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DISSENT IN THE JUDICIAL PROCESS: DISCORD IN SERVICE OF HARMONY

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Judicial dissent is a practice deeply rooted in Anglo-American jurisprudence. Except for a brief period during the first years of John Marshall's tenure as Chief Justice, dissent has been a regular component of Supreme Court decision making. Over this period, many dissenting opinions have later been adopted by subsequent Supreme Court majorities as the law of the land. Even when not adopted, dissents strengthen the quality of a court's jurisprudence by providing a theoretical counter-principle with which the court must contend. While dissenting opinions may destroy public perceptions of judicial infallibility, they also provide living proof of the independence, fairness and conscientiousness of the judiciary.

INTRODUCTION

After an arduous morning of oral argument, a three-member panel of judges was deliberating over the disposition of a particularly difficult appeal. The presiding judge turned to his junior colleague and exclaimed: "Frank, this case is frivolous! We must affirm the lower court." "Oh no, Chief," replied the junior judge, "I cannot possibly vote to do that!" "Oh well," smiled the Chief, "you're entitled to be mistaken." He then turned to his more experienced colleague: "Lawrence, surely you agree that we must affirm?" "I'm afraid not Chief," said Lawrence, "I emphatically agree with Frank that we must reverse." "Well, then," snorted the presiding judge, "the case will be affirmed; you two argue between yourselves who will write the dissent!"[1]

The last term of the United States Supreme Court produced a windfall of far-reaching decisions touching on diverse areas of social life including first amendment limitations on political protest[2] and patronage,[3] the respective rights of parents and their children regarding abortion,[4] religious activity in public schools[5] and the right to die.[6] In each of these disparate cases, the Court's opinion has been accompanied by a forceful dissent. While some of these dissents may be attributed to

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1. This dialogue is based on the dialogue which appeared in Brennan, *In Defense of Dissents*, 37 HASTINGS L. J. 427, 429 (1986).

2. United States v. Eichman, 110 S. Ct. 2404 (1990) (5 to 4 decision).

3. Rutan v. Republican Party, 110 S. Ct. 2729 (1990) (5 to 4 decision).

4. Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (5 to 4 decision).

5. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990) (8 to 1 decision).

6. Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841 (1990) (5 to 4 decision).

the passing of the ideological old guard,[7] dissent cannot be explained entirely by the liberal-conservative split on the Supreme Court.[8] To appreciate the habit of dissent on the Rehnquist Court, contemporary dissent must be viewed relative to its historical and jurisprudential foundations.

I. JUDICIAL DISSENT IN AMERICA

In colonial America, the courts of last resort from decisions of American courts and British common law courts were the Privy Council and the House of Lords.[9] However, most appeals were concluded in one of the common law courts with subordinate appellate jurisdiction.[10] All published opinions of those tribunals were written *seriatim*; meaning that each judge wrote out his individual rationale for deciding the case.[11] It was these reports of the common law courts to which colonial lawyers had access and it was the judicial practice of *seriatim* opinions with which lawyers were most familiar.[12]

Based on this colonial experience, the United States Supreme Court continued the practice of *seriatim* opinions in the early days of the Republic. Each justice delivered an unabashedly individual response to each case.[13] Thus, the first reported case of the Supreme Court, *Georgia v. Brailsford*,[14] contained holdings by Justices Johnson and Cushing contrary to the decision reached by Chief Justice Jay, and Justices Wilson, Blair and Iredell. This practice continued in other early Supreme Court cases.[15]

The ascendancy of Chief Justice Marshall in 1801 marked an abrupt

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7. Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV., 307 (1988).

8. Justice Brennan's opinion in United States v. Eichman, 110 S. Ct. 2404 (1990), struck down a federal law banning flag desecration on first amendment grounds. Justice Brennan was joined by conservative stalwarts Scalia and Kennedy, while the dissent was written by Justice Stevens, usually perceived as a centrist.

9. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 187 (1959).

10. *Id.* at 190.

11. Dissenting votes of Privy Council members were kept secret while in the House of Lords, the lower appellate court, each judge stated the reasoning behind his judgment either orally or in writing. Simpson, *Dissenting Opinions*, 71 U. PENN. L. REV. 205, 207 (1923). The House of Lords apparently followed the early Germanic and Roman procedure whereby judgments were arrived at in public. *See Nadelman, The Judicial Dissent: Publication vs. Secrecy*, 8 AM. J. COMP. L. 415 (1959).

12. ZoBell, *supra* note 9, at 191. Referring to the Kings Bench, Thomas Jefferson wrote:

> [F]rom the earliest ages of English law, from the date of the year-books, at least, to the end of the IId George, the judges of England in all but self-evident cases, delivered their opinions *seriatim*, with the reason and authorities which governed their decisions. . . . Besides the light which their separate arguments threw on the subject . . . it shewed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent.

Id. at 190.

13. *See* Ray, *supra* note 7, at 308.

14. 2 U.S. (2 Dall.) 402 (1792).

15. *See, e.g.*, Cooper v. Telfari, 4 U.S. (4 Dall.) 14 (1800); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). *But see* Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797) (Chief Justice Elsworth delivered the opinion of the court without other options).

end to the practice of *seriatim* opinions. In one of many "significant acts of audacity . . . which made his career historic,"[16] Marshall terminated the practice of *seriatim* opinions delivering the Court's opinion himself in *Talbot v. Seeman*.[17] Thus, in the early years of the Marshall Court, the Supreme Court wrote as a single unit; all dissension from the Court's holding remained secret.[18] However, Marshall's challenge to the established tradition of *seriatim* opinions was not met with universal accord. Those opposed to the Marshall Court's expansion of federal power were among the most strenuous critics of the new practice.[19] President Jefferson criticized the Court's unanimous holdings as:

> An opinion . . . huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lax or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning.[20]

While Chief Justice Marshall's practice of delivering unanimous opinions was revolutionary, it was also short-lived. A scant four years after Marshall's ascendancy, Justice Johnson separately concurred in the Court's opinion in *Huidekoper's Lessee v. Douglass*.[21] Once broken, Marshall's rule of unanimity lost its sway over his colleagues and dissent was once again seen in the Supreme Court. Marshall himself authored nine dissents and one special concurrence[22] and his dissent in *Ogden v. Saunders*[23] is widely viewed as his judicial masterpiece.[24] However, Marshall's focus on judicial unity remained prevalent throughout his tenure and dissents rarely were published in more than fifteen percent of the cases decided in a given term.[25]

A new era of judicial dissent began with the appointment of Roger Taney as Chief Justice.[26] Following Justice Johnson's example, Justice Curtis assumed the dissenter's mantle, authoring the sole dissent in *Dred Scott v. Sandford*.[27] *Dred Scott* was the most famous dissent of the Taney era, an era which was typified by deep conflicts over fundamental philosophies.[28] In the latter half of the nineteenth century, the Court was enlivened by a series of dissenting opinions by Justices Harlan, Miller and Field.[29] Justice Field became famous for his dissents in the *Slaughter-*

16. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919).
17. 5 U.S. (1 Cranch) 1, 25 (1801).
18. This was an important precondition for the Court's deft assumption of power in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), wherein Marshall established the constitutional principle of judicial review.
19. ZoBell, *supra* note 9, at 194.
20. *Id.* (quoting letter to Thomas Ritchie (Dec. 25, 1820), *reprinted in* 12 FORD, THE WORKS OF THOMAS JEFFERSON 175 (1905)).
21. 7 U.S. (3 Cranch) 1, 72 (1805) (Johnson, J., concurring).
22. *See* ZoBell, *supra* note 9, at 196.
23. 25 U.S. (12 Wheat.) 213, 332 (1987) (Marshall, C.J., dissenting).
24. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 66 (1928).
25. *See* ZoBell, *supra* note 9, at 196.
26. *See* Ganoe, *The Passing of the Old Dissent*, 21 OR. L. REV. 285, 286 (1942).
27. 60 U.S. (12 How.) 393, 564 (1857) (Curtis, J., dissenting).
28. *See* Ganoe, *supra* note 26, at 286.
29. *See generally id.* at 287.

House Cases[30] and *Munn v. Illinois*,[31] while Harlan became a "judicial folk-hero" for his lone dissent in *Plessy v. Ferguson*.[32]

In the early twentieth century, Supreme Court dissenting opinions became more common. Under the leadership of Justice Holmes, dissent was fully legitimized and even surrounded with an aura of romance.[33] Much of Holme's fame is derived from his reputation as a dissenting justice,[34] despite the fact that he authored only half as many dissents as Justice Harlan.[35] Unlike Harlan, however, Holmes lived to see many of his dissents become majority opinions.[36]

The habit of judicial dissent intensified in the early years of Franklin Roosevelt's second administration. With the departure of conservative stalwarts Van Devanter, Sutherland, Butler and McReynolds, many expected a more unified Court.[37] However, dissents increased throughout the Roosevelt presidency and in the years following. Today, dissent remains an integral part of the Supreme Court's adjudication. If history is any guide, the prevalence of dissent is unlikely to diminish despite the growing conservative consensus on the Supreme Court. While judicial dissent may be decried by some as a judicial institution, it is here to stay.

II. THE FUNCTION OF DISSENT

A. *Appealing to Future Generations*

The hope of every dissenting judge is that today's dissent will become tomorrow's majority opinion. Dissenting opinions sow the seeds for subsequent majorities, providing a "wholesome element" for the growth of the law.[38] In the words of Chief Justice Hughes:

> A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[39]

Although dissenting opinions are usually relegated to the dustbin of judicial history, there exist many examples of dissenting opinions which were subsequently adopted.

Justice Harlan's dissent in *Plessy v. Ferguson*[40] stands among the most prophetic in American judicial history. Eight Justices joined in the Court's opinion which upheld forced racial separation as constitutional, "social" (as opposed to "political") discrimination.[41] Justice Harlan

30. 83 U.S. (16 Wall.) 36, 83 (1872) (Field, J., dissenting).
31. 94 U.S. 113, 136 (1876) (Field, J., dissenting).
32. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
33. Ray, *supra* note 7, at 310.
34. *See* ZoBell, *supra* note 9, at 201.
35. Ray, *supra* note 11, at 310.
36. *See* ZoBell, *supra* note 9, at 202.
37. *See, e.g.*, Ganoe, *supra* note 26, at 288.
38. Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33, 47 (1929).
39. HUGHES, *supra* note 24, at 68.
40. 163 U.S. 537, 552 (1896).
41. *Id.* at 544.

cast the sole opposing vote. In an eloquent appeal to future generations, he urged that the folly of his contemporaries be undone:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[42]

It took sixty years for Harlan's vision of the fourteenth amendment to prevail, but in *Brown v. Board of Education*,[43] his view was vindicated by a unanimous Supreme Court.

In *Lochner v. New York*,[44] the Supreme Court struck down a state regulation which limited the work hours for bakery employees. The Court found the statute to be an unconstitutional abridgment of freedom of contract.[45] Justice Holmes castigated the majority for legislating social Darwinism from the judicial bench:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory. . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[46]

The searing dissent of Justice Holmes laid the groundwork for the Court's subsequent retreat from substantive due process and became the majority view within six years.[47]

Another dissent later adopted as the law of the land was that of Justice Brandeis in *Olmstead v. United States*.[48] In *Olmstead*, the Court held that contents of telephone conversations surreptitiously apprehended were not subject to the warrant requirement of the fourth amendment. Justice Brandeis's dissent went beyond the particulars of the case and articulated an eloquent defense of individual rights which today continues to evoke the attention of constitutional scholars and lay individuals alike.

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42. *Id.* at 559 (Harlan, J., dissenting).
43. 347 U.S. 483 (1954).
44. 198 U.S. 45 (1905).
45. Significantly, the Court's reasoning in *Lochner* was derived from Justice Field's dissenting opinions in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1872) (Field, J. dissenting), and Munn v. Illinois, 94 U.S. 113, 136 (1876) (Field, J. dissenting) in which Justice Field castigated the Court for its subordination of substantive due process rights to the economic regulation of the states. *See generally* Bloch, *The Value of Dissent*, LAW & SOC'Y J. 7, 8 (November 1930, February 1931).
46. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).
47. *See* Bunting v. Oregon, 243 U.S. 426 (1917) (state regulation of work hours does not violate due process).
48. 277 U.S. 438 (1928).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[49]

While Justice Brandeis failed to carry the day, his reasoning ultimately prevailed in *Berger v: New York*[50] and *Katz v. United States*.[51]

In *Betts v. Brady*,[52] the Supreme Court held that indigent defendants were not constitutionally entitled to counsel in non-capital cases. Justice Black vehemently dissented from the court's reasoning:

> A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.[53]

Twenty-one years later in *Gideon v. Wainwright*,[54] Justice Black had the uncommon pleasure of living to see his dissent become the opinion of the Court. In fact, he had the opportunity to author the opinion himself.

A final example of a dissenting opinion becoming the law of future generations is Justice Douglas's dissent in *Dennis v. United States*.[55] *Dennis* arose out of the prosecution of several Communist leaders under the Smith Act.[56] The Supreme Court upheld portions of the Smith Act which prescribed penalties for "advocating" the overthrow of the United States government. Justice Douglas dissented, arguing that because there was no clear and present danger that the defendants' advocacy would result in violence, such advocacy was protected by the first amendment.

> Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas re-

49. *Id.* at 478-79 (Brandeis, J., dissenting).
50. 388 U.S. 41 (1967).
51. 380 U.S. 347 (1967).
52. 316 U.S. 455 (1942).
53. *Id.* at 476 (Black, J., dissenting).
54. 372 U.S. 335 (1963).
55. 341 U.S. 494 (1951).
56. 28 U.S.C. § 2835 (1989).

> leases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.[57]

Six years later, Justice Douglas's view of the first amendment was largely vindicated in *Yates v. United States*,[58] wherein the Supreme Court recognized the distinction "between advocacy of abstract doctrine and advocacy directed at promoting unlawful action. . . ."[59]

These cases are only some of the more famous examples of judicial dissents which were subsequently adopted as the opinion of the Court. Significantly, most of these now-famous dissents did not command widespread attention or support at the time they were written. Their "greatness" was left for future generations to determine. Consequently, it is impossible to know today which dissenting opinions will be venerated tomorrow and which will be relegated to deserved obscurity. If courts are to preserve the opportunity for future generations to learn from their mistakes by adopting the reasoning of their dissenting colleagues, they must preserve all dissenting opinions and leave to their successors the task of sorting the wheat from the chaff.

B. *Counter-Principle to the Majority's Reasoning*

While every dissenting judge hopes that his reasoning will be adopted by subsequent generations, most dissents never become the law. Even Justice Holmes, "the great dissenter," did not fare well; fewer than one-tenth of his 173 dissents were adopted as the opinions of the Court.[60] Therefore, if dissents are to be accepted in the regular course of judicial decision-making, they must be justified by contemporary standards, not merely as an appeal to the future.

A dissenting opinion enunciates what Professor Unger refers to in a different context as the "counter-principle" of the stated legal proposition.[61] A counter-principle represents the antithesis of the stated legal position; the philosophical and jurisprudential consequences of the majority's reasoning.[62] By enunciating the legal principle opposite the court's opinion, the dissent provides a "vitalizing influence"[63] on the law by adding a second dimension to the court's analysis. Even when a dissent does not become the law, it spotlights the reasoning utilized by the court by articulating the logically opposite legal principle.[64]

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57. *Id.* at 584 (Douglas, J., dissenting).
58. 354 U.S. 298 (1957).
59. *Id.* at 318.
60. ZoBell, *supra* note 9, at 211.
61. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 618-33 (1983).
62. *See id.*
63. Frankfurter & Landis, *supra* note 38, at 47.
64. *See* Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A.J. 794 (1953).

This function of dissent as a spotlight on the majority's reasoning exists even where the dissent is not followed by the majority. Justice Frankfurter's dissent in *Baker v. Carr*[65] helped illuminate the extension of federal and judicial power that the majority's opinion represented. Justice Black's dissent in *Griswold v. Connecticut*[66] has helped frame the terms of the "right to privacy" debate. And Justice Jackson's passionate dissent in *Korematsu v. United States*[67] stands as a grim reminder of how, in times of national emergency, constitutional rights can become dangerously imperiled.

Dissenting opinions provide a talisman of where the Court is heading from which both the bench and bar can take their bearings in subsequent cases. If the legal principle enunciated by the Court survives the criticism stated in the dissent, the Court's opinion is strengthened. Future opinions are similarly enhanced by addressing and incorporating the criticisms contained in a prior dissent. As Chief Justice Stone explained:

> A considered and well stated dissent sounds a warning note that legal doctrine must not be pressed too far. It sometimes, for better or for worse, arrests a trend and sometimes reverses it. Its appeal can properly be only to scholarship, history and reason, and if the business of judging is an intellectual process, as we are entitled to believe that is its, it must be capable of withstanding and surviving these critical tests.[68]

III. JUDICIAL DISSENT AND ITS CRITICS

Dissenting opinions have been described as the *enfant terrible* of appellate practice.[69] One judge opined that "[d]issents like homicide, fall into three categories, excusable, justifiable and reprehensible."[70] Another writer has likened dissenting opinions to the weakling making faces at the bully across the street from the protection of his front porch.[71] The most widespread argument against dissenting opinions, however, is that they detract from the authority of the court.[72] By publicizing dissension, the dissenting judge airs the court's dirty laundry before the public and undermining public confidence in the wisdom and universality of the judicial process. As one commentator has argued:

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65. 369 U.S. 186, 277 (1962) (Frankfurter, J., dissenting).

66. 381 U.S. 479, 507 (1965) (Black, J., dissenting).

67. 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

68. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC'Y 78 (1942).

69. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

70. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 928 (1962) (quoting Hirt, *In the Matter of Dissents Inter Judices de Jure*, 31 PA. B.A.Q. 256, 258 n.1 (1960).

71. Wollman, *The Stability of the Law - The Income Tax Case*, speech *reprinted in Evils of Dissenting Opinions*, 57 ALB. L. REV. 74, 75 (1898).

72. *See, e.g.*, Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 608 (1895) (White, J., dissenting) ("The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of the courts of last resort.").

> The outstanding objection to the habit of dissent is that it weakens and injures the Court with the public. It makes the impression that the Court is not as able as it should be; not as learned, not as wise, not as harmonious, and, therefore, not entitled to the full confidence which it should have, and that dissenting justices are too little inclined to subordinate themselves in an effort to maintain the theoretical unity of the Court, and the reverence and respect that ought to be felt toward the Court.[73]

Although compelling, this argument ultimately rests upon two faulty premises. First, there exists such a thing as legal certainty. Second, public confidence in the judicial process is aided by unanimous judicial opinions.

Usually, cases are governed by a settled rule of law which dictates the result. Where the holding is not absolutely clear from statutory or case law, settled canons of judicial construction usually can lead to the appropriate result. However, occasionally judges are confronted with cases which are not governed by a settled rule of law or controlled by a particular canon of construction. Those cases must be decided by a process of judicial reasoning from a legal principle. This involves an inherent choice between competing principles, a choice necessarily governed by values.[74] But as Dean Pound explained, "the process of valuing" rests ultimately upon "the conception one has of the ideal relation among men and of the ideal of a civilized human society."[75] In contemporary society such ideals are far from settled. Therefore, it is unrealistic to expect the law to be settled and hold our legal certainty as an obtainable goal.[76]

Uncertainty in the law is not cause for alarm; it is endemic to democratic societies. As Justice Douglas explained, judicial dissent is merely logical and natural in a democratic society:[77]

> When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views. Judges are to be honored rather than criticized for following that tradition, for proclaiming their articles of faith so that all may read.[78]

Dissenting opinions undeniably destroy the illusion of certainty in the law, but the legitimacy of the judicial process ought not to rest upon such illusions.[79] Rather, the legitimacy of the judicial system must rest upon the public's knowledge that judges have dispassionately considered the issue on the merits and conscientiously attempted to apply neu-

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73. Moore, *The Habit of Dissent*, 8 VIR. L. REG. 338, 341 (1922).
74. *See* Pound, *supra* note 64, at 794.
75. *Id.*
76. *Id.*
77. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1948) (In the words of Justice Douglas, "[P]hilosophers of the democratic faith will rejoice in the uncertainty of the law and find strength and glory in it.").
78. *Id.* at 106.
79. Fuld, *supra* note 70, at 928.

tral legal principles to volatile and emotive factual settings. While dissenting opinions may destroy illusions of judicial inviolability, they provide assurance to the public that judicial decisions are not perfunctory.[80] As Chief Justice Hughes explained:

> There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.[81]

Chief Justice Hughes' statement recalls the story of the circuit judge who circulated a dissenting opinion to his colleagues on the panel after a long period of advisement. The presiding judge acknowledged that the case had given him much trouble and that he was not confident that his vote at conference had been correct. He suggested to the dissenter: "Why don't I reassign the opinion to you and we'll submit your dissent as the opinion of the court." "Oh, no you don't," replied the dissenting judge, "I only agreed to write a dissent. I never said I wanted my view to become the law of the circuit!"[82]

IV. The Limits of Dissent

Although dissenting opinions play an integral role in contemporary jurisprudence, in limited cases the benefits of unanimity outweigh the costs of stifling dissent. Such cases arise when the judicial branch, as a governmental entity, finds its institutional prerogatives threatened by potential encroachments from another branch of government. As Alexander Hamilton understood, the judiciary is the least powerful branch of government[83] and only can compel obedience through public acceptance of its legitimate authority. In those instances where the judiciary finds its authority challenged by other branches of government or by state authorities, it may be appropriate to strive for short-term unanimity to preserve the independence of the judiciary over the long-term.

An analysis of some of the pathbreaking Supreme Court opinions supports the proposition that unanimity may at times be important to protect judicial authority. The first major decisions that helped establish

80. Stone, *supra* note 68, at 78.
81. Hughes, *supra* note 24, at 67-68.
82. *See* Pound, *supra* note 64, at 794 (relating story in different context).
83. The Federalist No. 78 (A. Hamilton).

the structure of the federal government were all unanimous: *Marbury v. Madison*,[84] *McColloch v. Maryland*[85] and *Gibbons v. Ogden*.[86] It can hardly be doubted that Chief Justice Marshall's deft assumption of judicial and federal power in these cases could have been accomplished in the absence of such unanimity. More recent judicial history also supports the view that, when the court's authority is itself in question, unanimity is a worthwhile goal to achieve. In *Brown v. Board of Education*,[87] the Court anticipated that its decision would be met with widespread derision. Accordingly, Chief Justice Warren invoked his tremendous personal authority among his brethren to produce a unanimous opinion overturning the separate but equal doctrine.[88] This unanimity was influential in winning public acceptance of such a dramatic change in the national value pattern and in providing legal legitimation to the struggle against the "massive resistance" of the southern states.[89]

Similarly, in *United States v. Nixon*[90] the Court was faced with a constitutional conflict between the executive and the judiciary over whether executive privilege protected the president from a court's subpoena power. The Supreme Court's unanimous opinion resolved the opinion in favor of the courts and helped diffuse the incipient constitutional crisis. In the absence of judicial unanimity, it is quite possible that the Watergate crisis would have been prolonged to the detriment of the presidency and the nation.

Finally, judicial dissent should be exercised sparingly and only in the case of a fundamental disagreement over principles underlying the outcome of a particular case. A judge should not dissent merely because he or she would have composed an opinion differently. Where the disagreement is not central to the disposition of the case, a judge should exercise restraint and await a later case where the disagreement is more squarely presented. As an integral component of judicial decision-making, the institution of dissent should be exercised with the same care and solicitude as any other component of judicial power. Only when sparingly exercised can judicial dissent maintain its full persuasive power to present and future generations.

CONCLUSION

By appreciating the historical role of dissent in the judicial process, judges and lawyers should view dissenters, not as spoilers, but as jurists fulfilling an important judicial function. While the rancor surrounding the publication of dissents may disrupt the pristine image of judicial harmony, courts usually are able to weather the storms of discord and return to an even keel of collegiality. Ultimately, the mutual affection and

84. *Supra* note 18.
85. 17 U.S. (4 Wheat.) 316 (1819).
86. 22 U.S. (9 Wheat.) 1 (1824).
87. *Supra* note 43.
88. *See* W. DOUGLAS, THE COURT YEARS 1939-1975 114-15 (1980).
89. A. BARTH, PROPHETS WITH HONOR 51 (1974).
90. 418 U.S. 683 (1974).

admiration among judges provides the best bulwark against lasting discord resulting from judicial dissent. As Lord Justice Asquith said of his colleagues on the English Court of Appeal, "the members of this court are such nice and accomplished men [and women] that it is almost a pleasure to be dissented from by them!"[91]

91. Fuld, *supra* note 70, at 929 (quoting Asquith, J., *Some Aspects of the Work of the Court of Appeals*, J. SOC'Y PUBLIC TEACHERS OF L. 350, 353 (1950)).