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Justice William Johnson and the History of the Supreme Court Dissent

MEREDITH KOLSKY*

The conventional wisdom, generally imparted in high school history class, is that Chief Justice John Marshall’s decision in Marbury v. Madison permanently legitimated and strengthened the Supreme Court: this was his premiere victory over Thomas Jefferson and the anti-Federalists. But while most high school students know about Marshall’s coup over Jefferson, most legal scholars appear unaware that Justice William Johnson engineered a successful coup over Marshall. Justice William Johnson is arguably as important a Supreme Court figure as Marshall: While Marshall provided the Court with its initial dose of legitimacy, Justice Johnson—by championing the dissent—strengthened the Court in a more fundamental and enduring manner.

Many have argued that Justice Marshall increased the legitimacy of the Court by issuing each decision in a single opinion, seemingly endorsed by all of the Justices. Although this position may accurately describe the effect that Marshall’s actions had in the early 1800s, it does not withstand critical analysis when applied to the entire history of the Court. Unanimity may have helped to bolster the credibility of the weak, fledgling Supreme Court, but it would have been detrimental to the legitimacy of the Court if that system had prevailed in the long run.

Indeed, had Marshall’s practice of issuing solo opinions continued unchallenged throughout his entire tenure, this methodology might still be employed today. Institutions are at their most malleable when they are young; once an institution’s initial practices harden into established habits, they become ingrained into the very essence of the institution, eventually achieving the status of “the way things are done.” Had it not been challenged, Marshall’s style could have deprived generations of judges, scholars, lawyers, and citizens of the benefits provided by dissenting and concurring opinions.1

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1. The term dissent “is most commonly used to denote the explicit disagreement of one or more judges of a court with the decision passed by the majority.” BLACK’S LAW DICTIONARY 472 (6th ed. 1990). A concurrence is an opinion “in which [a judge or Justice] agrees with the conclusions or the result of another opinion filed in the case (which may be the opinion of the court or a dissenting opinion) though he states separately his views of the case or his reasons for so concurring.” Id. at 291.

This note generally uses the term dissent to refer to the practice of writing separate opinions. Although there is obviously a difference between a concurrence and a dissent, this note argues that it is better to have a system that allows for separate opinions than one that
Fortunately, President Jefferson appointed Justice William Johnson to the Supreme Court in 1804. Johnson rejected the practice of silent opposition that had been adhered to by the other Justices and put forth his disagreements with the majority for all his judicial contemporaries and successors to ponder. During the formative years of the Supreme Court, Justice Johnson broke apart Justice Marshall's monopoly on opinions. Without Justice Johnson, dissents might not exist today, and the judiciary would be weaker as a result.

This note tells the story of Justice Johnson, examining his role in the context of both historical and modern perspectives about dissent. Part I describes the history of Justice Marshall's Court and the changes Justice Johnson introduced. It argues that Justice Johnson's contributions to the development of the Supreme Court are at least as important as Justice Marshall's. Part II sets forth the arguments in favor of and against the practice of dissenting, concluding that the positive aspects of dissents far outweigh the negative aspects. Finally, Part III explores the triangular tension that existed between Thomas Jefferson, Marshall, and Johnson. This Part points out the irony in Jefferson's beliefs and actions towards the Supreme Court: Jefferson pushed Justice Johnson to dissent in hopes that this would weaken the Supreme Court, but the effect of Johnson's dissents was to strengthen the Court in an enduring manner.

I. JUSTICES MARSHALL AND JOHNSON DISSENT OVER DISSENTS

The early Supreme Court was highly politicized and was not well-respected. Chief Justice Marshall is credited for having strengthened the Court, in part through his practice of announcing a single opinion on behalf of the Court as often as possible. When Justice Johnson joined the Court, he challenged Marshall's dominance by issuing his own, separate opinions. This Part argues that Johnson's actions contributed more to the long-term prestige and strength of the Court than did any of Marshall's actions.

A. THE EARLY SUPREME COURT

Initially, neither the public nor the Justices themselves held the Supreme Court in high esteem. Before appointing John Marshall to the position of Chief Justice, President John Adams asked former Chief Justice John Jay to reassume his former position. Jay refused, having found

issues putatively unanimous opinions in a solo voice. In the interest of simplicity, the term "dissent" will generally be used for discussing separate opinions in the abstract, rather than employing more cumbersome terms like "separate opinions" or "dissents and concurrences." Whenever specific cases are discussed, however, "dissent" and "concurrence" will be used in accordance with the actual opinions.

the Court to be a fatally flawed body with which he wanted to associate no further.\(^3\)

The Court’s lack of prestige was due, at least in part, to the blatantly political behavior of the early Justices. On circuit, Justices generally opened each session with speeches politicking on behalf of Federalist candidates. Almost all judges were Federalists, and most used the bench as a platform from which to praise fellow Federalists.\(^4\) Such behavior reached its most egregious depths when, upon John Jay’s resignation as Chief Justice, former Justice John Rutledge openly campaigned for the position.\(^5\)

Early Justices found the job rather unpleasant, largely because the early Court heard very few cases. Instead, the Justices’ main duty was to “ride circuit.” The three circuit courts heard cases in panels that consisted of two Supreme Court Justices and one circuit judge.\(^6\) Justices loathed riding circuit as it involved dirty, difficult transportation and was often dangerous.\(^7\) Thus, many men with aspirations to serve in government considered the job of Supreme Court Justice to be decidedly unglamorous and unappealing. In addition, because the Court decided few cases, people did not view the Court as prestigious or powerful. Apparently, the Court was also held in low esteem within the federal government—by 1800, buildings had been erected for the executive and legislative branches, but the judiciary was forced to settle for a clerk’s office in the Capitol building.\(^8\)

When Chief Justice Oliver Ellsworth resigned in 1800, many assumed that Justice William Paterson, who was appointed to the Court by George Washington in 1793, would be named to fill the post. Paterson was well respected by the Federalists, and he had an impressive background of government service. Although he declined an offer to serve as Secretary of State in 1796, Paterson participated in the Constitutional Convention, wrote the first nine sections of the Judiciary Act of 1789, and served as a


> I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system. Independently of these considerations, the state of my health removes every doubt.

*Id.* (quoting Letter from John Jay to John Adams (Dec. 18, 1800)); see also Burton J. Hendrick, Bulwark of the Republic: A Biography of the Constitution 174-75 (1937) (describing the reluctance of American leaders to serve on the Supreme Court).

\[^4\] *Hendrick*, *supra* note 3, at 176.

\[^5\] *Id.* at 176-77.

\[^6\] *Id.*

\[^7\] *Id.* at 177. The danger arose from the frequent bad weather and resulting carriage accidents. John Marshall broke a collarbone on one such trip. *Id.*

\[^8\] *Id.* at 175-76.
Senator from New Jersey. John Marshall himself, then Secretary of State, even encouraged Adams to elevate Paterson.

Nevertheless, President Adams refused to name Paterson Chief Justice because of Paterson’s close relationship with Alexander Hamilton, whom Adams disliked. When John Marshall was nominated for the position of Chief Justice instead, disappointed Federalists delayed his confirmation in the hope that Adams would change his mind in favor of Paterson. One of Paterson’s indignant friends explained to Paterson that “the eyes of all parties had been turned upon you, whose pretensions were in every respect the best, and who would have been most acceptable to the country... [Adams] was inflexible, ... he would never nominate you.”

Indeed, Adams would never nominate Paterson. Despite resistance from some Federalists, Adams refused to withdraw the nomination, and Marshall was eventually confirmed. When Marshall assumed the position of Chief Justice in 1801, he immediately adopted a blatantly political stance. Before leaving for his inauguration, he wrote a letter to Charles Pinckney indicating his intention to use his new position to promote the Federalists’ policies. “Of the importance of the judiciary at all times but more especially the present I am very fully impressed and I shall endeavor in the new office to which I am called not to disappoint my friends.”

Prior to the ascension of Chief Justice Marshall, the Supreme Court issued its opinions seriatim, following the practice of the King’s Bench.

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11. Kraus, supra note 9, at 172.
12. Id.
15. American colonies had courts of first impression, but the ultimate appeal was to the Privy Council in England. Thus, the Council performed the role presently exercised by the U.S. Supreme Court. Privy Council decisions were announced as the decision of the body, without any registering of separate opinions. Karl M. Zobell, Division of Opinion in the Supreme Court: A History of Judicial Disintegration, 44 CORNELL L.Q. 186, 188 (1959). An Order of the Privy Council issued in 1627 decreed that “[w]hen the business is to be carried according to the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went.” Id. The Privy Council had a good reason for issuing opinions with the appearance of unanimity: its “decisions” were actually only advice to the Crown. The Council’s decrees and writs held no weight until they were approved and confirmed by the King. Because it would not have been logical for the King to speak with two voices at once, the Council always spoke as one. Id.
Along with the House of Lords, the Privy Council was the ultimate appellate tribunal for cases arising in the English courts and those of its possessions. Id. at 190. Nonetheless, most appeals terminated in one of the Common Law Courts, which had subordinate appellate jurisdiction. Id. The Common Law Courts—the Exchequer Chamber, the Court of Common
In the first case in which a full opinion was published,\textit{ Georgia v. Brailsfors},\textsuperscript{16} each Justice followed the seriatim practice and announced his independent judgment. In fact, the first opinion in \textit{Brailsfors} was that of Justice Thomas Johnson (no relation to Justice William Johnson), who disagreed with the majority.\textsuperscript{18} One scholar notes that "[b]ecause early American practice followed the English custom, allowing each justice to author his own opinion, early procedure was especially conducive to the articulation of analytical differences."\textsuperscript{19} Thus, the first Justices on the Supreme Court had little compunction about disagreeing with each other.

Even before the Judiciary Act of 1789,\textsuperscript{20} American judges were known to dissent and to recognize the value of dissenting opinions. In \textit{Purviance v. Angus},\textsuperscript{21} an early decision of the Pennsylvania Supreme Court, Justice Rush wrote, "[h]owever disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment."\textsuperscript{22}

\textbf{B. JOHN MARSHALL AND THE END OF THE SERIATIM PRACTICE}

When Justice Marshall joined the Court, he rejected the viewpoint, held by Justice Rush and others, that disagreement on the Court could be valuable. He discarded the practice of announcing opinions seriatim in favor of the system of announcing the judgment of the Court in a single opinion.\textsuperscript{23} Through this change, many argue, Marshall was able to present the Court as a strong, unified body.\textsuperscript{24} Indeed, for reasons that were politically motivated, Marshall specifically intended to strengthen the

\begin{itemize}
\item Pleas, and the King's Bench—all issued opinions seriatim in the seventeenth and eighteenth centuries. \textit{Id.} at 190-91. Like the King's Bench, the Supreme Court issued its opinions seriatim. Unlike the King's Bench, however, Supreme Court opinions were announced in inverse order of seniority. \textit{Id.} at 192.\textsuperscript{16}
\item \textit{Id.} Prior to 1792 there had been no reported cases in which a full opinion had been published. Cases either had not been reported or had been announced as judgments without full, or any, explanation. \textit{Id.}\textsuperscript{17}
\item 2 U.S. (2 Dall.) 402 (1792).\textsuperscript{18}
\item ZoBell, \textit{supra} note 15, at 192 n.37.\textsuperscript{19}
\item DONALD E. LIVELY, FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT at xxii (1992).\textsuperscript{20}
\item The Judiciary Act of 1789 created the federal court system. Act of Sept. 24, 1789, ch.20, 1 Stat. 73.\textsuperscript{21}
\item 1 DalI. 186 (1786).\textsuperscript{22}
\item \textit{Id.} at 194.\textsuperscript{23}
\item 3 BEVERIDGE, \textit{supra} note 2, at 16 (1919). By issuing the Court's decisions through a sole opinion, Marshall was able to put forth the appearance of unanimity amongst the Justices, even if there had been substantial disagreement. Thus for cases where a Justice, usually Marshall, issued a single opinion for the Court, there is no way to tell, from the opinion, whether the decision was actually unanimous or badly splintered.\textsuperscript{24}
\item See, e.g., 3 \textit{id.} (stating that, by providing only one opinion per case, Marshall impressed the country with the Court's unity).
\end{itemize}
By delivering the opinion of the Court as if it were unified, Marshall "intended that the words he wrote should bear the imprimatur of the Supreme Court of the United States," not merely "the views of John Marshall, Federalist of Virginia." Rather, he wanted the Supreme Court itself to put its stamp of approval on the Federalist viewpoint.

Marshall not only pressed for an outward display of unanimity, but he also wanted the sole voice of the Court to reflect his own vision. Marshall wrote for the Court in almost one-half of the nearly one thousand opinions decided under his tenure. "Thus he sought not only to avoid dissent but also, by the trend of his argument and choice of his language, to foreclose the expression of differences with the reasoning he employed to lead to an agreed-upon result, a syndrome of concurring opinions."

During Marshall's tenure, 1801-1835, the Court issued 1244 opinions and only seventy dissents. Marshall began speaking for the Court in his first case as Chief Justice, *Talbot v. Seeman*. Between 1801 and 1805, Marshall issued the sole opinion for the Court in twenty-four of twenty-six decisions; he was absent and thus did not participate in the other two. The only breakdown in unanimity came in 1804 when Justice Chase issued a one line concurrence in *Head & Armory v. Providence Insurance Co*. The first Justice on the Marshall Court to issue a dissent was Justice Paterson, who dissented once in 1806, the year he died.

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25. Percival Jackson notes that [it is undeniable that Marshall appreciated that seriatim opinions bred dissent and uncertainty, and that unity of opinion was essential if the Court, lacking other recourse, was to corral and gain strength from popular support. It is undeniable that in the first case in which he participated and which he decided, following his accession to the bench, Marshall undertook to put the English seriatim practice, which had theretofore been followed by the Court, at rest, by writing for the Court.]

28. Id.
29. 5 U.S. (1 Cranch) 1 (1801).
32. Simms & Wise v. Slacum, 7 U.S. (3 Cranch) 300, 309-11 (1806). It is ironic that Paterson was the first to write a dissent in response to one of Marshall's opinions because politically Marshall and Paterson were quite similar. Paterson was a staunch Federalist—James Madison even referred to him as "a federalist of federalists." Kraus, *supra* note 9, at 166. Indeed, Paterson foreshadowed Marshall's opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in a 1795 circuit case, Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.)
When Marshall did not participate, both early and late in his tenure, the other Justices frequently used the seriatim system, "thus breaking the silence the Chief Justice sought to impose upon them."33 However, when Marshall did participate, which was most of the time, the Associate Justices "seem to have had hardly any other function than to add the weight of their silent concurrence to the decision of their great chief."34

Several commentators argue that Marshall strengthened the Supreme Court by abandoning the practice of issuing seriatim opinions. Donald Lively, for example, argues that by insisting that the Court speak through a single opinion, Marshall "promoted analytical common ground and consensuality. The procedural change enabled the Court to speak in a single voice and significantly enhanced its institutional influence and status. So committed was Marshall to establishing unanimity that he reportedly changed his own vote on occasion to achieve it."35 Marshall biographer Albert Bever-
idge notes that Marshall’s abandonment of seriatim opinions was “one of those acts of audacity that later marked the assumptions of power which rendered his career historic. . . . Thus Marshall took the first step in impressing the country with the unity of the highest Court of the Nation.”

Many commentators echo Beveridge’s high praise for Marshall’s discarding of the seriatim system, but others view Marshall’s actions more critically. John Shirley found Marshall to be repressive. Regarding Marshall’s practice of issuing the sole opinion for the Court, Shirley wrote, “[t]his vicious practice occasioned great dissatisfaction.”

Marshall recognized that his practice of speaking for the Court was controversial. Thus, he wrote a letter under a pen name that was published by the Union of Philadelphia, a Federalist newspaper. The letter both explained and defended Marshall’s opinion writing method and practice.

The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.

While clearly supportive of the practice of issuing unified opinions for the Court, Marshall bristled at the suggestion that the Associate Justices were prevented from voicing their separate opinions, pointing to Justice Story’s dissent in The Nereide. In any event, by the time Marshall wrote this letter, the period of unanimity had already begun to wane. Justice William Johnson, among others, had issued a number of dissents. Still, Marshall continued to speak for the Court in the vast majority of cases and thus apparently felt obliged to defend the practice.

C. JUSTICE WILLIAM JOHNSON JOINS THE BENCH

By the time Thomas Jefferson appointed William Johnson to the Supreme Court in 1804, Chief Justice Marshall had largely succeeded in concealing any hint of disagreement behind a facade of unity. Johnson would serve as an Associate Justice for thirty years and emerged as the principal dissenter on the Marshall Court. As the first Jeffersonian

36. 3 BEVERIDGE, supra note 2, at 15-16.
37. See, e.g., LIVELY, supra note 19, at xxiv-xxv (suggesting that, at the time, the practice of unanimous opinions was quite sensible).
38. A.J. Levin, Mr. Justice William Johnson, Creative Dissenter, 43 MICH. L. REV. 497, 521 (1944) (quoting JOHN M. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES 309-10 (1879)).
39. 4 BEVERIDGE, supra note 2, at 320 (1919).
41. ZoBell, supra note 15, at 197. Justice Johnson began serving on the Supreme Court in February of 1805. Id.
Republican to sit on a theretofore all Federalist bench, it is not surprising
that Johnson often disagreed with his colleagues on the Court. It is
surprising, however, and indeed admirable, that Johnson had the courage
and independence to voice his opinions, though he often found himself the
lone dissenting voice. Nearly one-third of Johnson’s opinions were dissents
or concurrences. In the period from 1805 to 1833, Johnson wrote nearly
half of the dissents and concurrences issued by the Court. But despite his
important role as the first regular dissenter, Justice Johnson is often
overlooked in history books, biographies, and Supreme Court opinions.

Various experiences and forces led Justice Johnson to assume the role
of the first great dissenter on the Supreme Court. Johnson embarked upon
his political career at a young age. He began serving in the South Carolina
House of Representatives at age twenty-two and became the speaker of
that body four years later. When he was twenty-eight, Johnson was elected
to be a state judge. At the age of thirty-two, Johnson was named to the
Supreme Court of the United States. Johnson’s tenure in public office
had “aroused in [him] a suspicion of dogma and a conviction of the
necessity of practical wisdom and discretion in those who govern.” Conse-
quently, Johnson’s political philosophy and life experiences naturally led
him to question the wisdom of many of Marshall’s opinions. Whereas
Johnson favored a pragmatic approach, Marshall sought to advance a
frankly political, almost dogmatic agenda.

In accordance with South Carolina practice, while on the Common Pleas
Court, Johnson also sat as an associate justice on the State’s Constitutional
Court for over three years. When Johnson became a Justice on the U.S.
Supreme Court, he assumed that he would continue the practice of issuing
seriatim opinions that he had followed while sitting on the South Carolina
Constitutional Court. In fact, he issued a substantial concurrence in one

42. Id.
43. Compare ZoBell, supra note 15, at 197 (stating that Johnson wrote 169 opinions, 31
dissents, and 21 concurrences) with Donald G. Morgan, Mr. Justice William Johnson and the
Constitution, 57 HARV. L. REV. 328, 332 (1944) (counting 33 dissenting and 24 concurring
opinions for Johnson). Under either count, Johnson wrote nearly half of the Court’s
dissents, which numbered 70, and its concurrences, which totaled 59.
44. Levin, supra note 38, at 500-03. The Library of Congress does not have any of Justice
Johnson’s papers. Instead, it has one manila folder that contains an explanation that Donald
Morgan is Justice Johnson’s only biographer and that most of Morgan’s sources can be found
in various locales in Johnson’s home state of South Carolina. In addition to the two Morgan
works cited in this note, see supra notes 33 and 43, and the law review article by A.J. Levin,
see supra note 38, I am not aware of any other scholarship focusing solely, or even primarily,
on Justice Johnson.
46. Id.
47. Levin, supra note 38, at 510.
Brennan article is the text of the Third Annual Matthew O. Tobriner Memorial Lecture,
which Justice Brennan delivered at Hastings College of Law on Nov. 18, 1985.
of his first opinions, only to be severely rebuked by the other Justices.\textsuperscript{49}

President Jefferson, the man responsible for nominating Johnson to the Court, also influenced Johnson’s decision to break with tradition. Jefferson encouraged Johnson to oppose Marshall’s practice of issuing a single opinion on behalf of the entire Court.

The Judges holding their offices for life are under two responsibilities only. 1. Impeachment. 2. Individual reputation. But this practice [of issuing a single opinion] compleatly withdraws them from both. For nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself. Be the opinion therefore ever so impeachable, having been done in the dark it can be proved on no one. As to the 2d guarantee, personal reputation, it is shielded compleatly. The practice is certainly convenient for the lazy, the modest & the incompetent.\textsuperscript{50}

In Johnson’s reply to Jefferson, he confirmed Jefferson’s understanding of how the Court generally operated. He also related his experience in the case of \textit{Huidekoper’s Lessee v. Douglass},\textsuperscript{51} in which he issued the concur-

Some case soon occurred in which I differed from my Brethren, and I thought it a thing of Course to deliver my Opinion. But, during the rest of the Session I heard nothing but Lectures on the Indecency of Judges cutting at each other, and the Loss of Reputation which the Virginia appellate Court had sustained by pursuing such a Course.\textsuperscript{52}

\begin{thebibliography}{9}
\bibitem{49} \textit{Id.} The case was \textit{Huidekoper’s Lessee v. Douglass}, 7 U.S. (3 Cranch) 1, 72-73 (1805).

\bibitem{50} Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), \textit{microformed on} The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53, \textit{printed in} 12 \textit{THE WORKS OF THOMAS JEFFERSON} 246, 249-50 (Paul L. Ford ed., 1905). Interestingly, Jefferson appears to have had imperfect information regarding the Court’s decisions and decisionmaking process. In his letter to Johnson he wrote:

\begin{quote}
At what time the seriatim opinions ceased in the [S]upreme Court of the U.S., I am not informed. . . . I understand from others it is now the habit of the court, [and] I suppose it true from the cases sometimes reported in the newspapers . . . wherein I observe that the opinions were uniformly prepared in private.
\end{quote}

\textit{Id.} at 249. That Jefferson did not have a definitive understanding of the Court’s process of delivering opinions suggests that perhaps Marshall did not, as is commonly assumed, strengthen the Court through his practice of announcing solo opinions. At least, he probably failed to strengthen the Court in the eyes of the public. If Jefferson lacked knowledge regarding the process, it is unlikely that ordinary citizens understood it either.

\bibitem{51} 7 U.S. (3 Cranch) 1, 72-73 (1805).

\bibitem{52} Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), \textit{microformed on} The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53. These lectures from fellow Justices did not deter Johnson. Unlike later scholars who believed that Marshall was able to control the Court because his colleagues did not realize he was doing so, see, e.g., 1 \textit{BEVERIDGE, supra} note 2, at 89, Johnson believed that the nature and character of the Justices encouraged and enabled Marshall to achieve this degree of
Jefferson continued to push Johnson to announce his own opinions separately. Johnson agreed that, at least for matters of importance, he would endeavor to write separately. "On the subject of seriatim opinions in the Supreme Court I have thought much, and have come to the resolution to adopt your suggestion on all subjects of general interest; particularly constitutional questions. On minor subjects it is of little public importance." Johnson's stance should not be viewed as a mere capitulation to Jefferson's desires; Johnson had independently concluded that separate opinions were appropriate. By the time these letters were exchanged, Johnson had already contributed half of all of the concurring and dissenting opinions announced during his tenure on the Court.

Although Johnson happened to agree with Jefferson on this issue, Johnson was renowned for his intellectual independence. A tribute upon his death stated that Johnson "could not be swerved from his purpose either by the hope of reward or the dread of censure." It has even been said that Justice Johnson was appointed to thwart Marshall's nationalism, yet Johnson ultimately ended up more nationalist than even Marshall. Nonetheless, Jefferson's words appear to have strengthened Johnson's already firm resolve. In the Term following Jefferson's first letter concerning seriatim opinions, Johnson delivered four solo opinions (two concurring and two dissenting), more than he had issued in the previous four years.

domination. "Cushing was incompetent, Chase would not be got to think or write—Paterson was a slow man and willingly declined the trouble, and the other two [Marshall and Washington] are commonly estimated as one Judge." Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), supra. Johnson's low opinion of Paterson was not shared by the Federalists. See supra notes 9-12 and accompanying text.

53. See Letter from Thomas Jefferson to William Johnson (Mar. 4, 1823), microformed on The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53, printed in 12 THE WORKS OF THOMAS JEFFERSON, supra note 50, at 277, 279-80. In addition to his letters to Justice Johnson, Jefferson also tried to convince James Madison that the Court should return to issuing opinions seriatim. Madison agreed in principle, but worried that it would be difficult to get the Court to change its ways. Letter from James Madison to Thomas Jefferson (Jan. 15, 1823), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 291-92 (1884).

54. Letter from William Johnson to Thomas Jefferson (Apr. 11, 1823), microformed on The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53, printed in part in MORGAN, supra note 33, at 184. Justice Brennan similarly advocates refraining from dissenting on issues of lesser importance:

Dissent for its own sake has no value, and can threaten the collegiality of the bench. However, where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. This is why, when I dissent, I always say why I am doing so, Simply to say, "I dissent," I will not do.

Brennan, supra note 48, at 435.

55. MORGAN, supra note 33, at 178-79.
57. See Levin, supra note 38, at 501.
58. MORGAN, supra note 33, at 185 n.76.
Johnson believed it was his duty to make his individual views and reasoning known by issuing separate opinions. In *Marine Insurance Co. v. Young*, Johnson justified his issuance of a separate opinion as necessary "to avoid having an ambiguous decision hereafter imputed to me, or an opinion which I would not wish to be understood to have given." This rationale is articulated in Johnson's concurrence in *Gibbons v. Ogden*.

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

Indeed, Johnson held strong, independent views on the role of law in society and history that complemented his desire to issue separate opinions when appropriate. A.J. Levin notes that "Johnson felt himself a protagonist of a great movement in history, and he was intentionally impatient with obscurities, legal or otherwise, which would unduly suppress the underlying dynamic forces which were seeking expression." Donald Morgan, Johnson's biographer, explains that "[t]he central concept in Mr. Justice Johnson's constitutional philosophy was positive law... Positive law derived its authority from the representative nature of the bodies which enacted it.

Despite generally favorable treatment by scholars, Johnson was not well respected by some of his colleagues on the Court. Justice Story found him to be "peculiar," and Marshall "gloated over his discomfiture." Fellow Southerners considered him the enemy. It is no wonder, then, that Justice Johnson made some of his fellow Justices uncomfortable when he single-handedly changed the Court's long-entrenched method of operation and "restored the ancient habit of seriatim opinions, wherever there was any marked difference of judgment." Justice Marshall in particular had reason to dislike Johnson—Johnson's dissents provided "a running

59. 9 U.S. (5 Cranch) 187 (1809).
60. Id. at 191 (Johnson, J., dissenting).
61. 22 U.S. (9 Wheat.) 222 (1824).
62. Id. at 223 (Johnson, J., concurring).
63. Levin, *supra* note 38, at 532-33. The movement referred to here is the struggle in early America to replace superstition and fear with a new era of scientific and realistic thinking. *Id.* at 530.
67. *Id.*
68. *Id.* at 520 (quoting HAMPTON L. CARSON, 1 THE HISTORY OF THE SUPREME COURT 229 (1892)).
commentary on the wisdom of the majority's pronouncements . . . elucidating the points on which the Court split, and thereby shed[ding] light on Marshall's true convictions.\textsuperscript{69}

Justice Johnson's independence blazed the trail for future dissenters. In a number of instances, Justices appointed in the 1820s joined Johnson in dissenting and even reviving the practice of issuing separate opinions.\textsuperscript{70} After Johnson established the practice of issuing separate dissents, even Chief Justice Marshall issued an occasional dissent. Ultimately, Marshall filed nine dissents and one separate concurrence.\textsuperscript{71}

D. THE "REAL" ERA OF DISSERT?

Despite Johnson's large number of separate opinions, John Ganoe has argued that the real era of dissent began when President Jackson appointed Roger Taney to serve as Chief Justice.\textsuperscript{72} Apparently unimpressed by Justice Johnson's influence on the Court, Ganoe suggests that Marshall and Story were the masterful characters who managed to completely dominate the other Justices.\textsuperscript{73}

Ganoe's position is flawed in two respects. First, he fails to note that Justice William Johnson had a crucial impact on the Court. Johnson's early dissents laid the groundwork for Taney and later Justices to disagree with the majority. Had Johnson not initiated the practice of writing separately, the Court could have gone without a meaningful dissent during its first thirty-five years. It seems unlikely that Taney, or any Justice, could have begun dissenting after such a long, unbroken history of unanimity. Such a dramatic change would surely have been met with a great deal of scrutiny and disapprobation. Justice Johnson made it possible for later

\textsuperscript{69} Morgan, supra note 43, at 329.


\textsuperscript{71} ZoBell, supra note 15, at 196. In issuing the lone dissent in Bank of the United States v. Dandridge Marshall wrote:

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


\textsuperscript{72} John T. Ganoe, The Passing of the Old Dissent, 21 Or. L. Rev. 285, 286 (1942).

\textsuperscript{73} Id.
Justices to dissent by establishing, at an opportune time, the propriety of the dissent itself.

Second, Ganoe refers to Justices as "masterful" merely because they were able to "completely dominate" their colleagues. But it is disturbing that a jurist should be measured according to his capacity to dominate his colleagues. A masterful Justice is one who knows the law and considers precedent, the views of the other Justices, and the moral and policy implications of the case before issuing a well-reasoned, clearly written opinion. It is, of course, commendable if a Justice is so clear in his thought and so convincing in his presentation of the law that other Justices generally agree with him. However, it should be lamented rather than applauded if a Justice gets another to agree with him through domination rather than reasoned persuasion.

II. THE CASE FOR DISSERTS

Dissents serve a number of positive functions. They improve judicial decisions, guide future interpretation of the law, and give substantive expression to the First Amendment ideal of free speech for disfavored groups and minorities.

A. IMPROVING JUDICIAL DECISIONS

Dissents are a positive and necessary component of the American judicial system. There is almost unanimous agreement among judges and scholars that dissents serve some valuable purposes. Indeed, the dissent has been touted as “the secret of the success of the court in the American system, permitting the factors working toward both stability and evolution to operate in a nicely balanced system.” The advantages of dissents are manifold.

First, and most important, dissents improve the substance of judicial

74. Id.

75. Sometimes Justices have joined the opinions of another Justice with such frequency that they have been accused of not being independent thinkers. For example, Justice Clarence Thomas is widely criticized for generally agreeing with Justice Antonin Scalia. During his first Term on the Court, Justice Thomas agreed with Justice Scalia in 79% of nonunanimous cases, the highest rate of agreement on the Court. Christopher E. Smith & Thomas R. Hensley, Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush, 57 ALB. L. REV. 1111, 1121 (1994). Justice Blackmun was similarly criticized as being Justice Burger’s “Minnesota Twin” in the early years of his tenure on the Court. Id. at 1127.

76. The scope of this note is limited to a discussion of Supreme Court dissents. This is not intended as an indication that lower court dissents are unimportant. However, as long as there is a higher court of appeal, it is less critical for a lower court opinion to “get it right,” as it can easily be reversed. Supreme Court opinions are far more enduring because only the Supreme Court can reverse itself, and the doctrine of stare decisis makes this an infrequent occurrence.

77. Ganoe, supra note 72, at 295.
decisions in two distinct ways. Initially, dissents may serve as corrective devices by pointing out flaws in the majority's legal analysis that can be seized upon by litigants and courts in subsequent cases to correct these jurisprudential errors. Second, by forcing the majority to confront and consider alternative outcomes or analyses, a dissent improves the actual outcome and reasoning of the decision at hand.

1. Dissents as Corrective Devices

A dissent can be used as a “corrective device” in several ways. Most often it can be used to argue for limits on a potentially overbroad majority opinion or to give litigants and lower courts guidance on how to distinguish the majority decision. Justice Brennan has argued that

[D]issents prevent th[e] process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to re-think the result.

Similarly, Charles Evans Hughes is often quoted for his statement that

Dissenting opinions enable a judge to express his individuality. . . . A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

Thus, judges and Justices may use dissenting opinions as a means of debating with, influencing, and persuading their colleagues to change their votes. As a matter of principle, Justice Brandeis regularly circulated drafts of his dissents in the hope of swaying votes or altering the majority opinion. He would often refrain from publishing his dissents along with the final decision, however, if he believed there would only be minimal damage caused by the majority opinion.

78. Brennan, supra note 48, at 430.
79. Brennan used dissent at times to suggest to the litigants that their claims might be more successful if brought in state courts. Id.
80. Id. at 436.
81. Hughes, supra note 71, at 68.
82. Edward McGlynn Gaffney, Jr., The Importance of Dissent and the Imperative of Judicial Civility, 28 VAL. U. L. REV. 583, 608-09 (1994); see also Ruth Bader Ginsburg, Remarks on Writing Separately, 65 WASH. L. REV. 133, 142-43 (1990) (noting that Brandeis sometimes won changes in votes and alterations in majority opinions by circulating dissents). Judge Jerome Frank heartily approved of Justice Brandeis’s restraint in publishing dissents, writing that “[t]o have discarded some of [his separate] opinions is a supreme example of sacrifice to strength and consistency of the Court. And he has his reward: his shots are all the harder because he chose his ground.” John P. Frank, Book Review, 10 J. LEGAL EDUC. 401, 404 (1958) (reviewing Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (1957)).
2. Dissent and the Marketplace of Ideas

A system without dissent provides little incentive for the majority to choose the best words or the clearest analysis. Just as competition in economic markets generally results in better products than those produced by a monopolist with a captive market, better judicial opinions will result when Justices know their interpretations will be compared with those of any Justice who differs. If no one can concur or dissent, however, the majority has a monopoly over the opinion and thus does not have to concern itself with competing viewpoints that may reveal defects in the Court's result or analysis. The Supreme Court, interpreter of the Constitution, is perhaps the most vital forum in which to promote such a marketplace of ideas.

Justice Brennan argues that

[alt the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side. In this sense, this function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court—both for majority and dissent—were the product of a judicial town meeting.]

Without dissents, even in cases in which the Justices reach the "right" result, they might express the wrong reason for doing so. In other words, even if all of the Justices agreed on the outcome, they might not all agree on the correct rationale. If only one opinion were issued, once a majority of Justices reached agreement, they would be likely to issue their view without paying much heed to the protests of the minority Justices. As a result, the majority might not be as careful about its reasoning.

By contrast, in a system with separate opinions, the majority knows that the rationale of any concurrences or dissents will appear alongside its own. Because the different viewpoints are published side-by-side, they compete with each other to win over future judges and scholars. Not only will future readers compare the logic contained in each separate opinion, they will

83. Brennan, supra note 48, at 430.
84. Majority opinions are obviously also important for this same reason. However, it is still necessary to have dissents. Without the option of dissenting, the opinion writer has less incentive to determine the best and clearest logic for the decision. The existence of dissents provides an important check on the opinion writer; the knowledge that others have the ability to disagree encourages the judge to pay more careful attention to his or her precise wording and reasoning. This phenomenon resembles market competition as opposed to monopoly. When there is only one supplier of a good, the supplier has little incentive to expend the energy and expense to determine the exact desires of the captive consumer. However, when the supplier knows that others may enter the market at any time, she will try to protect her position by doing the best possible job of fulfilling consumers' desires.
also note how many Justices signed onto each viewpoint. The majority will thus have a greater incentive to express its views with the utmost precision and accuracy and to try to get as many votes for its position as possible. To maximize the potential that its decision will endure, the majority will examine the dissent for points that the majority opinion must either refute or incorporate into its analysis.

B. GUIDING FUTURE INTERPRETATION OF THE LAW

An additional benefit of separate opinions stems from their ability to guide jurists when previous decisions prove unworkable or undesirable. In a system that permits separate opinions, a court seeking to remedy a discredited legal doctrine will benefit from consideration of the conclusions and rationales suggested by dissenting or concurring opinions. By contrast, a legal regime that discourages explication of alternative opinions leaves the court without any guidance or direction.

Allowing for dissent also provides citizens, judges, and scholars with a better indication of the scope and strength of the Court's mandate. The dissent focuses the majority opinion and requires a clear delineation of the breadth of the Court's decision. Additionally, knowing the number of Justices who dissent from an opinion and how they disagree will inform people's views about the legitimacy and force of the opinion. For example, not only will a 9-0 opinion be more accepted as settled than a 5-4 one, but the 9-0 opinion also gains additional legitimacy because we know that any of the Justices could have dissented, but none elected to do so. In contrast, in a system without dissent, there is no way of measuring how settled a decision is. It could have been a plurality, 5-4, 9-0, or some other distribution of views. Thus, dissents provide a more accurate indicator of

85. This note assumes that law is indeterminate. That is to say that while some outcomes will be more or less clearly dictated by the language of the Constitution, the correct answers are not "out there" waiting to be discovered.

86. The important role of dissents and the strength of precedent can be seen in the manner in which both the plurality and the dissenters in Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992), discussed and utilized Roe v. Wade, 410 U.S. 113 (1973). The plurality argued that there had been no change in the original understanding of both the factual and constitutional principles underlying the Roe decision and that the subsequent cases had firmly upheld Roe's central doctrine. Casey, 112 S. Ct. at 2803-12. Thus, the plurality argued, it was appropriate to apply the principle of stare decisis to Roe. The plurality distinguished Roe from both Plessy v. Ferguson, 163 U.S. 537 (1896), and Lochner v. New York, 198 U.S. 45 (1908), two cases that were later overruled by the Supreme Court because their legal and factual bases had changed. Id. at 2812-16.

In contrast, the dissent argued that Roe should be treated exactly as Lochner and Plessy had been; as an erroneous decision that was not deserving of deference. The dissent emphasized the controversy that has always surrounded Roe, offering the debate as evidence that the decision was never particularly well grounded in accepted constitutional doctrine. Id. at 2855-67 (Rehnquist, J., dissenting). Ultimately, the dissenters and the plurality recognized that the stronger the initial support for Roe appeared to be, the harder it would be to argue against applying stare decisis.
where the Justices stand on an issue, a better measure of the security of the decision, and an improved understanding of the different ways of interpreting a given legal issue.

C. SUBSTANTIALLY EXPRESSING FIRST AMENDMENT IDEALS THROUGH DISSENTS

Dissents serve as an important institutional reminder about the value of free speech. Among the most fundamental concerns of the First Amendment is protecting the right of minority voices to be heard. In light of the First Amendment, it would be anomalous if the Supreme Court, as interpreter of all constitutional rights, refused to permit its own members to voice their dissenting views. Indeed, the practice of dissent in Supreme Court opinions boldly demonstrates that First Amendment rights are not merely formal, but are substantively honored both by and within the highest court of our judicial system.

Charles Evan Hughes has suggested that the less mundane a matter, the greater the likelihood of differences in judicial opinion. “Dissents in important controversies may be expected because they are cases in which it would be difficult for any body of lawyers freely selected to reach an accord.” This statement could be interpreted to suggest merely that some decisions are so complex that it becomes unlikely that all the Justices will reach the correct solution. However, Hughes appears to be conveying more than this: his statement suggests a belief that law is not determinate.

If one believes there is not one correct answer to a legal controversy waiting to be discovered, dissents take on even greater significance. Rather

87. Justice Brennan cites Brown v. Board of Education, 347 U.S. 483 (1954), and Cooper v. Aaron, 358 U.S. 1 (1958), as examples of cases where unanimity underscored the seriousness of the Supreme Court decision. Brennan, supra note 48, at 432. Both cases involved contentious legal issues regarding race. Cooper v. Aaron, although signed by all nine Justices, still had a separate opinion. Justice Frankfurter insisted on circulating a concurring opinion prior to the formal announcement of the opinion of the Court. Notwithstanding the longstanding custom of not announcing the Court’s decision before all views had been aired, Frankfurter felt it necessary to offer a personal explanation to his friends in Southern states who might be disturbed by the decision. EARL WARREN, THE MEMOIRS OF EARL WARREN 298-99 (1977), cited in Gaffney, supra note 82, at 617.

88. See David Cole, Agon at Agora: Creative Misreadings in the First Amendment Tradition, 95 YALE L.J. 857, 860 (1986) (arguing that “[t]he First Amendment suggests why we accord dissenting rhetoric such an important place in legal decision-making.”).

89. In a literal sense, judges and Justices probably do not enjoy a constitutional right to dissent, or at least not a constitutional right to have their dissents published in official Supreme Court reporters beside the majority opinions. The First Amendment is designed to protect the people from the government, not to regulate internal government practices. Nonetheless, the First Amendment could be implicated if the Court attempted to prohibit retired Justices from announcing that they had disagreed in various cases. That judicial dissent is not constitutionally protected per se, however, should not diminish the importance of the ability to issue dissents.

90. HUGHES, supra note 71, at 70.
than disagreeing with what the majority considers "the right answer," a dissenter in an indeterminate system illustrates why the majority answer is not the best one. Assuming that law is indeterminate, future Courts will reference both the majority and dissenting opinions to determine what the best approach is. Consequently, the dissent forces the majority to hone its legal analysis so as to arrive at what will be considered the best outcome. In contrast, if the Court believed in the determinacy of law, it would likely be far more wedded to stare decisis; the strong presumption would be that the answer identified upon the first consideration of the issue should be left undisturbed, even in some instances where the answer was not the correct one.91

D. CRITIQUING DISSENTS

Although most scholars acknowledge the value of dissents, some have been critical of the practice. Criticisms of dissents have ranged from calls for more judicial civility, to arguments that dissents should only be used in limited cases, to endorsements of a complete ban. While some critics believe that dissents should be strictly limited, the more prevalent and moderate critique proposes that only particular types of dissents should be discouraged.

1. The Argument for Judicial Civility

One proposed limiting principle regarding the use of dissents suggests that judges should not dissent solely for the purpose of impugning the qualifications of their colleagues on the bench.92 Modern scholars and judges have voiced similar concerns about the use of Supreme Court dissents. Many argue that Justices dissent too often, and that frequent dissents reduce the integrity of the Court. Justice Ruth Bader Ginsburg warns that too many dissents may undercut the respect accorded to Court decisions and diminish the reputation of the judiciary: "Rule of law virtues of consistency, predictability, clarity, and stability may be slighted when a

91. Justice Scalia has adopted this approach in his Eleventh Amendment jurisprudence. In Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), Justice Scalia declined to overrule Hans v. Louisiana, 134 U.S. 1 (1890). He argued that because it was a close question whether Hans had been incorrectly decided and because Hans had had a significant effect on statutory law, "the mere venerability of an answer consistently adhered to for almost a century, and the difficulty of changing ... the intervening law ... strongly argue against a change." 134 U.S. at 34-35.

92. Roscoe Pound wrote that:
The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributing of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court.

court routinely fails to act as a collegial body." Justice Brennan, although a staunch defender of dissents, similarly notes the danger to intra-Court relationships caused by over-frequent dissent: "Very real tensions sometimes emerge when one confronts a colleague with a dissent. After all, collegiality is important; unanimity does have value; feelings must be respected."

2. The Argument for Dissents in Limited Cases

In 1923, the American Bar Association (ABA) issued an opinion opposing the practice of dissents in most instances. "[J]udges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. . . . Except in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged." Many scholars and judges have agreed with the ABA, believing that, if dissents are to be used at all, they should be limited. Judge Learned Hand disparaged dissents in general, complaining that a dissent "cancels the

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93. Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. REV. 1185, 1191 (1992). Along these lines, the Seventh Circuit has recently adopted a set of judicial standards, which imposes a number of duties not only upon attorneys, but also on judges regarding their conduct towards one another. Specifically, Seventh Circuit judges have undertaken the following obligations:

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.


94. Brennan, supra note 48, at 429. Robert Bennett raises a different concern, arguing that the "rule of law" is being increasingly ignored in favor of political manipulation of legal doctrine. Robert W. Bennett, A Dissent on Dissent, 74 JUDICATURE 255, 259 (1991). Bennett acknowledges that a system of pure institutional judging, such as that which existed under Chief Justice John Marshall, would not successfully serve a constantly changing society. Id. at 258. However, he argues that repeated dissents on the same issue have little benefit; "[t]he issues were posed and presumably taken into account by the majority the first time around." Id. at 260. The increasing practice of individualistic decisionmaking "has become counterproductive, draining dissent of its power through overuse, and jeopardizing not only the stability and predictability of constitutional law, but even its claim to respect." Id. For Bennett there is little value in the repeated dissents of Justices Marshall and Brennan from death penalty decisions on cruel and unusual punishment grounds. And, even if the death penalty is an issue of such importance to merit Brennan's and Marshall's repeated dissents, Bennett argues that questions surrounding the Eleventh Amendment and the Garcia case surely do not merit their repetitious dissents. Id.

impact of monolithic solidarity on which the authority of a bench of judges so largely depends."96 Karl Llewellyn criticized the frequency of Supreme Court dissents, though he conceded that dissents play the important role of "rid[ing] herd on the majority."97 Justice Potter Stewart went so far as to characterize dissents as "subversive literature."98 Even Justice Holmes, the Great Dissenter, lamented in his first dissent that the practice was largely "useless" and "undesirable."99

Similarly bemoaning that unanimity had become "a rather atypical example of the manner in which members of the present [Supreme] Court have chosen to discharge their judicial duties,"100 Karl ZoBell argues that dissents should be written only when the dissent's positive potential outweighs its negative potential.101 The positive features of a dissent include the opinion's likelihood of having a beneficial influence on the law's future development; the negative features include the opinion's deleterious effect on the reputation of the Court that stems from the appearance of fractiousness.102 Ultimately, ZoBell concludes that a dissent should not be published if "the dissent is such that it cannot influence the future of the law, [because] it is submitted that no purpose which is, or should be, a purpose of a Justice of the Supreme Court, is advanced by placing it in the official reports."103

ZoBell's argument is flawed in several respects. First, he incorrectly assumes that Justices can know with any degree of certainty what influence their opinions will have on future courts or legislatures. As the sole dissenter in Plessy v. Ferguson,104 Justice Harlan undoubtedly did not know that his view would influence future Courts, let alone that it would be accepted by a majority of the Supreme Court nearly sixty years later.105

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98. Brennan, supra note 48, at 429.
100. ZoBell, supra note 15, at 186. ZoBell made this comment shortly after the Supreme Court issued a unanimous opinion in Cooper v. Aaron, 358 U.S. 1 (1958). ZoBell notes that the Warren Court was heavily criticized for its large number of separate opinions and for the numerous 5-4 decisions rendered on constitutional issues. For example, on March 31, 1958, the Court handed down five decisions, which contained 19 separate opinions and 18 dissenting votes. Four of the five cases were 5-4 decisions. ZoBell, supra note 48, at 186 n.4.
102. Id. at 211-13.
103. Id. at 212. Although ZoBell uses a wholly factual determination as an example of something for which no dissent should issue, his intent must be broader unless he meant only to limit a small percentage of dissents.
104. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
105. Indeed, Harlan's dissent was "the quintessential voice crying in the wilderness." Brennan, supra note 48, at 431. Justice Harlan dissented in a number of cases involving race. His last such dissent was also a solitary one. See Berea College v. Kentucky, 211 U.S. 45,
Similarly, in 1943 Justice Jackson wrote the majority opinion in *West Virginia State Board of Education v. Barnette.* Barnette overruled *Minersville School District v. Gobitis* in which Justice Stone had issued the lone dissent. In fact, Jackson's opinion reflected the spirit of Stone's dissent. Jackson wrote, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." ZoBell's formulation might well have negated some of the most powerful and important dissents in our history; this is an unacceptable cost for judicial restraint.

Second, even if a Justice could plausibly predict what the Supreme Court will find influential in the future, predicting the actions of other institutions, such as the legislature, presents an even more daunting challenge. No matter what the Supreme Court decides, the legislature may decide to take matters into its own hands, and it may rely on dissenting opinions for motivation and guidance.

3. The Argument for a Ban on All Dissents

Although most of the criticisms leveled against dissent concern how frequently the practice should be employed, there have been a few isolated attempts to squelch judicial dissent entirely.

Commentators writing early in the twentieth century tended to have comparatively harsh views of the practice of dissenting. One scholar joked that judges should be coerced into reaching unanimous decisions, even if

58-70 (1908) (Harlan, J., dissenting) (questioning state statute that prohibited voluntary integration of private schools); see also Gaffney, *supra* note 82, at 604-05 (discussing Harlan's last dissent).

106. 319 U.S. 624 (1943).


110. Examples of other courageous dissents that may never have been issued under ZoBell's standard include the following: Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting from opinion upholding conviction for subversive advocacy under Espionage Act of 1918); *Gobitis*, 310 U.S. at 601-07 (1940) (Stone, J., dissenting from opinion affirming school district's right to prohibit from attending public school minors who refused to salute the national flag); and Korematsu v. United States, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting from opinion upholding constitutionality of military order excluding persons of Japanese descent, whose loyalties had not been questioned, from West Coast war area). See Brennan, *supra* note 48, at 432 (citing these as powerful dissents).


112. While too much dissent may be undesirable, and judges should certainly refrain from using dissents to heap insults upon their colleagues, see *supra* notes 92-94 and accompanying text, limiting dissents should be viewed with suspicion. Doing away with them entirely is unacceptable.
this required application of ancient practices that had been used on juries: "How refreshing it would be, in cases of our judges in courts of last resort, not agreeing on their final judgment, that they should not either have food or drink, but in addition should be coerced by being transported from town to town in a cart."\textsuperscript{113}

A successful attempt to quash dissent occurred in the mid-1950s, when the Pennsylvania state reporter refused to publish the dissenting opinion of a Pennsylvania Supreme Court justice in the case of \textit{Musmanno v. Eldredge}.\textsuperscript{114} The justice requested a writ of mandamus against the state reporter, but the Court of Common Pleas refused to issue the writ on the grounds that the Supreme Court was not required to publish the opinions of its justices.\textsuperscript{115}

The Court relied on two Pennsylvania statutes. The first was a 1845 statute banning the publication of the minority opinions of state Supreme Court justices, which had been repealed in 1951.\textsuperscript{116} The second was an 1868 law authorizing the state reporter to publish the minority opinions on all constitutional questions.\textsuperscript{117} In considering these statutes, the Court of Common Pleas concluded that although the state reporter was authorized to publish all dissenting opinions raising constitutional questions, it was not required to do so.\textsuperscript{118} In criticizing the decision, one commentator noted that as a result of the decision, "[t]he reasoning for a court's decision would in many cases go unknown if [the] dissenting voice was quieted."\textsuperscript{119}

As the Pennsylvania episode illustrates, the United States has not been without debate over the propriety of dissents. Numerous battles have been waged in attempts to silence those who differ. But prohibiting dissent is completely antithetical to the American democratic ideal. Merely formalist rights have no place in a country based upon substantive freedoms. As Justice Brennan puts it, "[t]he right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births."\textsuperscript{120}

\begin{itemize}
\item\textsuperscript{113} Simpson, \textit{supra} note 95, at 206-07 (quoting C.A. Hereschoff Bartlett, 32 \textit{Law Mag. & Rev.} 54, 64 (1907)).
\item\textsuperscript{114} 1 Pa. D. & C.2d 535 (Dauphin County), \textit{aff'd}, 114 A.2d 511 (Pa. 1955).
\item\textsuperscript{115} Id. One law review commentator pointed out that this decision "proposes a fundamental question as to the right of a judge to render an effective dissenting opinion." \textit{Recent Decisions}, 24 \textit{Fordham L. Rev.} 438, 450 (1955).
\item\textsuperscript{116} Act of Apr. 11, 1845, 1845 Pa. Laws 374, § 2 (repealed 1951).
\item\textsuperscript{117} Act of Mar. 3, 1868, 1868 Pa. Laws 46.
\item\textsuperscript{118} \textit{Musmanno}, 1 Pa. D. & C.2d at 538.
\item\textsuperscript{119} \textit{Recent Decisions}, \textit{supra} note 115, at 451 n.9; see \textit{id.} at 451 (noting that dissents in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), influenced the passage of the 11th Amendment; dissents in Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), influenced passage of the 14th Amendment; and dissents in Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895), influenced passage of the 16th Amendment).
\item\textsuperscript{120} Brennan, \textit{supra} note 48, at 438. Percival Jackson has argued eloquently that dissents
\end{itemize}
4. "The Excellent Accident"

People who have not experienced "the excellent accident" of being raised in the United States are intrigued by our system. A member of the Conseil d'Etat, France's highest administrative court, once sent a letter to then-Judge Ruth Bader Ginsburg conveying his impressions of the American appellate judicial process. Ginsburg reports that the conseiller was at first distressed, even appalled, at our readiness to admit that legal judgments (including constitutional rulings) are not always clear and certain. In his second thought, however, the conseiller appears impressed, touched with envy or admiration, that our system of justice is so secure, we can tolerate open displays of disagreement among judges about what the law is.

The conseiller's comments highlight an important point. Even if one concurs with all of the criticisms of Supreme Court dissents, it is nonetheless important to appreciate that the United States system permits dissent. The right to dissent is often taken for granted, but it is important to realize and appreciate that the ability to discuss what the most appropriate types and frequency of dissents are assumes a system that allows dissents. The United States has moved beyond the debate of dissents versus no dissents. Now that the freedom to dissent has been firmly established, scholars and judges can focus on the less crucial issue of when and how to dissent.

The Pennsylvania episode notwithstanding, the vast majority of the scholarly debate concerning dissents has accepted that some dissent is productive and useful. The disagreements arise over how often, for what reasons, and how stridently one should dissent. That the practice of dissenting is accepted and, indeed, taken for granted is largely attributable to the crucial and underappreciated contributions of Justice William Johnson. Had Johnson not introduced dissent to the Supreme Court during its formative years, the practice might never have taken root. Johnson acted while the Court was still young and flexible. As institutions age and their practices become ingrained, change becomes progressively

are an integral part of the American experience: "In a nation that emerged from the womb of dissent, where progress grew from free thought, from diversity of opinion, from challenge of majority concurrence, conformity that banishes challenge becomes a dead hand that seeks to stay evolution—a dead hand that beckons to oppression and stagnation." JACKSON, supra note 25, at 3.

121. Ginsburg, supra note 93, at 1190. The conseiller had observed an appellate argument on a criminal matter before the D.C. Circuit. The three judges on the panel each issued separate opinions in the case. Id.

122. Id. In Germany, dissents are only permitted on the Constitutional Court, and in England, opinions are still orally announced seriatim from the bench. In many other nations, dissents are forbidden or discouraged. See Gaffney, supra note 82, at 591 n.33. See generally Ginsburg, supra note 82 (comparing the practice of appellate opinion writing in the United States with the practices used in Great Britain and civil law countries).
more difficult to achieve. Therefore, while a later Justice could conceivably have introduced dissent, the attempt would have come in the wake of thirty-five years of Justice Marshall's dominance and insistence on unanimity. Justice Johnson came along at the right time and with the right attitude to ensure that future generations would enjoy the benefits of the system he introduced.

III. A TRIANGULAR TENSION, AN IRONIC RESULT

In the early nineteenth century, Thomas Jefferson, Justice Marshall, and Justice Johnson all battled to shape the Supreme Court according to their respective visions. While Justices Marshall and Johnson served together on the Court, they held very different political and judicial philosophies. Marshall was intent upon strengthening the Court in order to advance the goals of Federalism and, at the same time, thwarting his ideological enemy, Jefferson. Jefferson sought to battle Marshall by influencing Johnson, his friend and nominee. This triangle of tension spanned decades, ultimately culminating in a delicious irony.

Simply put, John Marshall and Thomas Jefferson despised each other, and neither was interested in hiding his feelings. Marshall once opined that Jefferson's morals were impure. And prior to Jefferson's election as President, Marshall stated that he had "almost insuperable objections" to Jefferson:

Mr. Jefferson appears to me to be a man, who will embody himself with the House of Representatives. By weakening the office of President, he will increase his personal power. He will diminish his responsibility, sap the fundamental principles of the government, and become the leader of that party which is about to constitute the majority of the legislature. The morals of the author of the letter to Mazzei cannot be pure.

Jefferson responded by stating that Marshall's "mind was of that gloomy malignity which will never let him forgo the opportunity of satiating it upon a victim." Although the early Supreme Court heard few cases and thus had very little impact on society, Jefferson remained fearful of the Court. Although both the executive and legislative branches were Republican, President Adams, Jefferson's predecessor, had succeeded in creating a federal judi-

124. Id. The "letter to Mazzei" refers to a letter Jefferson wrote in which he criticized George Washington and the Federalists. Mazzei published the letter, thus its contents became common knowledge. Id. at 537 n.2 (citing Letter from Thomas Jefferson to Mazzei (Apr. 24, 1796)).
125. HENDRICK, supra note 3, at 179.
ciary consisting almost wholly of Federalists. Consequently, the Republican Jefferson hated the federal judiciary and was intent upon finding ways to control its influence.\textsuperscript{126}

Jefferson and Marshall fundamentally disagreed over the appropriate role of the federal judiciary. Jefferson fervently believed in the inherent right and power of the states to set aside any act of Congress that they believed to be contrary to the Constitution. In other words, for Jefferson, the states had the power, independent of the judiciary, to disregard Congressional acts as unconstitutional. Marshall, on the other hand, believed what he eventually established in \textit{Marbury v. Madison},\textsuperscript{127} that the judiciary had the duty and \textit{sole} power of deciding whether an act of Congress is constitutional.\textsuperscript{128}

Arthur Holcombe explains, however, that Marshall and Jefferson's disagreements transcended their dispute over the role of the federal judiciary. Their different ideals and priorities led them to fundamentally disagree over "three leading principles of popular government [that Jefferson immortalized] by writing them into the Declaration of Independence, where they will stand through the ages as the finest expression of liberal thought in the field of politics."\textsuperscript{129} These principles relate to the purpose of government, the governmental process, and the governmental performance.\textsuperscript{130}

Jefferson's first principle, Holcombe argues, was that governments are instituted among men to secure the inalienable rights of the people. According to Holcombe, Marshall did not place much emphasis on the protection of people's natural rights. Holcombe writes, "there is no evidence to support the view that [Marshall] regarded the protection of the people's natural rights as the primary purpose of the state government."\textsuperscript{131} When Virginia voted on whether to ratify the Federal Constitution, Marshall did not advocate a Bill of Rights, except in the form of a concession to the opposition for the sake of winning votes for ratification.\textsuperscript{132} Marshall was primarily concerned with establishing a national system of courts that


\textsuperscript{127} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{128} For a discussion on this fundamental disagreement, see HENDRICK, supra note 3, at 180-81.


\textsuperscript{130} Id.

\textsuperscript{131} Id. at 27. For example, while Jefferson developed the Virginia Statute of Religious Freedom, Marshall displayed no substantial interest in securing guarantees of religious freedom, even though, like Jefferson, he was a liberal on religious issues. Id.

\textsuperscript{132} Id. at 28.
could offer greater security for property owners and businessmen.  

Jefferson's second principle of popular government was that "governments derive their just powers from the consent of the governed." Marshall disagreed with Jefferson's desire to make government more democratic and was more interested in placing "constitutional limits upon the authority of the legislature than in making it more representative of the people." Marshall asserted that:

[T]he general tendency of state politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government... [and] gave a high value in my estimation to that article in the constitution which imposes restrictions on the states.

In other words, for Marshall, the appeal of a Federal Constitution was not the creation of a national, representative legislature with the accompanying prospect of increasing governmental accountability to the populace. Rather, he favored the prospect that anti-Federalists found so worrisome, that of restrictive constitutional limits on the popularly elected branches of the state governments.

Jefferson's third principle of popular government was the people's right of revolution. While Jefferson was indulgent towards Shays' Rebellion, Marshall found it depressing. Jefferson favored a two-party political system because of its potential for promoting peaceful revolution. In contrast, Marshall was skeptical of the benefits of a two-party system because he distrusted organized partisanship.

Thus, Jefferson and Marshall held widely divergent views on the nature of government, and Jefferson was determined to do everything possible to minimize the power held and wielded by Marshall. Jefferson wanted to remove all Federalist U.S. Marshals and Attorneys and to threaten the remaining officers with impeachment. As Albert Beveridge explains, "[t]hus by progressive stages the Supreme Court would be brought beneath the blade of the executioner and the obnoxious Marshall decapitated or compelled to submit."

133. Id.
134. Id.
135. Id.
136. Id. at 29 (quoting from John Marshall, Autobiographical Sketch (1827)) (unpublished sketch written for Justice Story). Marshall's experiences in the Revolutionary War led him to sympathize with the army. Id.
137. Id.
138. Shays' Rebellion was a revolt by Massachusetts farmers against the government.
139. Holcombe, supra note 129, at 31-33.
140. Id. at 32.
141. 3 BEVERIDGE, supra note 2, at 21.
142. Id. at 22.
Jefferson began his assault by repealing the Judiciary Act of 1789. Although many Federalist judges lost their jobs, the Supreme Court and the recently created inferior courts remained intact. Jefferson believed, however, that he had cemented his control over the judiciary when he refused to allow Secretary of State James Madison to deliver the commission that would have appointed William Marbury as Justice of the Peace. Of course, Marshall staged a stunning victory for the judiciary with his brilliant decision in Marbury v. Madison. While permitting Jefferson a symbolic victory—the commission did not have to be delivered—Marshall won the war for himself and the judiciary. Although Jefferson continued to fret about the Court, he had lost his opportunity to discredit successfully its legitimacy or power. Nonetheless, Jefferson continued to look for ways to influence the judiciary, even after the conclusion of his presidency. He was convinced that Marshall’s ability to prevent the Court from using the seriatim practice resulted in many of the important decisions of the Court with which Jefferson disagreed. In a letter to Thomas Ritchie, Jefferson complained about Marshall’s practice, noting that “[a]n 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.”

Jefferson even proposed that each Justice be obliged to give his own views on each case the Court considered, that Congress formally evaluate the opinions, and that a Justice should be impeached if his opinions failed to comport with the conclusions reached by Congress.

Jefferson continued his efforts to undermine the Supreme Court and Justice Marshall through a series of letters to Justice Johnson. Although Johnson did not mechanically follow Jefferson’s advice, it appears that Jefferson’s letters did influence Johnson to dissent at least some of the time.

143. 5 U.S. (1 Cranch) 137 (1803). For a discussion of the Marbury case, see HENDRICK, supra note 3, at 182-86.
144. JACKSON, supra note 25, at 23.
146. ZoBell, supra note 15, at 194 (citing 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 655 (1932)).
147. See supra notes 50-58 and accompanying text.
148. In 1808, Johnson issued an opinion in Gilehrist v. Collector, 10 Fed. Cas. 355, No. 5420 (C.C. Dist. of S.C., 1808), a circuit court case, in which he held that Jefferson had not had the authority, under the Amended Embargo Act of 1807, to mandate which ships port collectors were to detain. See MORGAN, supra note 33, at 57-60. Jefferson was greatly annoyed that his nominee had decided against him. See Levin, supra note 38, at 527-28 (noting Jefferson’s coolness toward Johnson after the embargo incident).
149. See supra note 58 and accompanying text.
Ironically, Thomas Jefferson's belief in and support of Johnson may have led to results contrary to those Jefferson would have desired. Not only did Johnson end up voicing certain views that Jefferson opposed, but Jefferson's encouragement of separate opinion writing also had a more enduring legacy.

Although Jefferson endeavored to weaken the Court, his attempts at subverting the judiciary likely has had precisely the opposite effect. Jefferson thought that encouraging Johnson to dissent would lead to a fractious, and thus weaker, judiciary. In the short run, he may have been right. However, the long-term consequences of Jefferson's position, as implemented by Johnson, significantly strengthened the Court in a way that Justice Marshall's practice could not. The presence and constant potential for dissent has forced the Court to arrive at more tightly reasoned, more analytically sound opinions. Further, dissents have imbued the Court with a sense of legitimacy that could not have endured had the Court forbidden its own members from airing their differences. The Court's enforcement of the free speech rights of the people would appear more formalist and less principled if it did not apply the same principles and ideals to its own practices. Ironically, Jefferson's idea of what would weaken the Court has had precisely the opposite effect. Dissent has both strengthened the Court as an institution and has increased its enduring legitimacy as a body that applies its principles and standards without prejudice.

CONCLUSION

According to the conventional wisdom, John Marshall masterminded the rise of a powerful Supreme Court. While this is probably an accurate explanation of the Court's initial leap to co-equal status with the other branches of government, the work of Justice William Johnson is arguably more responsible for the enduring prestige and legitimacy of the Court. Had Marshall's practice of issuing one opinion for the Court continued unchallenged for his entire tenure, this practice might have become permanent; the more time that passed, the harder it would have been for a Justice to challenge the status quo. As the Court's first major dissenter, Johnson opened the door for future Justices to air independent views. Consequently, Justice Johnson deserves far more recognition than he is given; he was truly a crucial figure in American legal history.

Those scholars and judges who have criticized Supreme Court dissents have focused on the frequency, tone, and propriety of separate decisions. Such critiques, however, should be examined in their proper context; that is, we should first applaud the fact that the American system allows dissents at all. By permitting Supreme Court Justices to express their differing views, the American judicial system substantively enjoys the free speech right that it professes to protect. The First Amendment would not hold the same value if the judicial branch chose to exempt itself from the
Amendment's principal mandate. And by allowing dissents, the Supreme Court and the nation enjoy the benefits of substantively and procedurally improved legal decisions and analyses.

Ironically, Thomas Jefferson, in his desperate attempt to weaken the federal judiciary, did far more to increase the Court's legitimacy than he did to diminish it. He made an excellent choice in nominating Justice Johnson to the Supreme Court, and he succeeded, at least in part, in encouraging Johnson to disagree openly with Jefferson's enemy Marshall. But Jefferson failed to recognize that Marshall's behavior would have harmed the Court in the long-run, and that it would be Johnson's actions that would propel the Court to new levels of strength, effectiveness, and legitimacy.