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

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

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I. Introduction

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 which 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 publicly.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 the concern that allowing dissent means the majority is free to be bolder in its decision, since it is not forced to compromise. In a recent speech at Georgetown Law School, Chief Justice Roberts stated the ground for this claim: "Division should not be artificially suppressed, but the rule of law benefits from a broader agreement. The broader the agreement among the justices,

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2 See Address to Georgetown University, Class of 2006, supra note 1.

3 See Part III.C. infra. 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).


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 U.S. 197, 400 (1904) (opinion of Justice Oliver Wendell Holmes, the “Great Dissenter”).
the more likely it is a decision on the narrowest possible grounds." Of course, this does not tell us the why, only the how. We can guess that the why has something to do with Bickel’s "passive virtues" and Sunstein’s one-case-at-a-time minimalism, with an eye toward sharing with, or even delegating to, others decision-making power over controversial social issues. Whatever the reason, Roberts, like Marshall before him, believes that changing the nature of the judicial opinions released to the public—the discourse of law—is how to achieve his unstated goals.

To other past and present justices, most famously Chief Justice Stone and Justice William Brennan, dissent is considered a healthy, and even necessary, practice that improves the way in which law is made.\(^8\) We get better law,  *ceteris paribus*, with dissent than without.\(^9\) Their counter-position rests in part on two ideas: first, dissents communicate legal theories to other justices, lawyers and political actors, state courts, and future justices, and have sometimes turned into good law later on as a result of this; and second, dissents are essential to reveal the deliberative nature of the Court, which in turn improves 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 right answer.\(^10\) 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.”\(^11\) Dissent, in this interpretation, is essential to getting the best possible legal rule and ensuring the Court’s legitimacy.

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 is it likely to lead to murky or bad legal rules? History tells us a little bit. We observe that throughout its history the Supreme Court has sometimes issued predominantly unanimous opinions, while at other times issued separate opinions in most cases. Since the trend is toward the latter, one conclusion might be that there has been learning and evolution—that the practice today is better in some sense than the practice in the past. In other words, judicial opinions have moved toward a more efficient method of deciding and announcing legal rules.

The almost thousand-year history of separate opinions by English courts gives us reason to doubt this. Another possibility is that Court practices are tailored to the particular times, and that what was the best method then is not the best method today.

\(^8\) See Hope, supra note 1.


\(^10\) 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 Jr, supra note 9 at 438 ("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).
If we believe this and we want to understand the practice of dissent, then we must ask what is it about the times in question that leads to this result. If true, we might also think that Chief Justice Roberts’s proposal is wrongheaded, since it would be trying to fit the square peg of unanimity into the round hole of modern cases and controversies.

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

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. So too here. The Court has no army, no guns, no bureaucrats to enforce its will, so its power must come from somewhere else. We must find this source of power in the only place where the Court communicates with those on the outside—its opinions. The content of opinions is obviously an essential element of this power, but this paper argues that so is the style or manner in which they are issued. And since decisions are an exercise of power, we should expect the manner in which the Court communicates decisions to reflect the Court’s power. In other words, the presence or absence of separate opinions does not arise from a state of nature, but depends on the particular goals or objectives of the Court.

To test this hypothesis, this paper briefly examines the history of dissent. It shows that the manner in which appellate law is made has been changed several times throughout Anglo-American legal history in an attempt to increase the power of law 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.

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14 HAND supra 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.

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 skyscrapers 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.
each case, the choice about which style was used was made with an eye toward bringing more business or more interesting business or more influential business to the court. A specific change in the delivery of opinions designed to achieve precisely this purpose—increasing the power of “Law”—has happened at least three times on a grand scale: (1) the change from traditional *seriatim* opinions to an “opinion of the court” in England circa 1760; (2) a similar change in the United States Supreme Court upon the ascendancy of John Marshall to Chief Justice in 1801; and (3) the development of a tradition of writing separately during the New Deal era of the Supreme Court, which has persisted to the present. In each of these examples, the change of discourse was a pure power-play designed to increase the role of law in shaping the norms of society. 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 judiciary as an equivalent branch in the fledgling days of American democracy; and the rise of dissent in the Court was necessary to expand the influence of the Court and Law in deciding disputes previously or possibly addressed by other, extra-judicial means.

Those seeking to control “truth” in each case, used a change in discourse to achieve power within their society for themselves, their class, or their group. For example, as shown below, the current practice of issuing frequent dissenting opinions in the Supreme Court flourishes in order for the Court to legitimately exercise dominion over controversial social or political disputes, such as reproductive rights, racial equality, and public safety, that otherwise might be handled by extrajudicial means. Imagine the potential political reaction to a unanimous and anonymous opinion on the abortion issue, and one gets an idea of how important dissent is at keeping controversial issues on the Court’s docket. In other words, dissent is merely one of the tools that allow the Supreme Court to stay in the business it is in or to extend its power into new areas. This does not necessarily mean that there were explicit or even conscious plans by those making the change. The Court and the individual justices did not plan or necessarily intend the consequence, but it may be the result of sociological forces beyond their ken.

This paper is organized as follows. Section II 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 its larger role in formulating the legal framework through which truth in our society is determined.

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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. Schoff, 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 (2d ed. 1985) (“In modern times, law is an instrument; the people in power use it to push or pull toward some definite goal.”).

21 *Id.* at 18 (“If the courts . . . are hidebound and ineffective, that merely means some other agency has taken over what courts might otherwise do.”); *id.* at 114 (“[L]aw had to suit the needs of its customers.”).
Section III builds on this foundation by examining the Anglo-American history of dissenting opinions. The takeaway here is that dissent and unanimity norms are merely tools that are used to increase the power of the Court and law in general in our society. Section IV describes current opinion delivery practices, focusing on the change from the Rehnquist to Roberts Court. In light of the case made in Section III, 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. Section V concludes.

II. Discourse, Power & Truth

Law is to a great extent what judges say it is, and how they say it, is one of the primary sources of legal power over society. In our society law is often synonymous with power, and it greatly influences the pursuit of “truth.” Not only do laws define the locus of acceptable conduct within society, but they also set the framework in which truth is determined. Whether it is the veracity of a litigant’s claim at a trial or the possible 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. Law has displaced these forces so that “the characteristic of our Western societies [is] that the language of power is law.”

But the law does much more than this. Law constructs much of modern discourse, since it authorizes some to speak and some views to be taken seriously, while others are marginalized, derided, excluded, or even prohibited. The law creates 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. These take the form of much more than enabling other state or individual actions. For example, court rules, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the delivery of opinions are all legal “grids” within which truth is produced. In other words, discourses generate truth. Foucault writes that:

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22 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.”).

23 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).

24 It is well known that religious or pseudo-religious entities have historically been rivals of law. See, e.g., Friedman, supra note 20 at 52, 65 (“[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.”).

25 Foucault, supra note 13 at 201.
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.  

Law is the “general politics” of the modern era, and legal opinions are the fundamental discourse of this politics. Initially, individual lower courts and judges 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. Lower courts may act in a variety of ways, but appellate courts supervise this conduct and issue opinions primarily to normalize the conduct of lower courts. In turn, the Supreme Court fills this same normalization role vis-à-vis the appellate courts. Whereas lower courts may develop various rules and procedures if left alone, with appellate supervision the result is the creation of a more regularized and more legalized form of truth.  

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. This legal grid is not usually transparent or obvious to the lay public, but nevertheless, 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, while 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 our society more broadly (for example, burning a flag is protected “speech,” while burning a cross is generally not). In other words, judges—and especially appellate

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26 Id. at 131.

27 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.

28 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.

29 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
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.  

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 other individual 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 final decision of a lesser court, but also over details of procedure, including what evidence may be admitted, what witnesses may testify, and what judges and juries may consider as proper in deciding the case. 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 law by following the precedent or argument of previous appellate opinions. The content, the structure, and the tone of judicial opinions influence all these players in the practice of law. In other words, a court determines the scope of its own authority through its 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 greatest influence on this discourse is the presence or absence of separate opinions from the official decision issued by the court as a whole. 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); 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).

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 will settle the law. Although lower courts may try to carve out small areas of disagreement within the legal grid, the message of the Court is that this issue is decided absolutely and will not be subject to reconsideration any time soon. No foreseeable changes in Court personnel or attitude are likely to change the votes of five justices. By contrast an opinion that carries the vote by only one justice will send quite a different message to lower courts and to lawyers who may wish to challenge the precedent. Challenges will be fruitful when changes in Court membership make the vote uncertain or when a

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30 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).  
31 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, supra note 20 at 22.  
32 For an analysis of the difference between these styles, see Ginsburg, Speaking in a Judicial Voice, supra note 9 at 67; Ginsburg, Remarks on Writing Separately, supra note 9 at 133.
compelling case comes along that may force one or two justices to reconsider their vote. Therefore, dissenting opinions are more likely to create some uncertainty in the law. This uncertainty will produce a much different process for determining “truth.”

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.” As a result, this apparently simple feature of appellate opinions can in actuality shape the very foundations of a society. 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 nations, while unanimous opinions dominated at other times or 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?

III. 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 recorded Anglo-American jurisprudence. The first is the *seriatim* delivery of the judgment of each judge individually and one after another with the grounds for the decision (known as “*seratim*”). This practice prevailed in Great Britain for nearly all of its history, from the time of William the Conqueror to 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” as a whole, with no publicly revealed vote or separate opinions issued by individual judges. This practice has been used at least two times, by chief judges Lord Mansfield of the King’s Bench in England and (more or less) 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”. This section traces the historical development of these three models briefly to search for explanations for their use.

A. The English Experience

From almost a thousand years, decisions of multi-member courts in England were delivered orally by each judge *seriatim* and without any prior intra-court consultation. The opinions, the sum of which would amount to the legal rule in the case, were not even published by the court or the judges until the early Seventeenth Century. Prior to that time, case reports were compiled by “prothonotaries” or scribes, who recorded, to the best of their ability, the proceedings of the court and the orally delivered opinions of the judges. These reports, covering a continuous period from the reigns of King Edward I to Henry VIII (1268 to 1535), were originally published in raw form, and were used by lawyers as source material and precedent. The unedited and

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33 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.


35 In some accounts, scribes were law students, and the recordation process was their education.
unabridged compilations were massive and in no sense portrayed a coherent picture of the law. Lawyers and judges had a difficult time even figuring out what the legal rule from a case was. “Precedent” was virtually unknown, since it implies the existence of a stable of judgments available to parties and judges. Abridgements of leading cases appeared by the late Fifteenth Century, but the quality varied tremendously, and no official court reports were issued until Edward Coke published his cases in 1609. The “poverty of the law reports,” as C.H.S. Fifoot writes, contributed to the lack of clarity of the law. 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 undoubtedly tradition and a sense of its 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, since judgments made in the open and without prior discussion 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.

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. Mansfield introduced a procedure for generating agreement and consensus among judges and then issuing

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36 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).

37 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.”).

38 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.

40 See infra notes 93-109 and surrounding text. 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 10 THE WRITINGS OF THOMAS JEFFERSON 169, 171 (Paul L. Ford ed., 1899).

41 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 non-royal 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.
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. 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.”

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 trade routes, in trade centers, or that traveled across Europe. The law merchant was distinct from the body of common law since 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. It also existed in various treaties or legal codes set out by scholars and merchants in trade centers, like Rhodes, Barcelona, or Visby.

In many cases, this customary law differed from the more structured formalities of English common law. For example, in certain periods, an action in contract in the King’s Court was permitted only on a written document “sealed by the party against whom the claim was made” while in fair courts this rule was generally waived. In general, the customs and practices of trades were the law of commerce on the Continent, while these were foreign to judges, juries, and judgments in English courts. As 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

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42 FRIEDMAN, supra note 20 at 133. 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.

43 OLDHAM, supra note 36 at 10.

44 EDMUND HEWARD, LORD MANSFIELD: A BIOGRAPHY OF WILLIAM MURRAY 1ST EARL OF MANSFIELD (1705-1793) LORD CHIEF JUSTICE FOR 32 YEARS 99 (Barry Rose 1979); FRIEDMAN, supra note 20 at 28 (“There were many types of merchant courts, including the colorful courts of piepowder, a court of the fairs where merchants gathered.”).

45 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).


47 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 ON 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.”).

48 See HEWARD, supra note 44 at 100-01.
influential, [should] be permitted to dictate the terms upon which his dispute should be resolved." In this respect, England differed substantially from the continent of Europe, where trade guild law was well incorporated into the body of general law. 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. 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 much engaged the attention of mankind, or commercial gain was sought with such general emulation." 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." 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." Others advocated the establishment of specialty courts, impugning the law courts for not understanding commercial issues and creating confusion with their opinions.

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 types of forums for 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 also exacerbated the problem. As commerce became more demanding of law, the hodgepodge of courts (e.g., courts of law, courts of equity, law merchant courts, ecclesiastical courts, etc.) regulating commerce only added to the misfit between common law adjudication and the needs of business. This manifested itself in two ways.

49 Fifoot, supra note 39 at 9.
50 See Heward, supra note 44 at 99-101.
51 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).
52 See Fifoot, supra note 39 at 4.
53 Murphy, supra note 46 at 4.
55 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.").
56 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, supra note 44 at 53.
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. 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 certain 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 down to the most important ones, this still leaves three—Common Pleas, Exchequer, and Kings’ Bench—all of which had overlapping jurisdiction. Decisions from these courts were not binding authority on other courts, meaning there were (at least) three relevant sources of legal precedents for any particular dispute. 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.” In addition, separate equity courts, specifically the Court of Chancery, existed as an alternative to law courts. Although these 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.

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. According to a recent study, the judges therefore had an incentive to rule in favor of plaintiffs, since they were the party that chose the venue in most common law cases. Plaintiffs also had an incentive to choose a venue that increased their prospects,

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57 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.

58 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, supra note 36 at 12.

59 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 (University of Southern California CLEO Research Paper No. C07-4, March 2007), available at SSRN: http://ssrn.com/abstract=968701, (forthcoming).

60 OLDHAM, supra note 36 at 366 (“Decisions from another court would be looked to only as advisory or as a means of persuasion.”).

61 OLDHAM, supra note 36 at 365.

62 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, supra note 36 at 366.

63 See KLERMAN, supra note 59 at 9-11 (showing that fees paid to judges per case were substantial and sufficient to bias their decisions in favor of plaintiffs, who chose the venue)

64 Id.
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—that a contract should be enforced despite technical defects for example—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” of England at that time competed for the business of commercial dispute resolution. By making favorable rules or procedures, courts could attract more disputes to resolve (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 unnecessary confusion to the opinions of that court. Instead of a binary win-loss character, opinions at the time were a collection of “for” and “against” arguments. To determine whether one had won or lost a case, and, more importantly what the rule of the case was and how strong the precedent was, it was necessary to count heads who had voted for a particular argument or line of reasoning. In complex commercial disputes, this was not an easy matter. 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.” Thus the nascent 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, to simplify legal proceedings and to create a simple set of rules that could be applied to all transactions. 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 . . .”

From the perspective of courts what was needed was a way to bring the business of commercial regulation from other courts or bodies to law courts – i.e., to increase the market share that law courts had for commercial disputes. 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

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65 *Friedman*, *supra* note 20 at 95.

66 *Friedman*, *supra* note 20 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.”).

67 Hamilton v. Mendes, 2 *Burr.* 1214 (1761).

68 *Friedman*, *supra* note 20 at 18. 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.”).
meant that commercial law must be the “same all over the world” and that this meant England 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.”

Related to this was his view that legal rules should be understood by those “who must obey [them].” The normative underpinning of Mansfield’s revolution was certainty: “the great object in every branch of law, but especially in mercantile law, is certainty.”

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. 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. The new “truth” about commercial law could only be discovered 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. As a result of the consolidation of power through the focusing of legal discourse, Mansfield created a forum that was conducive to handling commercial cases, and “business flowed into his court.”

The number of “commercial cases” handled by the King’s Bench increased more rapidly than the overall growth rate of the docket as a whole. 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. 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”

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70 OLDHAM, supra note 36 at 365.
71 Id. at 124.
72 Miles v. Fletcher, 1 Doug. 231, 232 (1779).
73 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.
74 FIFOOT, supra note 39 at 13 n.1.
75 Heward, supra note 44 at 173. 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 clause 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 (e.g., “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 Heward, supra note 44, at 105-06.
and various monetary disputes saw similar increases, while common law standards, like trover and trespass increased at much lower rates.\textsuperscript{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 the law.”\textsuperscript{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.\textsuperscript{79}

Writing with a bit more historical perspective, Oldham writes that Mansfield was one of the two “most important judicial figures in the law of bankruptcy”\textsuperscript{80}, and the elucidator of the fundamental legal principles of insurance and negotiable instruments, where his chief contribution was “cogency”.\textsuperscript{81} Mansfield brought, “with considerable success”, merchant customs “harmoniously” into the common law.\textsuperscript{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.\textsuperscript{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.

But the change from \textit{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 \textit{seriatim} opinions.\textsuperscript{84} This tradition preserved until very recently in all multimember English courts.\textsuperscript{85}

\textbf{B. Early American Practices}

\textsuperscript{77} Trover, or an action for the taking of property, went from 32 to 44, trespass from 7 to 16. See \textit{id.}.
\textsuperscript{78} See 2 William Blackstone, Commentaries on the Laws of England *461.
\textsuperscript{79} Lickbarrow v Mason, 2 TR 63, 74; 100 ER 35 (1787).
\textsuperscript{80} OLDHAM, \textit{supra} note 36 at 107.
\textsuperscript{81} \textit{Id.} at 124, 163.
\textsuperscript{82} \textit{Id.} at 365, 368.
\textsuperscript{83} \textit{Id.} at 365 ("[Mansfield] strove with considerable success to absorb the customs of merchants into the common law.").
\textsuperscript{84} Until recently they delivered their opinions \textit{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, \textsc{Introduction to English Legal History} 204-11 (3d ed.) (1990).
\textsuperscript{85} The Law Lords, who serve as the Supreme Court of Great Britain in some cases, routinely delivered opinions \textit{seriatim}, with each of the five judges announcing an individual judgment with reasons. \textit{See} LOUIS BLOM-COOPER \& GAVIN DREWRY, \textsc{Final Appeal: A Study of the House of Lords in Its Judicial Capacity} 81-82, 523 (1972). This practice recently waned. \textit{See also} PATERSO, \textsc{The Law Lords} 109-10 (1982) (noting that the Lords no longer routinely deliver five separate opinions).
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. 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.

But Mansfield’s change was evident to young American courts and judges, so in some cases it was emulated. In several states, the practice of Lord Mansfield 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 was able to increase 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. Pendleton admired Mansfield and “considered him as the greatest luminary of law that any age had ever produced.” Pendleton introduced Mansfield’s practice of “making up opinions in secret & delivering them as the Oracles of the court.”

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. Roane shared Jefferson’s view about the role 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.” Politics was not yet completely comfortable with judges playing such a powerful role in policy.

Thomas Jefferson’s role in returning to seriatim opinions in Virginia courts is not surprising since he was a vocal critic of courts and the threat to democracy an aggrandizement of judicial power posed. This battle against Judge Pendleton in

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86 Friedman, supra note 20 at 112 (“To fill the gap [in American law at the beginning], English materials were used, English reports cited, English judges quoted as authority.”).


89 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, supra note 20 at 109 (“One of the cultural heroes of the American legal elite was England’s Lord Mansfield.”).

90 Id.

91 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.”).


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. The winners of the battle—Marshall and the Federalists it turns out—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 as we know it today, looks like 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. 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, “judicial perversions of the Constitution will forever be protected.” 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.”

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.”

Second, Jefferson worried that judges were lazy, aloof, or otherwise absent from decision making on important legal questions. Jefferson reasoned that requiring a judge to write out his argument for each case would provide sufficient incentive for each judge to adequately 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

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95 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.


97 Id.

98 Id.
independently and unbiased by party views and personal favor or disfavor.\(^9\)

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.”\(^10\) All Jefferson really wanted was 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.”\(^11\)

This practice of dissent by vote only was occasionally practiced in the early years of the Court\(^12\) and has been advocated by some modern commentators.\(^13\) To Jefferson, who was fearful of the aggrandizement of power in the judiciary,\(^14\) 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.\(^15\) Jefferson knew of English cases in which laws were occasionally overruled based on “dissents” in previous \textit{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.”\(^16\) 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 as \textit{Lochner v. New York}\(^17\) and \textit{Plessy v. Ferguson},\(^18\) were instrumental in changing the law many years in the future.\(^19\)


\(^11\) Letter from Thomas Jefferson to Justice William Johnson (Jun. 6, 1823), \textit{in 7 The Writings of Thomas Jefferson, supra note 99 at 293-98}.

\(^12\) For example, in \textit{Herbert v. Wren}, 11 U.S. 370 (1813), Justice Johnson dissented from the opinion of the Court, but did not state his reasons.


\(^15\) Of course dissenting opinions can be used to overturn “good” law too.

\(^16\) Letter from Thomas Jefferson to Justice William Johnson (October 27, 1822) \textit{in Thomas Jefferson: Writings, supra note 100 at 1460-63}.


\(^19\) The overruling of laissez-faire constitutionalism based on Justice Holmes’s dissent in \textit{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 \textit{Plessy} that would
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 of the case 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.  

Calder v. Bull, a classic case from the pre-Marshall Supreme Court, demonstrates this problem perfectly. 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. At least 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 . . . .” Currie goes on to conclude that “Calder illustrates the uncertainty that can arise when each Justice writes separately . . .,” and that “[t]he practice of seriatim opinions . . . weakened the force of the [Court’s] decisions . . . .”

The result of this practice was a weak and divided Court unable to assert any real authority. 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.

The weakness of the Court was demonstrated by the negative reception received by many of its early opinions. Characteristic of the hostility to the Court during this period was reaction of the Anti-Federalists to the Court’s opinion in Chisholm v Georgia. Chisholm held that a state was not immune to suit by a private citizen in 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.

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10 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.”).

11 3 U.S. 386 (1798).

12 Id. at 387 (interpreting article I, section 10).

13 Currie, supra note 11 at 44.

14 Id. at 45.

15 Id. at 55.

16 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 circuit riding that was the likely culprit. Thus Congress, state legislatures, and state courts were the dominant policy makers during this period.

17 See, e.g., Ellis, supra note 93 at 12 (“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.”).

18 Chisholm v. Georgia, 2 U.S. 419 (1793).
federal court. 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 passed the ratification requirements of Article V and became the Eleventh Amendment to the Constitution. 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. 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.”

Following Jay’s departure and the brief leadership of John Rutledge, 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. The seed, however, that would allow the growth of national power was sowed.

When Ellsworth left office, however, 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 the biggest potential “source of tyranny”.

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119 Id.
120 U.S. 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 U.S. 601 (1895), which declared the federal income tax of 1894 unconstitutional.
121 Similarly, Robert H. Harrison refused an appointment to the Court in 1789 to become chancellor of Maryland. See FRIEDMAN, supra note 20 at 133.
122 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).
123 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.
124 See WILLIAM G. BROWN, THE LIFE OF OLIVER ELLSWORTH (1905).
In the end, Federalists, who envisioned a national judiciary to settle interstate disputes, were victorious. 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 neglected and ignored by lawyers, politicians, and the public. The Court was not provided with a chambers and the job of chief justice was refused by several prominent statesmen. According to the first chief justice, John Jay, in its first ten years the Court “lacked energy, weight, and dignity.”

Everything changed with appointment of John Marshall as chief justice in 1801.

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, it 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”. 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.”

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.

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126 See id.
127 MORRIS, supra note 122 at 81. See also, Robert P. Frankel, Jr., Judicial Beginnings: The Supreme Court in the 1790s, 4 HISTORY COMPASS 1102, 1104 (2006).
The Judiciary Act doubled the number of circuit courts (from three to six) and created 16 new judgeships to fill them. 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 sat on both the Supreme Court and on the three existing circuit courts. This freed up Supreme Court judges from having to hear cases outside of the Capital, and 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. The idea was that, relieved of their duties to travel and sit on other courts, the justices could live together in Washington, enabling them to develop strong relationships and to work united on important issues, giving the Court the “energy” that Jay claimed it lacked. This reform was not effective, however, as 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 had to rely entirely on the appointment of John Marshall to be chief justice of the United States. This was not lost on Marshall. The day Federalist enemy President Jefferson was inaugurated, he 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.”

Marshall was an “ardent nationalist,” who considered himself an American before a Virginian. 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.” Despite these firm beliefs in the national government, Marshall was a reluctant political actor. Marshall entered politics following Shays’s Rebellion of 1786 only because he felt that the nation was in danger of collapse. Like the apparent danger posed by Daniel Shays, Marshall viewed Republican control of the government as dangerous to his conception of the nation. The “gloomy views” of Federalists upon Jefferson’s ascendancy were captured by John Marshall in a letter he wrote to a Congressman from Massachusetts at the time: “I feel that real Americanism is on the ebb.” 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

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130 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”).


132 JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH 9-10 (John Stokes Adams, ed., 1937).

133 SMITH, supra note 128 at 5.

134 ALBERT 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.”).

1760s was recent history for the Founders. Marshall increased the power of the Court vis-à-vis the other branches of government by dramatically altering the way in which the Court decided and announced its opinions, just as Mansfield did 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. This change was viewed as an “act of audacity” and “assumption of power.” Marshall used his leadership skills, the power of persuasion, and other tactics lost to history to convince the other five members of the Court that they should abandon the Court’s accepted practice of issuing *seriatim* opinions. Cases were now decided by private conference in which the justices achieved a compromise position. An opinion, commanding an unknown vote, was drafted by an anonymous justice and then issued under the name of “John Marshall” who signed for the Court: “For the first time the Chief Justice disregarded the custom of delivery of opinions by the Justices *seriatim*, and, instead, calmly assumed the function of announcing, himself, the views of that tribunal.” Marshall’s great discursive revolution, which would cause fundamental shifts in the power of American government, began boldly with the Supreme Court’s decision in *Talbot v. Seeman*.

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, was captured by the French and then recaptured by Talbot, the captain of the American frigate “Constitution”. Talbot sued seeking salvage rights—half of the value of the cargo—while Seeman argued that the ship was neutral and in no danger of being condemned by the French, thus there was no service rendered and therefore no salvage rights owed.

The controversy required the Court to not only 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 decision 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, argued strongly

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136 Friedeman, supra note 20 at 109.
137 See, e.g., William H. Rehnquist, supra note 34 at 40 (2001) (“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.”).
138 Beveridge, supra note 134 at 16.
139 Id.
140 5 U.S. 1 (1801).
141 This is the famous “Old Ironsides”. See http://www.ussconstitution.navy.mil/.
The Court answered both questions in the affirmative, but did so in a manner designed to please or placate everyone, thereby allowing the Court to dramatically increase its power. Marshall convinced the other justices that if 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.

The decision the Court reached shows not only the compromise that the Court needed to reach to speak with one voice but also the need to prevent a political backlash against the Court’s new power play. The Court held for Talbot (a victory for the Federalists who Marshall swore to serve), 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 created 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, while insulating the decision (and thus the new power) from critics. Accepting 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 then able to assert itself as a tri-equal branch of government. This innovation – a paradigmatic shift in legal discourse – initiated a new era of Supreme Court power. The result was a focusing of the power of the national judiciary, and consequently, the shift in the locus of power from the nonlegal to the legal, and from the states to the federal government. This evolution in the function of law was enabled through a change in the form in which law is established and delivered. In 1801, the form of legal discourse transmogrified to adapt to Law’s new role in the emerging modern world.

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142 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.

143 SMITH, supra note 128 at 293.

144 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 U.S. at 28.

145 See William J. Brennan Jr., *In Defense of Dissents*, supra note 9 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.”).
During the first ten years as chief justice, Marshall “wrote” 90 percent of the opinions for the Court.\textsuperscript{146} The only opinions that were not issued under his name during this period were in cases where Marshall tried the case below while riding circuit,\textsuperscript{147} where he had a personal interest in the case,\textsuperscript{148} or when he rarely dissented from his fellow justices.\textsuperscript{149} Marshall did himself dissent occasionally, but he generally led by example and acquiesced to the compromise position. This is demonstrated by comparing Marshall’s dissenting proclivity with his successors. As shown on Table A, in the entire history of the Court, Marshall is the chief justice least likely to dissent.

\renewcommand\arraystretch{1.5}
\begin{table}[h]
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\begin{tabular}{llrr}
\hline
Chief Justice & Dates of Service & Number of Cases & Number of Chief Justice Dissenting Opinions & Dissent Proportion (percent) \\
\hline
Marshall & 1801-1835 & 1187 & 3 & 0 \\
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 \\
\hline
\end{tabular}
\caption{Dissenting Behavior of Chief Justices}
\end{table}

Source: Westlaw SCT database

Marshall’s plan was a dramatic success. From 1801 to 1835 there were 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,\textsuperscript{150} the implied powers of the national government,\textsuperscript{151} the Court’s power over state court

\textsuperscript{146} 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, however, about four times as many opinions as are written by Chief Justice Rehnquist.

\textsuperscript{147} See, e.g., Stuart v. Laird, 5 U.S. 299 (1803).
\textsuperscript{148} See, e.g., Martin v. Hunter’s Lessee, 14 U.S. 304 (1816).
\textsuperscript{149} See, e.g., Bank of the U.S. v. Dandridge, 25 U.S. 64 (1827).
\textsuperscript{150} Marbury v. Madison, 5 U.S. 137 (1803).
\textsuperscript{151} McCulloch v. Maryland, 17 U.S. 316 (1819).
decisions implicating federal questions,\textsuperscript{152} and federal power over interstate commerce\textsuperscript{153} without much dispute, open challenge, or probability of reversal.

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.\textsuperscript{154} 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.”\textsuperscript{155} In order to counter the lack of political accountability in the Court, Jefferson urged Republican-appointed judges to revert to the practice of \textit{seriatim} opinions.\textsuperscript{156} Most famously, a series of letters between Jefferson and Johnson in 1822 in which the former urged the latter to dissent in nearly every case. This urging was somewhat successful at breaking Marshall’s grip on the Court. 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, the result was still only one dissent in about every twenty-five cases decided during the Marshall Court, the

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure1.png}
\caption{Dissenting Opinions in the Supreme Court During the Marshall Court (1801-1835)}
\end{figure}

\begin{itemize}
\item \textsuperscript{152} Martin v. Hunter’s Lessee, 14 U.S. 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).
\item \textsuperscript{153} Gibbons v. Ogden, 22 U.S. 1 (1824).
\item \textsuperscript{154} See Herbert v. Wren, 11 U.S. 370 (1813). Johnson’s first dissent was tentative: the report states that he dissented but “did not state his reasons”. \textit{Id.} at 382.
\item \textsuperscript{155} \textsc{Charles Warren, The Supreme Court in United States History} v 1, 193 (1926).
\item \textsuperscript{156} For example, many of Jefferson’s letters cited above were correspondence between Jefferson and Justice Johnson in which Jefferson extolled the virtues of traditional \textit{seriatim} opinions.
\end{itemize}
lowest percentage in the history of the Court.\footnote{See Figure 3.} 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.\footnote{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.} Although law at the time of the Marshall Court was considered less political than it is today, even at this early time, dissent was often an overtly political act. Still, Johnson—on a political mission of sorts—sided with Marshall far more often than not, signing the Opinion of the Court about 96 percent of the time.\footnote{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 Quarterly 353, 377 (1953).} According to legal historian Lawrence Friedman, Johnson was under Marshall’s “spell.”\footnote{FRIEDMAN, supra note 20 at 128.}

Although Marshall did effectively control the discourse of the Court, he did not dominate the “thinking” of the Court.\footnote{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.’”).} Instead, Marshall effectively led the Court. Marshall established and maintained an atmosphere during conferences that was conducive to compromise. After the decision was made, Marshall managed the public and political perception of the Court through the issuance of unanimous and anonymous opinions. Without disagreements, the opinions carried greater authority, and individual justices were shielded from outrage or impeachment charges.\footnote{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 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, supra note 20 at 129-130. 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.”).}

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 he disagreed with; President Lincoln famously 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;\textsuperscript{163} and numerous representatives and senators have proposed curtailing Supreme Court power through legislation\textsuperscript{164} – but none have 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 own 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.”\textsuperscript{165} 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.”\textsuperscript{166} Whether Marshall had a strategy or whether he was an “intriguer,” is a question without an easy answer. Jefferson famously accused

\textsuperscript{163} The number of Supreme Court justices was originally set at six. See Judiciary Act of 1789 [insert proper cite]. 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. See [insert cite]. Andrew Jackson got two appointments when the Court grew to nine in 1837. See [insert cite]. 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. See [insert cite]. 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. See [insert cite]. His nominees quickly made an impact, voting to reverse the Court’s recently created precedent in the \textit{Legal Tender} cases. See [insert cite]. 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. See [insert cite].

\textsuperscript{164} 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 of pretert of the invalidity thereof shall be excuse or defense for any neglect, refusal, or failure to perform any duty in regard to them.” See \textit{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 \textit{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 \textit{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 \textit{Congressional Record, 67th Con2nd at 9073, Reprint of LaFollette’s speech before the American Federation of Labor.}

\textsuperscript{165} JOHNSON, \textit{supra} note 161 at 21.

\textsuperscript{166} SMITH, \textit{supra} note 128 at 291.
Marshall of deliberately manipulating the Constitution to achieve his own ends, and some modern observers agree, viewing his early opinions as highly political.

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 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 socio-economic 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. In addition, for the first several decades of Court history, the justices all lived at a boardinghouse in Washington. This living arrangement added to the collegial environment of the Court and helped foster similar views among justices. Whatever the exact mix of reasons, Marshall was able to increase the power of the Court 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 from the Court, Marshall’s practice of unanimity dominated the Supreme Court for over 100 years (Figure 2).

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167 “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 The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 64 (M. Smith, ed. 1995).


169 JOHNSON, supra note 161 at 96-97.
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 a significant amount (especially 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 hostile to Marshall were beginning to assert their power on the Court, 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 residences in Washington, the “boardinghouse Court” was abolished. This would seriously undermine attempts to hold the Court together in unanimous blocks. In addition, many new justices who did not live in the boardinghouse renounced the brotherhood spirit that prevailed in the early Marshall Court. Evidence of the factions developing in the Court at this time is the fact that 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 term in 1835 to the beginning of John Harlan Stone’s term in 1941 saw little change in the discourse of Supreme Court opinions. Table B shows the frequency of dissenting opinions during each chief justiceship.

<table>
<thead>
<tr>
<th>Chief Justice</th>
<th>Dates of Service</th>
<th>Percent of Opinions with a Dissent</th>
</tr>
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170 Id. at 110-11.
171 Id.
172 “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, supra note 20 at 134.
Marshall 1801-1835 4
Taney 1836-1863 9
Chase 1864-1873 9
Waite 1874-1887 6
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

As shown on this table, the rate 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, had remarkable leadership skills, and was committed to unanimity above all else. Melville Fuller (1888-1910) was described as an “excellent social leader...blessed with conciliatory and diplomatic traits.” Justice Oliver Wendell Holmes characterized him as the greatest chief justice because of his ability to conduct the business of the Court without much dissent. 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.” 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.” Taft wrote that “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.” Taft imparted this tendency to his successor Charles Evans Hughes (1930-1940). Hughes discouraged dissent in order (to) shield internal divisions from public view.

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173 Marshall, like his successors, was first and foremost a lawyer. He spent a career representing business interests in Virginia, and, like most of his contemporaries of the bench and bar, was a significant property owner. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 74 (1996).
175 Id. at 178-79.
178 Walter Murphy, Elements of Judicial Strategy 61 (1964).
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.”

In terms of case characteristics, many of the cases heard by the Court during this period were rather straightforward common law or admiralty cases and were therefore less contentious politically than modern cases. Talbot was the rare admiralty case, in that it involved questions of war and peace, as well as the power of the other two branches. Most Supreme Court cases were not like Talbot. These decisions were able to garner greater consensus in part because the common law provided numerous precedents. It was not until after the Erie decision in 1938 when federal common law was abandoned that the Supreme Court would routinely handle difficult, and politically sensitive, constitutional issues. In fact, federal courts did not have general federal question jurisdiction to hear matters arising under the Constitution and laws of the United States until 1875. 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. Consider that for its first 150 years, the Court did not decide a single case involving civil liberties, as we understand them today. The first cases to uphold civil liberties were the tripartite of test-oath cases (Ex parte Milligan, Ex parte Garland, and Ex parte Cummings) decided in 1866. There would be more contentious cases during the next few decades, including the upholding of “separate but equal laws” in Plessy v. Ferguson in 1896, but the Court’s cases were largely 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 ascendency of John Harlan Stone to chief justice in 1941, the Court began a trend writing separate opinions in most cases (Figure 2). Several possibilities may explain the rise, but one stands out in historical perspective.

For one, 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 want to encourage open debate. This academic pedigree and his personality, which favored debate and confrontation, manifest themselves in his frequent dissents during his time as an associate justice. This

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180 Id. at 224.

181 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, supra note 110 at 65-193 (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, supra note 34 at 90-1.

182 Erie Railroad Co v. Tompkins, 304 U.S. 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, e.g., Lochner v. New York 198 U.S. 45 (1905), Scott v. Sanford 60 U.S. 393 (1857), and Plessy v. Ferguson 163 U.S. 537 (1896).
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 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. This leadership may be a partial explanation for the dramatic increase in dissenting opinions during this time.

It is Stone’s leadership that scholars argue caused the end of the consensus norm.\(^{183}\) For example, in the most prominent study of dissent in the political science literature, several possible explanations for the change in Supreme Court discourse were considered, but the authors concluded that, like the case of John Marshall and the rise of the unanimity norm, it was the leadership of Chief Justice Stone that was responsible for the change.\(^{184}\)

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, internal politics of the Court, and large-scale changes in Court 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 the new jurisdiction of discretion could create more dissent because only difficult and contentious cases would be granted certiorari, the authors conclude that this change was not responsible for the increase in dissents based on the fact that the rise in dissents is not seen until 1942, many years after passage of the Act.\(^{185}\) 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 in the past 100 years. The authors reject this explanation out of hand because of a difference in timing. Although they argue that a dramatic increase in cases results in less time to build consensus and construct compromises, they conclude that the timing is again all wrong—the growth in the caseload they observed was not dramatic until 1960’s, 20 years after the rise of dissent. The authors’ data confuses the rise in federal cases, which started in the 1960s, and the rise in the number of Supreme Court opinions, 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 a decrease in opinions by the time of the Stone Court (1941-45).

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\(^{184}\) Id.

\(^{185}\) Id. at 364-65.
The data suggest that the change in the number of opinions issued 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 opinions.

The authors also briefly considered this possible explanation when they analyzed the type of cases heard before 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.” This analysis ignores the fundamental change in the role of the Court post-Erie as discussed above. The Court was, by the time of Stone’s ascendancy to chief justice, becoming a constitutional court rather than a supreme common law court. Certainly the increase in contentious, political cases seen during 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.”

The unquestionable growth in dissent-prone cases was caused in part by the fact that during this time the Court issued a series of cases that extended the protections of the Bill of Rights to state law through the Fourteenth Amendment.

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186 REHNQUIST, supra note 34 at 174-75.
187 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
But like the possible causes noted above, this explanation cannot be viewed in a vacuum. The law and society was in great flux at this time. The rise of New Deal constitutionalism replaced the long history of *Lochner* constitutionalism in the first major reversal of Supreme Court jurisprudence. Holmes’s dissent in *Lochner* was vindicated and somewhat revered after it became the law of the land in 1937. Dissent proved to be a powerful weapon for change. Furthermore, this time saw the rise of legal realism as a counter to the traditional use of natural law. During the majority of Supreme Court history, the Court 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 truth behind the law began to evaporate in legal academic circles by the 1920s. Although Holmes in his Lowell Lectures on the common law in 1881 argued that many extralegal matters affected 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 known by any of 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 attitude 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. This period of history was a wellspring for change in the law and it was at the Supreme Court that the

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188 *See* Gilbert v. Minnesota, 254 U.S. 325 (1920).
reformers were able, through the use of reasoning of past dissenting opinions, to achieve 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 change the law through dissent, and Stone sought to encourage the practice.\(^{189}\) Therefore, compared to earlier chief justices who sought compromise above all else, Stone was an ineffective “leader.” His conference debates were heated and filled with controversy.\(^{190}\) In them, Stone encouraged dissent stating 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.”\(^{191}\) The “history” that Stone was referring to was the recent vindication of Holmes’s dissent in \textit{Lochner}. Stone was a new breed of lawyer in control of the law’s most powerful entity during a fundamental change in our understanding of legal reasoning. Law was now politics to a great extent, and Stone was willing to assert the Supreme Court as a political branch. Stone achieved this revolution at the Court by increasing the use of dissenting opinions just as Marshall implemented his revolution by introducing the unanimity consensus. As discussed briefly below, 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 under different circumstances. Both Marshall and Stone were about achieving a more active political 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 through the use of dissent 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 and practice of dissent was likely to have the impact that it did on the Court’s domination of controversial public policy questions. The practice here, like that for Marshall, may well have been one that seemed natural, reflected the mood of the times, and been merely a satisfaction of the preferences of those on the Court. But it is unmistakable when viewed in light of the other discursive changes, that these explanations are just the surface or “conditions of possibility”\(^{191}\) that undergird the true sociological explanation for the practice.

Unlike the quick reversion to traditional methods of opinion delivery in England and Virginia, after Stone’s brief tenure as chief justice, the unanimity rule was dead for good. This was in spite of immediate steps to reverse the trend. To replace Stone as chief

\(^{189}\) The most startling example of this power comes from the cases \textit{Minersville School District v. Gobitis}, 310 U.S. 586 (1940), and \textit{West Virginia Board of Education v. Barnette}, 319 U.S. 624 (1943). In \textit{Gobitis}, Chief Justice Stone dissented from a 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 U.S. at 601-02. In the very next term, five justices were persuaded by Stone’s dissent, and voted to overrule \textit{Gobitis} in a case again involving Jehovah’s Witnesses and the Pledge. Barnette, 319 U.S. at 642


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.192

But eight justices were already in place and were all influenced by Stone and the concept of legal realism. They were aware too that dissent 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.193 Instead of working toward compromise and consensus, the Vinson court became known as “nine scorpions in a bottle.”194

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 been able to achieve 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 John Marshall, however, the Court and the justices were certain about the role of law. Marshall merely redirected the Court toward a more active political role. In fact, it is a natural conclusion of the thesis of this paper that if Marshall were chief justice during this time, he would have been instrumental in leading the change from unanimity to the dissent norm. In both cases, it was the end result—an increased political role for the law and the Court—that was important, not the means.

In contrast to the end of the Marshall Court, during the Stone Court and later Courts, the dispute was not only about the political nature of the Court, but the broader question of the role of law in society. Achieving unanimity in this context is much more difficult and might have the opposite of the desired effect. The justices, despite somewhat similar backgrounds, were likely to have different perspectives on diverse social issues such as the rights of women, segregation, or abortion. In addition, the Court does not act in a political vacuum, and the issuance of a unanimous, per curiam opinion “deciding” a particularly thorny issue might provoke an extra-judicial or even extra-legal response.

193 See, e.g., REHNQUIST, supra note 34 at 148 (“Brought in as a mediator, Vinson largely failed in this task.”).
Justice Frankfurter portended the surge in dissents in one of his first opinions, written in 1939. Frankfurter praised the *seriatim* tradition in England, an odd thing to do in a judicial opinion, calling it a “healthy practice”, but noting that the Court’s workload prohibited them from doing it in every case.\(^{195}\) He then 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.”\(^{196}\) 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.\(^{197}\)

Frankfurter’s suggestion is notable because it previews both the constitutional showdowns to come, as well as 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 achieve a more political role by essentially mollifying the losing parties and encouraging a continuing legal discourse over social issues. Of course, achieving unanimity on contentious political issues might have been preferred by the winners *ex post*, but if the issues were too contentious and the opposition too strong to achieve any broad consensus, *ex ante* both sides of the debate would prefer the option value imbedded in a world with dissent. And, as discussed below, any consensus would in fact undermine the ability of the law to remain the locus for the determination of the truth of such questions. Dissent actually allows the Court to continue in its active role post-legal realism.

**IV. Recent history: To *seriatim* and back again?**

The last 50 years of Supreme Court history since the time of Chief Justice Stone has been characterized by a proliferation of dissents.\(^{198}\) During the first 140 years of

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\(^{196}\) Id.

\(^{197}\) See Letter from James Madison to Spencer Roane (Sept. 2, 1819), *reprinted in, The Founders’ Constitution, Article 1, Section 8, Clause 18, Document 15* (Philip B. Kurland & Ralph Lerner eds., 1987).

\(^{198}\) 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 U.S. 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 U.S. 370, 379 (1827).*
Court history dissents appeared in less than seven percent of cases; since that time there have been dissenting opinions in over half of all opinions issued by the Supreme Court.199 Chief justices from Stone to Rehnquist made no attempt to return to a Court of consensus. Chief Justice Rehnquist spoke of dissent in matter-of-fact terms200 and Justice William Brennan wrote of dissent as a “duty”.201 Therefore, the dissent norm continues to this day.202

A. The modern hybrid approach

Although opinions are still issued as an “opinion of the court” and separate opinions are merely 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.,

(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 U.S. 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 U.S. 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 U.S. 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 U.S. 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.

199 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).


202 In 1995 majority opinions represented 43 percent of all opinions. See Posner, supra note 193 at 358 (1996). See also, Figure 3, supra.
Henderson 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. 203

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

There are several reasons why dissenting opinions might be so common today. First, there is inertia and custom. Perhaps once the practice is encouraged 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 do what the norm is and has been was one of the reasons that the age of consensus lasted for almost 100 years after the death of Marshall. In a classic defense of dissents, Justice Brennan acknowledged that while a justice's “general duty is to acquiesce in the rulings of th[e] court,” he stated that it was a “duty” (and not “an egoistic act”) for each justice to dissent. 204

There are also potential political reasons. Vehement dissents signal possible political drift of the Court that threatens the stability of the country. The audience for these dissents would be other justices (in an attempt to influence them to vote differently in the future on similar cases) and/or the public, the press, advocacy groups, and thus the Congress (in an attempt to influence the confirmation process). Politically, dissents signal to Court stakeholders (i.e., the public, the press, political groups, and the Congress) that the Court is wrong or is headed down a dangerous path. In this way, dissents can be viewed as a way of marshalling groups to influence the appointment/confirmation process. After all, a series of 5-4 decisions increasing the power of states vis-à-vis the federal government can all be curtailed or overruled with a few appointments by a like-minded president.

In both cases, dissent is a tool to seize power within the Court. For example, consider the justices in the minority on one of the Court’s recent Federalism Cases. The justices can acquiesce in the ruling silently as was the tradition for the first century and a half of Court history or can alert Court stakeholders about the errors of the decision. To do the former creates a perception that the ruling is settled law and that no changes in Court personnel will change that result. To do the latter would to exactly the opposite. Dissent, especially when it creates a 5-4 decision, weakens the precedents, and thus encourages judicial or political responses. Judically, like-minded lower court judges

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204 Brennan, supra note 9 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. As shown on Figure 6, 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 were 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.
may feel emboldened by the dissents, and attempt to narrow the rulings at the circuit level. In addition, dissents communicate to justices in the future (either current or new members of the Court), providing them with logic and support for voting to reverse 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*. 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.” In addition, like a concurrence that directly limits the scope of a particular holding, a dissent allows lower courts or future coalitions of justices to carve out an exception to a majority opinion that sweeps too broadly. Brennan views these as essential components of judicial determination of the “truth.” Therefore, Brennan criticized Justice Marshall as “shut[ting] down the marketplace of ideas” when he instituted the consensus norm. This marketplace of legal ideas, Justice Brennan argues, is necessary for the creation of quality legal decisions. In this way, Justice Brennan sees the publishing of multiple opinions as analogous to legal argument within the courtroom. There is a battle of justices in legal literature, among judges, and in the forum of public opinion as there is a battle of witnesses or experts in the courtroom.

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205 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 are 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 U.S. 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.

206 Brennan, *supra* note 9 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 U.S. 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.

207 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 too 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, *supra* note 193 at 356-57 (1996). The power of ego should not be underestimated. See, e.g., Rehnquist, *supra* note 34 at 141 (commenting on Justice Franfurter’s proclivity to write separately, and noting the rise in the judicial ego). Especially when justices
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 “govermentnalization” 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 for legal power, the Court has adopted various discursive practices throughout its history depending on the circumstances of the society at the time. When Marshall took control of the Court, there existed a power vacuum at the national level. The consensus norm was a way by which the Court could achieve not only power vis-à-vis the other branches of government, but also power in the form of “govermentnalization.” 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 a greater control of judicial authority over other forms of government and more generally 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 more narrow (or broader) interpretation of an opinion. In addition, the dissents allow future justices to overrule the opinion and reverse the trend of the law. By generally limiting the authority that comes with a 9-0 opinion, dissents seem to undermine the normalizing power of the Court. Even Supreme Court justices recognize this impact of dissenting opinions. Frequently in controversial cases the Court will go out of its way to achieve a unanimous result. For example in the recent case of 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 opinion.²⁰⁸ 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.²⁰⁹ The result instead has been an acceptance that can only come when the Court seems united and apolitical.

Justice Scalia recently wrote about this important role for dissenting opinions. Scalia argued that dissenting opinions augment the prestige of individual justices while allowing “genuine” unanimity to have great force when most needed.²¹⁰ As an example of when unanimity was “most needed,” Scalia cites to Brown v Board of Education when the Supreme Court decided a contentious issue of race relations. Although in Brown and Clinton unanimity was necessary to achieve political acceptance, in the majority of cases decided today, dissent provides exactly the same result. The argument

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²⁰⁸ Clinton v. Jones, 520 U.S. 681 (1997). In fact this was a 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.


²¹⁰ See Scalia, supra note 207 at 33-44 (1994).
is that 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.

This is related to the point Chief Justice Charles Evans Hughes made about what is needed to “sustain the court in public confidence.” 211 Part of this is revealing the deliberative nature of the Court’s decision making process. Kevin Stack argues that the “Supreme Court’s legitimacy depends in part upon the Court reaching its judgments through a deliberative process.” 212 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. Stack writes that given the secrecy of the Supreme Court process for deciding cases, “dissent is necessary to expose the deliberative character of the Court’s decisionmaking.” 213

In Stack’s view, majorities, concurrences, and dissents published in the US Reports are a published version of the behind-the-scenes debate in the Supreme Court conference room; and this public airing of the deliberative process lends political legitimacy to the institution of the Court. This argument also 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 that they would have the incentive to consider and reason 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 proper incentives to consider the case properly.

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

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

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213 *Id.* at 2246.
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 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 law. This change precipitated a crisis for law and the Court.

How is it possible to address these often highly political subjects without losing the integrity of the Court? The partial answer is 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 and written in a law that they would support. 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 are subject to the force 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 verdict 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. 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.214 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 occupants of the Court. 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. Possible political reactions are impeachment, change in Court composition or jurisdiction,215 or a constitutional amendment. Congress’ power is robust here, as the Constitution grants it the “power to decide how much appellate jurisdiction, and of what sort, the Supreme Court would enjoy.”216

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214 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 THE WRITINGS OF THOMAS JEFFERSON MEMORIAL EDITION 114 (Lipscomb and Bergh, eds., 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 THE WORKS OF THOMAS JEFFERSON 1904-05 (Paul Leicester Ford ed.) (“For experience has already shown that the impeachment it has provided is not even a scarecrow . . ..”).

215 See infra note 164.

216 See FRIEDMAN, supra note 20 at 142.
For example, Robert Bork, Patrick Buchanan, and other political activists, have argued that the Congress should be able to reverse Supreme Court decisions by vote. The “legislative veto” is not as odd as it sounds, having been used in England and in colonial America. In fact, the constitutions of states such as New York, New Jersey, Connecticut, Rhode Island, and others granted the power to review supreme court decisions to the legislative, executive, or some combination thereof. The Bork/Buchanan proposal did not garner serious support, despite the outrage at many Court decisions such as Roe v. Wade, perhaps in part because of the practice of dissent leaves open the opportunity for new rules tomorrow. Dissent undermines the force of the 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 attacks like those of Bork and Buchanan.

For another example of a political attack on the Court, consider the state of Georgia’s response to the Court’s opinion in Chisholm. Although the tactic of reversing a specific opinion with a constitutional amendment has been used only twice in Supreme Court history, 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.

Because it is extremely difficult to amend the Constitution, those opposed to particular decisions may try to use the courts to achieve their ends. Take the example of abortion. After the decision in Roe the question of abortion was no more resolved than it had been prior to the Court’s opinion. However, after Roe not only was abortion lawful, but the issue of abortion was “lawyerized” or “judicialized”. The locus of the dispute was now the legal system and all its components of domination. Protests now moved from the statehouse to the Supreme Court and those opposed to abortion seized upon the dissenting opinions and the hope of a change in Court reasoning or personnel to win their battle for the “truth.” Dissent keeps potentially extrajudicial subjects such as

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217 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 if could be use destructively as well 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.”).

218 See FRIEDMAN, supra note 20 at 139-40. The final state to move away from this system was Rhode Island, which abandoned the practice by 1860. Id.

219 See also Robert F. Nagel, The High (and Mighty) Court, WALL ST. J., Jun. 30, 2000 (disparaging the current role of the Court in deciding cases such as partial-birth abortion and school prayer, and arguing that the “basic purpose of contemporary judicial activism is to maintain the institutional prestige of the federal judiciary.”).

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?

A fourth potential discursive change is afoot. 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 politically like-minded 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, the theoretical possibility of its existence, or its application to practice in the first two terms of the Roberts Court, but Roberts has stated publicly that he affirmatively 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 another, 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.221

Stone also echoes Jefferson. He writes that opinions without dissent are an “abdication” of judicial responsibility to expose judicial decision making to public 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.222

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222 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, the 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.
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.”

Although Jefferson and Professor Stone make the same arguments about the value of dissent, remember that Jefferson wanted to decrease the power of the Court, while presumably Professor Stone 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 believe 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 that is consistent with the theme of this paper, is that Roberts wants to decrease the power of the Court in American society, and his mechanism for that is same as that used by Mansfield, Marshall, and Stone, just in the opposite direction. While his predecessors used a change in opinion-delivery practices to increase the power of the Court over issues of the day, Roberts may be advocating a discursive change to decrease this power. In all cases, discourse reflects power in same way that form follows function.

V. 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 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 courts, and also to limit the kind of cases the Court hears. A

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.”).

223 Id.
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, as this paper has shown, 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.
Appendix

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Figure X: Dissenting Opinions: 1801-2006

Cases with Dissenting Opinions: 1793-2006 (not including petitions)
Readers with comments should address them to:

Professor M. Todd Henderson  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
toddh@uchicago.edu
300. Adam B. Cox, The Temporal Dimension of Voting Rights (July 2006)
301. Adam B. Cox, Designing Redistricting Institutions (July 2006)
303. Kenneth W. Dam, Legal Institutions, Legal Origins, and Governance (August 2006)
305. Douglas Lichtman, Irreparable Benefits (September 2006)
306. M. Todd Henderson, Paying CEOs in Bankruptcy: Executive Compensation when Agency Costs Are Low (September 2006)
310. David Gilo and Ariel Porat, The Unconventional Uses of Transaction Costs (October 2006)
312. Dennis W. Carlton and Randal C. Picker, Antitrust and Regulation (October 2006)
316. Ariel Porat, Offsetting Risks (November 2006)
324. Wayne Hsiung and Cass R. Sunstein, Climate Change and Animals (January 2007)
332. Cass R. Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care? (February 2007)
334. Eugene Kontorovich, Inefficient Customs in International Law (March 2007)
335. Bernard E. Harcourt, From the Asylum to the Prison: Rethinking the Incarceration Revolution. Part II: State Level Analysis (March 2007)
337. Adam B. Cox and Thomas J. Miles, Judging the Voting Rights Act (March 2007)
338. M. Todd Henderson, Deconstructing Duff & Phelps (March 2007)
341. Anup Malani, Valuing Laws as Local Amenities (June 2007)
342. David A. Weisbach, What Does Happiness Research Tell Us about Taxation? (June 2007)
344. Christopher R. Berry and Jacob E. Gersen, The Fiscal Consequences of Electoral Institutions (June 2007)
348. Eric A. Posner and Adrian Vermeule, Constitutional Showdowns (July 2007)
349. Lior Jacob Strahilevitz, Privacy versus Antidiscrimination (July 2007)
351. Lior Jacob Strahilevitz, “Don’t Try This at Home”: Posner as Political Economist (July 2007)
355. David A. Weisbach, A Welfarist Approach to Disabilities (August 2007)
358. Joseph Bankman and David A. Weisbach, Consumption Taxation Is Still Superior to Income Taxation (September 2007)
359. Dougals G. Baird and M. Todd Henderson, Other People’s Money (September 2007)
360. William Meadow and Cass R. Sunstein, Causation in Tort: General Populations vs. Individual Cases (September 2007)