] This idea—that all justices should be heard from on big questions—originated with Madison, who wrote in an 1819 letter:

> I could have wished also that the Judges had delivered their opinions seriatim.The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the views of the subject separately taken by them. This might either by the harmony of their reasoning have produced a greater conviction in the Public mind; or by its discordance have impaired the force of the precedent now ostensibly supported by a unanimous & perfect concurrence in every argument & dictum in the judgment pronounced.[204]

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[200] *See, for example*, Rehnquist, *The Supreme Court* at 148 (cited in note 34) ("Brought in as a mediator, Vinson largely failed in this task.").

[201] Robert Steamer, *Chief Justice: Leadership and the Supreme Court* 19 (1986).

[202] Graves v New York *ex rel.* O'Keefe, 306 US 466, 487 (1939) (Frankfurter, J., concurring).

[203] *Id.*

[204] See Letter from James Madison to Spencer Roane (Sept. 2, 1819), *reprinted in*, Philip B. Kurland & Ralph Lerner, eds, *The Founders' Constitution, Article 1, Section 8, Clause 18, Document 15* (1987).

Frankfurter's suggestion is notable because it previews both the constitutional showdowns to come and the role of dissent (if not *seriatim*) in giving the Court legitimacy to decide these disputes. 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 play a more political role by essentially mollifying the losing parties and encouraging a continuing legal discourse. 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, *ex antes* both sides of the debate would prefer the option value imbedded in a world with dissent. Dissent allows the Court to continue in its active role post-legal realism.

III. Recent History: To *Seriatim* and Back Again?

The last 50 years of Supreme Court history since the time of Chief Justice Stone have been characterized by a proliferation of dissents.[205] During the first 140 years of Court history there were dissents in less than seven percent of cases; since then, there have been dissenting opinions in more than half of all cases.[206] Chief justices from Stone to Rehnquist made no attempt to return to a Court of consensus. Chief Justice

[205] Not only has the number of dissents increased but so has the vitriol. When justices did dissent during the Marshall Court, they did so reluctantly and apologetically. This was in part due to the collegial atmosphere that existed in the "boardinghouse Court." Compare several opening sentences from dissenting opinions during this period. Those Federalist justices that supported Marshall's change in discourse wrote cautiously when dissenting. *See* Bank of the United States v Dandridge, 25 US 64, 90 (1827) (Marshall, J. dissenting) ("I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion . . .."); Mason v Haile, 25 US 370, 379 (1827) (Washington, J. dissenting) ("It has never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this Court."); Drown v United States., 12 US 110, 129 (1814) (Story, J. dissenting) ("In this case, I have the misfortune to differ in opinion from my brethren."). By contrast the two most frequent dissenters during Marshall's reign Justice Johnson and Justice Livingston, both Jefferson appointees and strongly opposed to Marshall's change to unanimous opinions, did not hesitate to criticize the majority when dissenting. *See* Kirk v Smith, 22 US 241, 294 (1824) (Johnson, J. dissenting) ("The reasoning upon this cause, must be utterly unintelligible to those who hear it...."); United States v Smith, 18 US 153, 163 (1820) (Livingston, J. dissenting) ("In a case affecting life, no apology can be necessary for expressing my dissent from the opinion which has just been delivered."). Even these attacks on the majority pale by comparison to the lack of respect shown fellow justices by modern dissenters. *See* Lee v Weisman, 505 US 577 (1992) (Scalia, J. dissenting) (writing that the majority opinion was "oblivious to our history," "incoherent," a "jurisprudential disaster," and "nothing short of ludicrous."). This type of name calling and hyperbolic rhetoric is a far cry from the day when justices rarely had the courage to dissent, and when they did, the guilty feelings compelled them to apologize publicly. As Roscoe Pound noted long ago, such vitriolic denunciation of other justices is "not good for public respect for courts and law and the administration of justice." Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent* 39 Aba Journal 794, 795 (1953). Although Judge Posner has argued that justices should dissent because dissents play (have played) an integral part in the development of law, Posner agrees with Pound that the acerbic dissent is both unnecessary and destructive. *See* Richard A. Posner, *The Federal Courts: Challenge and Reform* 356-57 (1996). Posner criticizes justices as being more concerned about their individual role and less concerned with the institutional role of the Court. In cases that are relatively straightforward, Posner agrees with Justice Taft that a definitive rule that may not be perfect or even "correct" is often better than an uncertain rule. "In such a case a dissent will communicate a sense of the law's instability that is misleading." *Id*. Accusing judges of worrying about their own legacy and ego, Posner writes that "[f]rom an institutional perspective it is better for the disagreeing judge not to dissent publicly [in a case which he knows will not be reconsidered soon], even though such forbearance will make it more difficult for someone to write the judge's intellectual biography." *Id* at 357.

[206] From 1801 to 1940 (Marshall to Hughes) there were approximately 1231 cases with dissents out of a total of approximately 17,811 (~7 percent); from 1941 to 1997 (Stone to Rehnquist) there were about 3877 cases with dissents out of a total of approximately 7434 (~52 percent). From 1801 to 1940 (Marshall to Hughes) there were approximately 1231 cases with dissents out of a total of approximately 17,811 (~7 percent); from 1941 to 1997 (Stone to Rehnquist) there were about 3877 cases with dissents out of a total of approximately 7434 (~52 percent).

Rehnquist spoke of dissent in matter-of-fact terms[207] and Justice William Brennan wrote of dissent as a "duty."[208] The dissent norm continues to this day.[209]

A. The Modern Hybrid Approach

Although opinions are still issued as "opinions of the court" and separate opinions are designated as concurrences or dissents, the practical effect has been a change back to writing separately—back nearly to the tradition of *seriatim*. For example, in *Turner Broadcasting System v. FCC*, the decision was announced as follows:

> Kennedy, J., announced the judgment of the Court and delivered the opinion of the Court, except as to a portion of Part II-A-1. Rehnquist, C.J., and Stevens and Souter, JJ., joined the opinion in full, and Breyer, J., joined except insofar as Part II-A-1 relied on an anticompetitive rationale. Stevens, J., filed a concurring opinion. Breyer, J., filed an opinion concurring in part. O'Connor, J., filed a dissenting opinion in which Scalia, Thomas, and Ginsburg, JJ., joined.[210]

Dissents, once reserved for only the most profound differences of opinion, are now commonplace.

There are several reasons why dissenting opinions might be so common today. Most simply, there is inertia and custom. Perhaps once the practice develops it is hard to stop; dissent becomes the discourse of law and will continue to be so until another fundamental shift in power. This tendency to follow the norm was one of the reasons the age of consensus lasted for almost 100 years after the death of Marshall. In a classic defense of dissents, Justice Brennan argued that while a justice's "general duty is to acquiesce in the rulings of th[e] court," it was a "duty" (and not "an egoistic act") for justices to dissent.[211]

There are also potential political reasons. Vehement dissents may signal a political drift within the Court that threatens the stability of the law. The audience for these dissents would be other justices, the public, the press, advocacy groups, and the Congress. Dissents signal that the Court is headed down a dangerous path. In this way,

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[207] William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 302-03 (1987).

[208] Brennan, *In Defense of Dissents*, 37 Hastings L J at 437-38.

[209] In 1995 majority opinions represented 43 percent of all opinions. *See* Posner, *Federal Courts* at 358 (cited in note 193). *See also*, Figure 3.

[210] Turner Broadcasting System v FCC, 520 US 180 (1997).

[211] Brennan, *In Defense of Dissents*, 37 Hastings L J at 437-38. Justice Brennan and Justice Marshall were two of the Court's most frequent and famous dissenters. Not only did these two justices significantly add to the number of dissenting opinions, but they also introduced a new practice in the Supreme Court—the publishing of dissents from petitions filed with the Court. During the past 30 years there were hundreds of dissents from petitions published by Justice Brennan and Justice Marshall. These dissents were occasionally in protest of a denial of certiorari, but the vast majority was dissents from denials to review sentences of capital punishment. In each case for death penalty review received by the Court, Justice Brennan and Justice Marshall published a dissent that simply stated that in their view capital punishment violated the cruel and unusual provision of the 8th Amendment. This practice was in plain violation of well-established Court precedent. The justices were making an overtly political statement—a statement to the public and to the future.

dissents can be viewed as a way of marshalling groups to influence the appointment/confirmation process.

Dissent is a tool to seize power within the Court. The minority justices can silently acquiesce (as was the tradition for the first century and a half of Court history) or they can alert Court stakeholders about the "errors" of a decision. To do the former creates a perception that the ruling is settled law and that no changes in Court personnel will alter the result. To do the latter can weaken the precedent and thus encourage judicial or political responses. Like-minded lower court judges may feel emboldened by the dissents, and attempt to narrow the rulings. Dissents also communicate to justices in the future (either current or new members of the Court), providing them with logic and support for voting to reverse or narrow the holding.

Another reason for the continuing use of dissents is the commonly held belief that dissents make the law better or make better law. This is based on the power of famous and not-so-famous dissents throughout history to shape the Court's future holdings. Think of the success of Holmes's dissent in *Lochner* and Harlan's dissent in *Plessy*.[212] As Justice Brennan argued, dissents are offered as a corrective in "the hope that the Court will mend the error of its ways in a later case."[213] In addition, dissents may enable lower courts or future coalitions of justices to narrow a majority opinion that sweeps too broadly. Brennan views these as essential components of judicial determination of the "truth." Therefore, Brennan criticized Chief Justice Marshall as "shut [ting] down the marketplace of ideas" when he instituted the consensus norm. This marketplace of legal ideas, Brennan argued, is necessary for the creation of quality legal decisions. In this way, Brennan sees the publication of multiple opinions as analogous to legal argument within the courtroom.[214]

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[212] Although the law would be less great without the dissents of Brandeis and Holmes, these influential and often graceful expositions of the law as how it should be are by far the exception from the mass of pointless dissents. An example of the inefficient use of separate opinions is the opinions of Justice Frankfurter. John P. Frank studied the separate opinions of Justice Frankfurter, the most frequent concurring justice in the history of the Court. Frank found that Frankfurter's opinions were almost never cited by anyone. *See* John P. Frank, *Marble Palace: The Supreme Court in American Life* 126 (1958). Frank concluded that this was a waste of energy and talent and led to unnecessary ambiguity and uncertainty in the law. Even Justice Holmes, who was known as the "Great Dissenter," remarked that dissents are in most cases "useless and undesirable." Northern Securities Co. v United States, 193 US 197, 400 (1904). Therefore, Holmes was want to dissent and discouraged the practice in all but the most necessary circumstances. Like the boy who cried wolf, the more one dissents, the less likely dissents are to be seriously considered. Familiarity of dissent breeds contempt.

[213] Brennan, *In Defense of Dissents*, 37 Hastings L J at 430. A classic example of this in our era is the dissenting opinion of then-Associate Justice Rehnquist in *Garcia v San Antonio Metropolitan Transit Authority*, in which he wrote, that the states' rights principles he and the other dissenters were advocating were "a principle that will, I am confident, in time again command the support of a majority of this court." 469 US 528, 580 (1985). After the Court's stunning series of 5-4 decisions over the past decade upholding the rights of states against federal interests, Rehnquist has proved to be quite a prognosticator.

[214] Another possible explanation for continued dissents is the rise of the law clerk and the expansion of opinions to resemble law review articles. As the length and legal extent of an opinion increases with more and more arguments and footnotes, so does the grounds for possible disagreement among the justices. Finally there is the possibility that modern justices are generally more apt to desire individual recognition. Supreme Court justices now have their own jurisprudence that is studied in law schools and debated in the legal literature. Furthermore, legal biographies, monographs, and speeches are increasingly popular so as to tempt individual justices to create their own legacy of judicial opinions. Justice Scalia and Judge Posner both agree that personal recognition is often the motivating force behind the trend of frequent dissenting opinions. *See* Antonin Scalia, *The Dissenting Opinion*, J. Supreme Court History 33-44 (1994); Posner, *Federal Courts* at 356-57 (cited in note 198). The power of ego should not be underestimated. *See, for example*, Rehnquist, *The Supreme Court* at 141 (cited in note 34) (commenting on Justice Franfurter's proclivity to write separately, and noting the rise in the judicial ego), especially when justices are so underpaid relative to what they could earn in the private legal world. Without riches, it is understandable that justices seek individual power and fame.

But this isn't the whole story. The criticism of Marshall and the distinction that Brennan draws between the current and past practice of dissent is flawed. 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 "governmentalization" of society. The current practice of dissent in exactly the same terms and achieving exactly the same results as Marshall's consensus norm—an increase in Court power. To achieve these ends, the Court has adopted various discursive practices throughout its history depending on the circumstances of 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 for the Court to achieve not only power vis-à-vis the other branches of government, but also power in the form of "governmentalization." By increasing the authority of the Court, law as an institution was able to intrude into previously uncharted territory. Lawyers and judges became more important. The discourse of law was forever altered in favor of greater judicial authority over other forms of government and the lives of individual citizens.

At first blush, the rise of the dissenting opinion seems to offer a counterexample to this theory of Supreme Court normalization. Published separate opinions allow the 11 circuit courts and hundreds of lower federal and state courts to offer their own narrower (or broader) interpretation of an opinion. In addition, dissents enable future justices to overrule an opinion and reverse the trend of the law. By limiting the authority that comes with a 9-0 opinion, dissents undermine the normalizing power of the Court. Even Supreme Court justices recognize this impact. In controversial cases, the Court will go out of its way to try to achieve a unanimous result. For example, in *Clinton v Jones*, a highly politicized case involving a conflict between the power of the executive and the judiciary, the Court achieved a 9-0 majority in order to strengthen the Court's decision.[215] A 5-4 opinion with only "conservative" justices in the majority would have been highly criticized as a political attempt to undermine the power of the president.[216] The result instead has been an acceptance that only can come when the Court seems united and apolitical.

Justice Scalia recently wrote about the role of dissenting opinions. Scalia argued that dissenting opinions augment the prestige of individual justices while allowing "genuine" unanimity to have great force when most needed.[217] As an example of when unanimity was "most needed," Scalia cites to *Brown v Board of Education*.[218] Although in *Brown* and *Clinton* unanimity was necessary to achieve political acceptance, in the majority of cases decided today, dissent provides the same result. Ironically, the practice of dissent provides the Court as an institution with a public and political acceptance it would be unable to achieve with *per curiam* opinions.

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[215] Clinton v Jones, 520 US 681 (1997). In fact this was an 8-0-1 majority in which Justice Breyer concurred with the majority. However, Justice Breyer's opinion reads more like a dissent. Breyer probably joined the majority primarily to achieve unanimity, while writing separately in order to undercut the majority opinion (?) or to offer future Supreme Court justices an antiprecedent, or to offer lower court judges an escape hatch around the decision. Other examples of this need abound. *See, for example,* United States v. Nixon, 418 US 683 (1974) (requiring President Nixon to turn over the Watergate tapes); Cooper v. Aaron, 358 US 1 (1958) (requiring states to abide by federal desegregation law).

[216] *See, for example,* Bush v Gore, 531 US 98 (2000) (reserving, 5-4, the recount of the ballots in the 2000 presidential election by the Florida Supreme Court).

[217] *See* Scalia, *Dissenting Opinion*, J. Supreme Court History at 33-44 (cited in note 207).

[218] 347 US 483 (1954).

This goes back to the point Chief Justice Charles Evans Hughes made about what is needed to "sustain the court in public confidence."[219] The credibility of the Court iin general is enhanced when it reveals, at least to a degree, the integrity of its deliberative decisionmaking process. Kevin Stack argues that the "Supreme Court's legitimacy depends in part upon the Court reaching its judgments through a deliberative process."[220] Decision making at the Court is secret. Only the nine justices attend the conference of justices and the circulation of draft opinions is kept hidden from public view. Given the secrecy of the Supreme Court process for deciding cases, "dissent is necessary to expose the deliberative character of the Court's decision-making."[221]

In Stack's view, majorities, concurrences, and dissents offer a published version of the behind-the-scenes debate in the Supreme Court conference room. This public airing of the deliberative process lends legitimacy to the institution. This cuts to the heart of Jefferson's criticism of opinions of the court. Jefferson encouraged the use of *seriatim* opinions in order to expose each justice to public view, so they would have to consider and reason through each case. With individual opinions, justices expose their competence and legal analysis to the world for criticism. In this way, dissenting opinions arguably create better justices. With their reputation or career on the line, justices have the incentive to consider each case carefully.

But this account is not complete. Dissent is not just about modernity's quest for deliberative democracy or necessary for the proper functioning of a Supreme Court. It is also about the type of law being practiced before the Court. Dissent is not only necessary to ensure the legitimacy of the Court, but also 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 power 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 in 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.

In order to test this hypothesis, let us compare the origin of unanimity and the origin of modern dissent. Despite the long history of openness in the judicial process, Lord Mansfield instituted a change to unanimity in order to achieve greater legal control over the commercial law. Chief Justice Marshall seized upon this same power to increase the reach of the judiciary into new realms. This extension was not simply a greater centralization of power, but also an increase in establishment of broad norms and the enabling force behind modernity's juridical monarchy. For one hundred years, the unanimity consensus existed in part because of this purpose, but the inertia of institutional processes and the culture of the legal profession also perpetuated the norm. During this time, the Supreme Court was deciding similar types of cases. On common law and primarily economic matters, the Court was generally accepted as legitimate despite the secrecy of its process.

But then, in the early 1940s, the conditions of possibility were such that a departure from the consensus norm was necessary. The origin of law evolved from

[219] Hughes, *Supreme Court* at 67-68 (cited in note 12).
[220] Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 Yale L J 2235, 2236 (1996).
[221] *Id* at 2246.

natural law to legal realism—politics entered the law *explicitly* for the first time. But legal realism was a symptom of a broader change in society. Issues never before considered as properly before the Court were thrust into the discourse of the law. This change precipitated a crisis for both the law and the Court.

How is it possible to address these often highly political subjects without sacrificing judicial integrity? The partial answer was dissent. Separate opinions not only show society that the process of decision making is legitimate, but also allow those who oppose a particular result to take comfort that the result may someday be reversed. This is Brennan's idea of dissent as a corrective force. The corrective force of dissents is a two-way street. Both good and bad law is subject to the force of criticism, depending on the prevailing political attitude of the Court. Dissents therefore preserve the ability of the Court to maintain its normalizing power. The vulnerability of precedents based on less than a unanimous judgment makes the Court and the law invulnerable.

Imagine a *per curiam* opinion that overruled all affirmative action programs or established a constitutional right to an abortion, where the absence of dissent reflected mere conformity rather than actual agreement. Such an opinion would be criticized in part because of Stack's notion of legitimacy, but also because opponents of the opinion would have no legal grounds to continue the fight. A unanimous opinion is so strong as to be susceptible only to constitutional amendment or impeachment of individual justices, both of which are unlikely.[222] By contrast, dissent allows lower courts, lawyers, and politicians to measure the weight of the opinion and to plan a political or legal counterattack. Dissents lead to ambiguity and hope of change, both of which are fertile ground for legal fights and more lawyers. Litigation strategy often depends on the strength of precedents or the voting records of the current justices. Without such possibilities for counterattack, the opinion would carry more weight, but the integrity of law and the Court might well come under siege from more dangerous from political forces.[223] Possible political reactions are impeachment, change in Court composition or jurisdiction,[224] or a constitutional amendment.[225] Congress' power is robust here, as the

[222] Jefferson wrote about how difficult impeachment would be, and how this interplays with judicial discourse. *See Letter of Thomas Jefferson to Edward Livingston, in* 16 Lipscomb & Bergh, eds, *The Writings of Thomas Jefferson: Memorial Edition* 114 (1903-04). ("I . . . [am] against caucusing judicial decisions, and for requiring judges to give their opinions *seriatim*, every man for himself, with his reasons and authorities at large, to be entered of record in his own words. A regard for reputation, and the judgment of the world, may sometimes be felt where conscience is dormant, or indolence inexcitable. Experience has proved that impeachment in our forms is completely inefficient."); *see* also Letter from Thomas Jefferson to Spencer Roane, *in* Paul Leicester Ford, ed, *The Works of Thomas Jefferson* (1904-05) ("For experience has already shown that the impeachment it has provided is not even a scarecrow. . .").

[223] For example, Bork proposed congressional review of Supreme Court decisions or curtailing the scope of judicial review. *See* Robert H. Bork, *Our Judicial Oligarchy*, 67 First Things 21, 21 (1996). Bork argued that "[t]he most important moral, political and cultural decisions affecting our lives are steadily being removed from democratic control," and that a "change in our institutional arrangements" is the only thing that "can halt the transformation of our society and culture by judges." *Id.* His solution: "Decisions of courts might be made subject to modification or reversal by majority vote of the Senate and the House of Representatives. Alternatively, courts might be deprived of the power of constitutional review." *Id.* This point of view is a departure for Bork, who argued previously that a veto over the Supreme Court was dangerous because it could be used destructively to overturn the "Court's essential work." *See* Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 55 (1997) ("If two thirds of the Senate might have overruled Dred Scott, then perhaps it is imaginable that two-thirds might have overruled a case like *Brown v Board of Education*. That depends on the passions of the moment, but is obvious that unpopular rulings may be easily overturned as improper ones. There is, after all, no reason to think that over time the Senate will be a more responsible interpreter of the Constitution than the Court.").

[224] *See* note 164.

[225] Although the tactic of reversing a specific opinion with a constitutional amendment has been used only twice in Supreme Court history (the 11th Amendment "overruled" *Chisholm v Georgia*, 2 US 419 (1793); the 16th

Constitution grants it the "power to decide how much appellate jurisdiction, and of what sort, the Supreme Court would enjoy."[226]

Dissent undermines the force of an opinion, and allows opponents to hope for the day when they will control the Court. Paradoxically by undermining the authority of the Court, dissent increases the power of the Court and the law by insulating it from potential political attacks. Dissent keeps potentially extrajudicial subjects such as abortion and affirmative action within the purview of the law courts, in just the same way that Mansfield brought commercial disputes into the ambit of the common law.

B. The Roberts Gambit?

At his confirmation hearings, Chief Justice Roberts expressed a narrow conception of the role of the Court in public policy matters. Using a baseball analogy, Roberts defined the Supreme Court's role as simply "calling balls and strikes," rather than deciding the fundamental rules of the game. He distinguished himself from justices Antonin Scalia and Clarence Thomas, by proffering himself as, to use Cass Sunstein's terms, a "minimalist" rather than a Scalia or Thomas-like "visionary." Some doubt the seriousness of this claim, but Roberts has stated publicly that he wants the Court to return to a Marshall-like consensus norm. Critics object to his proposed reform of discourse. Geoffrey Stone recently opined that Supreme Court opinions are not about deciding outcomes but announcing legal principles that will give guidance to lower courts, police, citizens, and so on—they are the creators of legal truth grids, and small or narrow grids are unhelpful. Stone writes:

> Whenever the Supreme Court decides a case "narrowly," resolving only the particular dispute before it, it leaves the rest of the society and rest of the legal system in the dark. When the Supreme Court leaves important issues unresolved, everyone else must guess about what they can and cannot do under the law. Lower courts are free to disagree with one other, with the result that the scope of constitutional rights will vary randomly from state to state and district to district throughout the nation. Unnecessary uncertainty is not a healthy state of affairs when it comes to the freedom of speech, the freedom of religion, or the right of the people to be secure against unreasonable searches and seizures. It may be easier for the Court to decide cases "narrowly," but it creates chaos for everyone else in the system.[227]

Stone also echoes Jefferson. He writes that opinions without dissent are an "abdication" of judicial responsibility to expose judicial decision making to public

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Amendment "overruled" *Pollock v Farmers' Loan*, 158 US 601 (1895)), this may be attributable in part to the fact that the losing parties before the Court may find sufficient solace in the power of dissenting opinions to achieve similar ends.

[226] *See* Friedman, *History of American Law* at 142 (cited in note 20).

[227] Geoffrey Stone, *Chief Justice Roberts and the Role of the Supreme Court*, The University of Chicago Faculty Blog (Feb. 2, 2007), *available at:* http://uchicagolaw.typepad.com/faculty/2007/02/chief_justice_r.html.

critique: "The legitimacy of the judicial branch rests largely on the responsibility of judges to explain and justify their decisions in opinions that can be publicly read, analyzed, and criticized." Consensus decisions that paper over differences do not do this. Here we see Jefferson's arguments about transparency and accountability. Stone also believes dissent is essential to overruling bad law, and he, like Jefferson, cites examples of cases in which results we think are right were first suggested in earlier dissents.[228] Squelching dissent would "degrade the quality of the Court's work and undermine the public's and the legal profession's ability to evaluate the seriousness and persuasiveness of the Court's reasoning. In the long run, it would undermine the Court itself."[229]

Although Jefferson and Stone make the same arguments about the value of dissent, remember that Jefferson wanted to *decrease* the power of the Court, while Stone presumably wants to *increase* it or, at least, keep it the same. This exposes these arguments, as well as the arguments of their opponents—Marshall and Roberts respectively—for what they are: justifications for a particular political role for the Court. The critiques are instrumental only. Neither Jefferson nor Stone believes that dissent makes better law in the abstract, but rather that separate opinions from that of the Court were necessary for an expression of their particular preference for the locus of legal power. Jefferson wanted a weak Court so power could be located in the legislature, presidency, and the states, and dissent was the means to weaken the Court given its institutional position at the time. Stone wants a strong Court and dissent appears to be the means to strengthen the Court at this time.

To put it another way, taking Chief Justice Roberts at his word, the preference for unanimity does not obviously sit well with the current stable of cases and the main argument of this paper—it seems implausible to suggest that Roberts can achieve unanimity on questions of race, gender, school choice, homosexual rights, the War on Terror, and other politically contentious issues. So what is his rhetoric about? One possibility is that Roberts wants to decrease the power of the Court in American society, and his mechanism for that is same as that urged by Mansfield, Marshall, and Stone, just in the opposite direction.

IV. Conclusion

It is not surprising that we observe opinion-delivery practices of Anglo American courts suited to the particular times. This fact seems almost self evident, but it does rebut claims that the current practice of writing separately is theoretically and *ceteris paribus* superior to other methods. The lesson from history is that allowing or forbidding dissent is not about getting better law per se, but about achieving some defined role for courts. This role is typically more power over disputes.

We have seen that the history of debates about the opinion delivery practices of Anglo-American courts has been about court power. Those arguing for the right to dissent have sometimes been about limiting court power (e.g., Jefferson) and sometimes

[228] *Id.* ("It is also important to note that some of the most influential opinions in the history of the Supreme Court were concurring and dissenting opinions. Although they did not command the support a majority of the Justices at the time, they eventually won the day because of the force of their reasoning. Familiar examples, to name just a few, include Justice Harlan's famous dissenting opinion in *Plessy v Ferguson*, the pivotal dissenting and concurring opinions of Justices Holmes and Brandeis in a series of free speech decisions following World War I, and Justice Robert Jackson's landmark concurring opinion in the *Steel Seizure* case.").

[229] *Id.*

about increasing it (e.g., Brennan). We should view the proposal from Chief Justice Roberts in this light. Roberts's nostalgia for the Marshall era of unanimity is about reducing the power of the Court, both by narrowing individual holdings to open up decision space for other actors, and also to limit the kinds of cases the Court hears. A consensus norm is incompatible with deciding the Court's recent docket of cases, at least in the broad manner in which they have historically been decided. In this day and age, narrowness and minimalism go hand in hand with consensus, while breadth and judicial power go hand in hand with dissent. Of course, it was not always this way, and it may not be again. This pattern of punctuated equilibrium is bound repeat itself again and again. Dissent is a powerful tool of the law. And because it is a tool, dissent is used to achieve the ends of the law, whatever they may be.

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