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Publishing Dissent

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Were I to speak to the topic of this conference, on unpublished and depublished opinions, I would undoubtedly say that the proliferation in American courts of the mass destruction of opinions is so horrible for so many reasons that it is hard to keep track. I can capture why it is in one thought: Unpublication and depublication are threats to the integrity of common law. If common law is just the record of what courts have done and why they have done it, suppressing a portion of that record creates a divergence between the law in the books and the law on the ground. Common law at its most rigorous holds that any adjudication may from the perspective of some future adjudication be understood to have made law, however insignificant. Unpublication breaks the link that common law establishes between law-making and adjudication. Where rules against the citation of unpublished opinions are in effect, unpublication permits judges (or whoever makes the publication decision) to pick and choose which cases will be available to serve as precedent and which will not. It thus allows judges to make decisions that are exempt from common law's fundamental discipline, that a judge must be prepared to see whatever decision he makes serve as precedent for a future decision. Depublication, for its part, conceals judicial behavior from public scrutiny. It erases from the public record an important jurisprudential phenomenon: judicial regret. It is that rarest of events: the cover-up of a virtuous deed. For what judges are hiding when they depublish an opinion is that, having set their minds on a certain course, they were willing to engage in further deliberation and prepared to say they were wrong.

Together, unpublication and depublication insult democracy by endorsing what is, in effect, secret judicial action. On a professional level, they tempt the judiciary towards sloppy decision making. By avoiding public scrutiny of judicial behavior, they open the door to abuses of power—to corruption, favoritism, and an unbridled judicial prerogative.[1] By embracing unpublication

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1. The availability of a considerable number of unpublished opinions on Westlaw and LEXIS, or in litigation services such as Mealey's, or circulating amongst law offices as *samizdat* manuscripts ameliorates the problem but does not solve it, and even creates a further problem. Unpublished opinions "published" these various ways are no longer secret (of course, those not

and depublication, American judges are recalling the Tudors' Court of the Star Chamber, but without the Tudors' charm. And Star Chamber, in turn, was an instrument in the Tudors' effort to emulate the absolutism of the French monarchy, specifically its Conseil d'État. I do not reference absolutism entirely as hyperbole, or merely in jest. For the infelicities of unpublication and depublication may be avoided only by the exercise of rigorous bureaucratic control over and within the judiciary. That, in turn, requires a strong state—one not hobbled by the recognition of rights against the state or by a robust separation of powers.[2]

But I shall not speak to the topic of this conference, not because I am loath to criticize the American judiciary—just ask my students—but because I wish to condemn instead a very different sort of unpublication committed by appellate panels in legal systems based on civil law: their practice of not publishing separate opinions, either dissents or concurrences.[3] Appellate panels in common law jurisdictions obviously do publish them; they do leave a record of disagreement amongst the judges. Because disagreement just as surely marks discussion in civilian panels, failing to publish separate opinions has the effect of masking it against public inspection or awareness. I argue that this suppression has numerous political and jurisprudential consequences, which I, for one, consider deleterious. My condemnation will proceed, for the most part, indirectly, by praising common law jurisdictions for publishing separate opinions and tracing that practice's desirable consequences. Mine is thus, in a way, the obverse of the topic of this conference: Instead of condemning American courts for not publishing majority opinions, I shall instead be praising them for publishing minority opinions.

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picked up are). But in most jurisdictions they still cannot be cited or even spoken of in polite company, that is to say, in court. So there is a divergence between the law on the ground and the law in the books after all, effectively depriving us of a potentially valuable source of law. But more: Now lawyers know a considerable amount about the law on the ground. They just cannot speak about it. Forced silence about reality leads to decision by winks and nods, to the indirection of courtiers, not the open and frank discussion of democratic citizens. For a recent effort in England to limit the availability for citation of even those opinions that have officially been published, see Practice Direction (Citation of Authorities), [2001] 2 All E.R. 510, 510–12.

2. I am grateful to Christian Biet for this thought.

3. A practice which only recently has begun to change, but only in a limited number of constitutional courts, which are themselves relatively recent innovations in civil law jurisdictions. *See* Michele Taruffo, *Institutional Factors Influencing Precedents*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 437, 450–51 (D. Neil MacCormick & Robert S. Summers eds., 1997) (discussing changes in unpublication procedures in civil law systems). For the prevalence of the suppression of dissents and concurrences in civilian jurisdictions, see JOHN P. DAWSON, THE ORACLES OF THE LAW xii (photo. reprint 1978) (1968) (citing Kurt Nadleman, *The Judicial Dissent: Publication and Secrecy*, 8 AM. J. COMP. L. 415 (1959)).

But I must be more precise. The American practice of publishing separate opinions differs not only from civilian practice but also from the practice of the common law jurisdiction from which all others issue. For English appellate judges do not denominate any of their "judgments" (English for "opinions") dissents or concurrences. A judge may in fact be dissenting from his panel's disposition, but the reports never say so. Similarly, a judge may in fact be concurring—he may agree with the disposition but disagree with the reasoning of a majority of the panel—but the reports never say that he's concurring. You have to read through all the judgments in order to discover that any one of them is a concurrence. Indeed, there could not as a logical matter be dissents or concurrences in the English system, because no appellate panel ever adopts a single judgment as the judgment of the court; that is American, not English, practice. The expectation in England was that each judge on an appellate panel would compose (or deliver orally from the bench) his own judgment.[4]

American practice is thus at a curious fulcrum between civilian and English practice.[5] The civilian appellate panel issues only one opinion, and it is the opinion of the court. Every opinion is per curiam, "by the court." The public record does not reveal dissenting or concurring opinions. No judge signs the opinion of the court. It is an institutional, not personal, opinion. The English appellate panel issues no judgment of the court. Rather, each judge on

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4. I say "was" because Adrian Zuckerman of University College, Oxford, informs me that English practice has been changing in favor of single over seriatim judgments:

> I have enquired [of Professor Ian Scott, one of the editors of the White Book] about the recent conventions concerning multiple judgments and here is the answer:
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> There is no practice direction pressing for single judgments. Some judges take the view that it would violate their judicial oath if they had to work under a rule which said that they had to produce a single judgment when sitting in a multi-judge court.
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> Obviously, our Court of Appeal (Civil Division) is undergoing a sea change. Whereas once upon a time one frequently got a detailed judgment from one lord justice and then an "I agree" and an "I also agree" judgments from the other two, now it is not uncommon to find that, although the judgment is delivered by one judge he makes it clear at the outset that the judgment is the judgment of all three (or two) or them, and is the judgment "of the Court." Sometimes the judge will indicate the level of contribution made by the other judges, and will say (1) that all of have them contributed significantly or (2) that one judge has played a particularly prominent role. Indeed, in one recent case the Master of the Rolls, in delivering the judgment of the Court, said it had been written entirely by Henry Brooke!

E-mail from Adrian Zuckerman, Fellow, University College, Oxford, to Arthur J. Jacobson, Max Freund Professor of Litigation & Advocacy, Benjamin N. Cardozo School of Law, Yeshiva University (Apr. 6, 2005) (copy on file with the Washington and Lee Law Review).

5. Justice Ginsburg has called it a "middle way." Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990).

the panel (until recently) issues his own judgment. Every judgment is personal; none is institutional. Reading through the judgments permits one to say which judges agree with the court's disposition and share the reasons for it (one of these judgments could have been selected as the judgment of the court if that were the practice), which judges agree with the disposition but do not share the reasons (concur), and which judges disagree with the disposition (dissent). But no judgment comes with a label affixed to it, "opinion of the court," none with the label "concurrence," and none with "dissent."

The American practice differs from both of these, and shares an affinity with both. Unlike English practice, American practice requires, when possible, an opinion of the court. But unlike civilian practice, an individual judge (joined by others) signs it. Unlike civilian practice, the opinion of the court is not necessarily the only opinion: There may be concurrences and dissents. Unlike English practice, however, there need not be multiple opinions; it is not the expectation that every judge will write (or, in the English case, possibly speak). Thus, like the English practice and unlike the civilian, there is authorship of opinions, and like the civilian practice and unlike the English, there is an opinion of the court. It is only in this special place, where there is authorship of opinions together with an opinion of the court, that dissent and concurrence are possible.

We may speculate about the reasons for these differences. Civil law as we have it reaches back to the *ius commune*—the common law—of medieval Europe.[6] The *ius commune* was first a law of scholars, having no influence on the law as it was actually practiced in courts, which was an amalgam of vulgar Roman law and the laws of the various barbarian kingdoms.[7] The elaboration of the *ius commune* was an antiquarian and a sacred task. It began with the discovery of the *Corpus Iuris Civilis* in Italy in the 11th century and coincided with the establishment of the first university in Bologna.[8] The *Corpus Iuris*

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6. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 9 (2d ed. 1969) (tracing history of civil law tradition). The direct origin of civil law is not classical Roman law. The divergence of the *ius commune* from classical Roman law is especially prominent in the field of procedure, where classical Roman procedure more nearly resembles common law procedure than civil law procedure. *See* MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 25–31 (Hans Smit ed., 1965) (explaining history of Italian civil procedure and its differences from Roman civil procedure).

7. *See* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 17–18 (Tony Weir trans., 1995) (explaining history of European legal systems).

8. *See* MAURO CAPPELLETTI ET AL., THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION 13–18 (1965) (explaining early history of Italian law); WIEACKER, *supra* note 7, at 28–30 (tracing beginnings of European legal science).

was no mere restatement of classic Roman law, but a reworking of it at the behest of a Christian emperor to meet the needs of a Christian empire animated by a moral theology entirely foreign to pre-Christian Rome. The work of the Glossators—those who launched the *ius commune*—was an idealist project, bent on reviving a law that was Christian and universal.[9] The text on which the Glossators worked had the authority of a specifically Christian text,[10] and there was in the reading of it a right and a wrong. When at the beginning of the 14th century the Commentators began to shape the ideal law of the Glossators into a practicing jurisprudence used by real lawyers in real courts,[11] the source of authority was still the scholarly knowledge of a sacred text. That structure, in which scholarly knowledge trumps lawyerly or even judicial know-how and, as knowledge, can be right or wrong, has stayed substantially intact in civil law jurisdictions to this day.

In such a system there can be no use for different reasons. Only the right reasons matter; only they ought to be recorded and recalled. There can be no suggestion of different dispositions: One of the suggested dispositions must be animated by the wrong reasons. Disagreement amongst judges is a confession of imperfection, acknowledgment that the legal learning of one of the disputants is lacking. But this acknowledgment threatens the authority of the court as a whole. For who is to say that the court reached the right result when resolution of the dispute was by majority vote, not by recourse to a higher authority who could anoint one of the dispositions, one of the reasons, with rightness? Judicial disagreement is tolerable in such a system only when courts can bring disputes to a legal notable of unquestioned authority. But then, why have judges in the first place? If we are to have judges in such a system, they must conceal, not blazon forth, their disputes. The last thing in the world these judges would want is to publish their disagreements.

The difficulty then is the specific authority that civilian judges may claim or recognize. This authority adheres only to rightness, a rightness that has a transcendent, sacred cast. It is not the rightness of science, and only in part the rightness of logic. It is a rightness whose maintenance ultimately depends on a further kind of authority, the authority of a legal notable known to be skilled in divining the true law.[12] But it is in the very nature of this further kind of

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9. *See* WIEACKER, *supra* note 7, at 55–56 (discussing goals of Glossators and their impact on medieval legal studies).

10. *See id.* at 31 (explaining the significance of *Corpus Iuris* and its use in Glossators' teachings).

11. *See id.* at 59–61 (detailing Commentators' effect in Europe, including contributions to legal system).

12. *See id.* at 34–35 (tracing origins of authority in ancient philosophers' ideas and logical

authority to be organized in and conferred by a hierarchy, since the rightness of civilian legal statements, not being entirely or even largely self-evident, must be earned through experience and skill. Civilian authority has a high and a low, a more-likely-to-be-right and a less-likely-to-be-right, that the hierarchy defines. The transcendent rightness and hierarchical organization of civilian authority thus echoes the intellectual structure of the authority held by its spiritual patron, the Catholic Church. The Church not only administered a parallel and thriving system of law but also provided the only model in medieval Europe for an organized, universal administrative apparatus. The Decretists were animating canon law in the very period that the Glossators were recovering the *Corpus Iuris*, but their work, unlike the work of the Glossators, had an immediately practical effect in the ecclesiastical courts.[13] Thus the idea of authority in the *ius commune* was Christian both because the intellectual structure of the *ius commune* was amenable to the Christian idea and because the Church and its law possessed immense intellectual and political prestige.

It would be wrong, however, to conclude that civilian authority took the specific form of transcendent rightness and hierarchical organization—so hostile to the practice of dissent—simply because it traced its lineage to sacred authority. Rather, civilian authority took the specific form it did because of the specific brand of religious authority it mirrored. There are other brands, which yield very different results when laid against the possibility of dissent. The rabbinic tradition of biblical law (*Halakhah*), for example, tolerates or even treasures dissent, though it possesses a transcendent law whose cultivation and recall is entirely the responsibility of scholars. This openness of *halakhic* authority to dissent has three sources.

First, because *Halakhah* itself is intrinsically open to disputation, the greatest text of rabbinic interpretation is fundamentally a record of contention. The Talmud recalls that for three years there was a dispute between the school of Shammai and the school of Hillel.[14] Both sides asserted that "[t]he *Halakhah* is in agreement with our views."[15] A voice of heaven replied: "[The utterances of] both are the words of the living God, but the *Halakhah* is in agreement with the rulings of Beth Hillel."[16] Why, the rabbis asked, if "both are the words of the living God," was the school of Hillel entitled to have

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formalism).

13. *See id.* at 50 (explaining how Decretists linked study of law with study of theology to create curriculum in canon law).

14. 4 HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD, TRACTATE 'ERUBIN 13b (Israel W. Slotki trans., 1983).

15. *Id.*

16. *Id.*

Halakhah fixed in agreement with their rulings?[17] "Because," they answered, "they were kindly and modest, they studied their own rulings and those of Beth Shammai, and were even so [humble] as to mention the actions of Beth Shammai before theirs."[18]

One could say much about this passage. For our purposes, however, two points are consequential. First, both positions, that of Beth Shammai and that of Beth Hillel, were equally valid in theory, because both were taken by adequately learned and pious scholars devoted to the ongoing maintenance and cultivation of the *halakhic* system. The fact that a voice of heaven validated the position of Beth Hillel does not invalidate the position of Beth Shammai. Yes, Beth Shammai's position did become invalid in the limited sense that it did not enter actual *halakhic* practice. But both positions were transcendently valid, even though contradictory; both were designed by divine providence to be taken and both inhere equally in *halakhic* structure.[19] Dissent in practice is thus built into the *halakhic* system in theory. Dissent itself has transcendent validation.

Second, when there is dispute amongst adequately learned and pious scholars, the legal validity of a position in practice does not flow solely from its transcendent rightness. The voice of heaven validated Beth Hillel's position because they were kindly and modest, carefully studied their own and their opponent's position, and accorded the latter the utmost respect. These are not reasons for adopting Beth Hillel's position, but rather signposts of providence: Scholars who behave as those of Beth Hillel did are more likely to attract the vote of the majority.

Which brings us to the second source of *halakhic* authority's openness to dissent. Though *Halakhah* has a transcendent origin, the rabbis recognized that the process of its working out is entirely a human affair, permitting no transcendent affirmation. The Talmud reports a discussion about the cleanness of a certain oven of 'Aknai.[20] The Sages said it was unclean.[21] One preeminent Sage, Rabbi Eliezer, made "all the arguments in the world" that the oven was

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17. *Id.*

18. *Id.*

19. *See* J. DAVID BLEICH, 1 CONTEMPORARY HALAKHIC PROBLEMS xv–xvi (1977) (describing *halakhic* dialectic comprised of two divergent but equally valid conclusions); MENACHEM ELON, 3 JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1071 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publication Society, 1st English ed. 1994) (observing that dual nature of *halakhic* tradition is not self-contradictory).

20. 17 HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD, BABA METZIA 59a–b (H. Freedman trans., 1986).

21. *Id.*

clean.[22] The Sages would not budge.[23] So Rabbi Eliezer called for proof: "If the *Halakhah* agrees with me, let this carob-tree prove it!"[24] And God supplied it: The carob-tree was torn a hundred cubits from its place—others said four hundred cubits.[25] The Sages' retort? "No proof can be brought from a carob-tree."[26] Rabbi Eliezer tried again: "If the *Halakhah* agrees with me, let the stream of water prove it!"[27] The stream of water flowed backwards.[28] The Sages: "No proof can be brought from a stream of water."[29] Rabbi Eliezer persisted: "If the *Halakhah* agrees with me, let the walls of the schoolhouse prove it."[30] The walls "inclined to fall."[31] But Rabbi Joshua rebuked the walls: "When scholars are engaged in a *halakhic* dispute, what have ye to interfere?"[32] "Hence," says the Talmud, "they did not fall, in honour of R. Joshua, nor did they resume the upright, in honour of R. Eliezer; and they are still standing thus inclined."[33] So Rabbi Eliezer shifted tactics: "If the *Halakhah* agrees with me, let it be proved from Heaven!"[34] A voice of heaven cried out: "Why do ye dispute with R. Eliezer, seeing that in all matters the *Halakhah* agrees with him!"[35] Rabbi Joshua answered: "*It is not in Heaven.*"[36] The Talmud asks, what did he mean by this?[37] Rabbi Jeremiah explains: "That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, *After the*

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22. *Id.* at 59b.

23. *Id.*

24. *Id.* The carob is an eastern Mediterranean evergreen. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 125 (1971).

25. 17 HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD, BABA METZIA 59b (H. Freedman trans., 1986). A cubit was the distance from the elbow to the tip of the middle finger. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1234 (1971). So four hundred cubits was quite a ways.

26. 17 HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD, BABA METZIA 59b (H. Freedman trans., 1986).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

majority must one incline."[38] The Talmud then records the consequences of the dispute:

> R. Nathan met Elijah and asked him: What did the Holy One, Blessed be He, do in that hour—He laughed [with joy], he replied, saying, "My sons have defeated Me, My sons have defeated Me." It was said: On that day all objects which R. Eliezer had declared clean were brought and burnt in fire. Then they took a vote and excommunicated him [literally "blessed him," a euphemism for excommunication].[39]

The Talmud proceeds to describe Rabbi Eliezer's excommunication (delivered by Rabbi Akiva, who volunteers for the task, lest someone "unsuitable" deliver the message and thus "destroy the whole world") and the natural disasters that followed ("everything at which R. Eliezer cast his eyes was burned up").[40]

About this passage one could say even more. But again, for our purposes, we should note one point. The rabbis in the oven of 'Aknai story did not listen to the voice of heaven, while the rabbis in the Beth Hillel story did. Why the difference? A majority of rabbis had definitively decided the dispute over the cleanliness of the oven. Learned and pious opinion had coalesced. No such conscientious majority, using the ordinary methods of legal interpretation, was able to form in the dispute between the schools of Shammai and Hillel. The Deuteronomic command "After the majority must one incline" did not kick in. Rabbi Eliezer's excommunication was the result of his violation of this command. His position, that the oven was clean, was as transcendently valid as the position of the majority, that it was not. But once a majority had coalesced, his position was no longer valid in *halakhic* practice. What validates the position of the majority in practice is not that it is transcendently right but that it is the position of the majority. The Torah is not in heaven, and transcendent stamps of rightness must be ignored. God laughed, and rejoiced in His inability to shake the majority from their task.

The third source of *halakhic* authority's openness to dissent is the recognition in *halakhic* tradition that, in theory at least, the view of a learned and pious dissenter may eventually win out over that of the majority. Maimonides, writing in the twelfth century, asked why the Talmud recorded dissents.[41] The answer, he says, depends on whether the dissent was to the

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38. *Id.*

39. *Id.*

40. *Id.*

41. MOSES MAIMONIDES, MAIMONIDES' INTRODUCTION TO THE TALMUD: A TRANSLATION OF THE RAMBAM'S INTRODUCTION TO HIS COMMENTARY ON THE MISHNA 101–02 (Zvi Lampel trans., 1987).

decision of a dispute settled by final vote before the Mishna was put into writing or to the decision of a dispute which was unsettled by the time of its writing.[42]

Maimonides argues that the redactor of the Mishna, Rabbi Judah Ha-Nasi (Rabbi Judah the Prophet), recorded dissents in disputes settled by final vote before the Mishna was put into writing in order to show that the dissenter's position was known to the majority and considered by them. If dissents had not been recorded, then a "reliable man" "would come to us and state a view opposing the one recorded—which he actually merely received from the Sages who had originally held it."[43] Then the authority of the majority's decision would be in doubt, since it would appear that they had neither heard nor considered the omitted view. Thus, Rabbi Judah published dissents in order to protect the authority of final, irreversible decisions of the Sannhedrin (the rabbinic court) in the Mishna.[44]

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42. The Mishna was a redaction of the Oral Law, led by Rabbi Judah Ha-Nasi at the end of the second century C.E. ELON, *supra* note 19, at 1049. The Oral Law was revealed to Moses on Mt. Sinai along with the Written Law. *Id.* at 191. It elucidates and supplements the Written Law and includes "the entire corpus of the *Halakhah* in all its forms throughout its history." *Id.* This would include authoritative rabbinic texts produced after the Mishna, such as the Gemara. It was forbidden to reduce the Oral Law to writing, but this prohibition was relaxed over time in face of the increasing complexity of its elaboration and the difficulty of maintaining a purely oral tradition in the diaspora. *Id.* at 224–27.

43. MAIMONIDES, *supra* note 41, at 101.

44. In the American context Judge Evan Evans expressed the view that dissents "must be, to the thoughtful reader, as well as to the litigants, proof conclusive that the questions presented were thoroughly and seriously considered and this conviction should go far to develop respect." Judge Evan Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 MO. L. REV. 120, 129 (1938), *quoted in* Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724, 758 (2003). Lynch's article draws on an especially valuable survey of the literature on dissent. Chief Justice Vinson has expressed a similar thought in an apology for dissents he published in the U.S. Reports:

> The dissenting opinion itself is of value in many different respects. For example, an opinion circulated to the Court as a dissent sometimes has so much in logic, reason, and authority to support it that it becomes the opinion of the Court. . . .
>
> In the second place, the dissent gives assurance to counsel and to the public that the decision was reached only after much discussion, thought, and research—that it received full and complete consideration before being handed down.
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> In the third place, a dissent may have far-reaching influence in bringing to public attention the ramifications of the Court's opinion and by sounding a warning note against further extension of legal doctrine, or the dissenter's conviction that existing doctrine has been unduly limited.

Chief Justice Fred M. Vinson, *Work of the Federal Courts*, 69 U.S. v, x–xi (1949).

Why did Rabbi Judah record dissents in disputes the Sannhedrin had not taken to final vote by the time of the writing of the Mishna? Maimonides answers:

> But the reason he felt obliged to chronicle the words of an individual together with those of the majority, is that the final law may eventually have been decided in accordance with the individual against that majority. Consequently, the recording of such dissensions now demonstrates to us that if a sequence of logic is clear, even if it is only an individual's, we should listen to it, and even if a large number of people differs.[45]

The first sentence answers the exact question Maimonides posed. A later Sannhedrin that actually takes the dispute to final vote should have the view expressed in the dissent available to it in the text of the Mishna, since they may well adopt it. Were the dissenting view not available, the later Sannhedrin may give the recorded view greater weight than if they had the dissent before them, and there is no guarantee that it would be before them, since in literate, post-Mishnaic times the habit of oral transmission was weaker. The rabbis would then have lost the opportunity to make what they might have regarded as the superior decision. But the second sentence goes further. The recording of dissents is valuable not just for later Sannhedrins, but also "now," when there is no Sannhedrin and thus a more fluid structure of rabbinic authority. The recording of dissents "demonstrates to us that if a sequence of logic is clear, even if it is only an individual's, we should listen to it, and even if a large number of people differs."[46] The respect for dissent displayed by the Mishna inculcates *in us* the virtues shown by Beth Hillel—of kindness and modesty, of

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45. MAIMONIDES, *supra* note 41, at 102 (citation omitted). Maimonides cites Mishnah 5, Chapter 1, of the minor Tractate Eduyyoth ("Testimonies"):

> And why do they record the opinion of a single person among the many, when the Halachah must be according to the opinion of the many? So that if a court prefers the opinion of the single person it may depend on him. For no court may set aside the decision of another court unless it is greater than it in wisdom and in number. If it was greater than it in wisdom but not in number, in number but not in wisdom, it may not set aside its decision.

21 HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD, EDUYYOTH 29b (Rabbi Dr. I. Epstein ed., M.H. Segal trans., 1988).

Cass Sunstein makes a similar point. He has recently "ventured a unified treatment of three social phenomena: conformity, cascades and group polarization," all of which tend to deprive society of valuable information that could save it from blunders and injustice. CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT 210 (2003). He provides evidence that a dissenting judge on a three-judge panel who is from a different political party acts as a kind of whistleblower, dragging the other two like-minded judges kicking and screaming to follow the law laid down by the Supreme Court. *Id.* at 176–78.

46. MAIMONIDES, *supra* note 41, at 102.

careful study of one's own and one's opponent's position, and of according the latter the utmost respect.

These are the virtues of a legal culture that treasures dissent. They are, I think, the virtues of any culture of dissent, whether based on transcendent law or on secular morality and policy. Not just these virtues but the entire structure of dissent in the rabbinic tradition may, I suggest, be carried over into cultures where law is not expected to be transcendent. Thus, we may suspect that the sources of *halakhic* authority's openness to dissent will also be the sources of openness to dissent in a non-transcendent legal culture. A culture of dissent must regard law as inherently open to disputation. The process of working out the law must be an entirely human one, permitting no affirmation other than by vote of the majority. The culture must recognize that, in theory at least, the view of a qualified dissenter may eventually replace the view of the majority. These are the pillars of dissent, and a legal culture lacking any one of these will not be interested in or even tolerate it.

When we turn to the English case, we find all three pillars intact. Legal literature was predominantly, if not exclusively, a literature of contestation. The Yearbooks, which ran from the reign of Edward I to 1535, were notebooks in which students recorded the debates of judges prior to a vote. These notebooks were the basis for further study by other students and lawyers. The entire experience of legal learning was of debate. The focus of learned energies was in mastering the techniques and ideas that animated the debate, not scholarly meditation on a sacred text. Little in the legal culture was devoted to justification after the vote.[47] Rules had an agonistic, not an inquisitorial, origin,

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47. *See* L.W. ABBOTT, LAW REPORTING IN ENGLAND 1485–1585, at 16 (1973) (stating that medieval reporters were used to teach the art of pleading and often neglected to record the final judgment in a case). As late as the end of the sixteenth century, Coke "lamented the neglect of methodical reporting and reliance on a series of 'running reportes' which failed to convey the right reason and rule of the case." *Id.* at 248. It seems to have been Coke who began the transformation to opinion-centric reports:

> Coke frequently omitted the speeches of counsel altogether and concentrated on opinions from the bench. . . . He professed a high regard for the judges and saw in their pronouncements the heart of the common law; as he was accustomed to say, they were *lex loquens*. One of the motives he gave for publishing his reports was to preserve the more memorable resolutions propounded by the sages of the law. . . .

Id. at 251 (footnotes omitted).

In early common law, one sort of legal literature was available that often did present reasons: the plea rolls. DAWSON, *supra* note 3, at 51. But the practicing bar that developed in the late 1200s took little interest in organizing them into a usable system of legal literature. Their attention was focused exclusively on where the action was: the jousting of the experts and judges in Westminster Hall. Hence the agonistic order of the Yearbooks was dominant. *See* DAWSON, *supra* note 3, at 52–55 (noting Yearbooks' argument-oriented record of legal proceedings).

and retained their agonistic stamp—sometimes more, sometimes less, depending on the greater or lesser influence of Romanism,[48] on the natural tendency of institutions to fall into peaceable routine—throughout the common law. True, the contention described in the Yearbooks was not underwritten by a transcendent structure; the culture had no sense that this was how law had to be. Thus common law cultures are always prey to slipping into the civilian spirit.[49] But neither is the decadence of common law, in those eras it commands, underwritten by a transcendent structure, by the expectation that authority ought to speak with one voice. Periods of decline in the agonistic spirit can be succeeded by periods of renewal. The hardening of the doctrine of precedent, which seems to cut off the possibility that dissent can become the rule, is inevitably challenged by the pressures of political and social transformation, and precedent must always be ready to give way. Thus we cannot say that common law as it always was, in its own mythic time, is as it is or even as it wishes to be. But enough of common law's ideal self-image remained, so that in the period English judges began to write or deliver[50]

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48. Turner speculates that common law owes its insularity, its tendency towards resistance against civilian and canonist ideas, to the gradual disappearance of clergy from the bench beginning in the fourteenth century. G.J. Turner, *Introduction* to 4 THE YEAR BOOKS OF EDWARD II, A.D. 1309–1311, at xxi (F.W. Maitland & G.J. Turner eds., 1907).

49. A remarkable instance of this tendency is Lord Halsbury's pronouncement, in dictum, that "a decision of the House [of Lords] on a question of law is conclusive," and can be changed only by act of Parliament. London St. Tramways Co. v. London County Council, [1898] A.C. 375, 380, *quoted in* DAWSON, *supra* note 3, at 91. Dawson remarks rather wryly: "This self-declaration of infallibility by the House of Lords followed by only twenty-eight years the declaration of papal infallibility by the Vatican Council of 1870. There is no reason to suspect a connection." DAWSON, *supra* note 3, at 91–92. Lord Halsbury's understanding dominated the House of Lords until 1966, when it announced that it would "depart from a previous decision when it appears right to do so." Note, [1966] 3 All E.R. 77, 77. What the Lords give, they can take away.

50. Dawson reports that, as of 1959, written opinions are the usual practice only of the House of Lords:

> But most opinions in other courts, even at the intermediate appellate level, are still delivered extemporaneously at the conclusion of oral argument. It then becomes the reporter's task to ensure that these oral comments are reduced to readable English. Through usage, not rule, drafts of opinions that have been selected for inclusion in the Law Reports are submitted to the judges for criticism and comment. The opportunity thus given to edit the drafts before publication makes it possible to describe them as "approved" by the judges. But the extent to which revisions will be suggested depends on the choice of each individual judge, since this aid is bestowed "purely as a matter of grace." On the other hand, many cases are reported, not in this approved series (one cannot call it an "official" series), but by various private enterprisers with no other safeguard than a certificate by a barrister that he has reported what he heard. Here the only protection is a disclaimer entered later by the judge, asserting that he has been misquoted.

elaborate justifications of positions already reached—in the period the legal literature ceased recording debates and began displaying judgments—enough of the spirit of the Yearbooks survived to create the expectation that each judge would have a position, that each must justify his vote, and that the institutional decision was the disposition alone and never the judgment.

Modern American practice is a bit more complex than I have described. While the Supreme Court Reports say, "Justice So-and-so delivered the opinion of the Court," reports of the appellate decisions of most or all the states do not. They just say, "Smith, J.," and the opinion follows. They do, however, characterize the actions of judges writing separately as "dissenting" or "concurring." One must infer that the lead opinion, where the action of the writer has not been characterized, is the opinion of the court. The same is true of decisions of the United States Courts of Appeals.[51] Of course, it happens upon occasion (and more frequently in recent times) that the Supreme Court cannot muster five Justices to agree on a single opinion. In that case, there will usually be a plurality opinion for which the report says, "Justice So-and-so announced the judgment of the Court and delivered an opinion, in which Justice A, Justice B, and Justice C join." It's also possible that the Court split nine ways, when not even a plurality can be assembled.[52] But in the overwhelming majority of cases one Justice delivers an "opinion of the Court," whether called that or not, and signs.[53]

DAWSON, *supra* note 3, at 83 (footnotes omitted). Dawson draws much of his information about the history of English law reporting from the indispensable W.T.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS (1884). DAWSON, *supra* note 3, at 80 n.1.

51. When a court of appeals opinion is unpublished, no judge claims authorship. The report simply states the names of the three judges on the panel (as it would when an opinion is published) followed by the (authorless) opinion.

52. This happened in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the *Pentagon Papers Case*) (featuring very brief three-paragraph per curiam, virtually without legal reasoning, together with six concurring opinions, none joined by more than one Justice, and three dissenting opinions, two of which were solo performances and one joined by two Justices). Another example, somewhat akin to the *Pentagon Papers Case*, is *Dred Scott v. Sandford*, 60 U.S. 393 (1856). Chief Justice Taney did write what he styled an "opinion for the Court," but it is unclear that he had a majority, and every Justice wrote a separate opinion. *Id.* at 399.

53. My colleague, Michael Herz, has pointed me to *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), in which three Justices—O'Connor, Kennedy, and Souter—claimed authorship of the opinion of the Court. In other cases where more than one Justice contributes to an opinion, only one claims authorship. The opinion of the Court in *Casey* is interesting also because it was the opinion of the Court only for certain sections. Thus the complex statement: "O'CONNOR, KENNEDY, and SOUTER, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, in which BLACKMUN and STEVENS, JJ., joined, and an opinion with respect to Parts IV, V-B, and V-D." *Id.* at 841.

Of course, the Supreme Court does not really say who the author of an opinion is; it just

We can date the origins of the Supreme Court's opinion-delivery practices to the accession of John Marshall as Chief Justice in 1801. Before Marshall, a majority of decisions (71%) were announced in a single, short opinion issued in civilian style, unsigned and unaccompanied by separate opinions.[54] Alexander Dallas does report, however, that the opinion was "By the Court" (per curiam), in contrast with civilian reports, which need not make that announcement.[55] Most of the rest (24%) were announced English-style, in seriatim opinions prepared by each Justice and read from the bench.[56] John Kelsh surmises that the Justices may have chosen one or the other method for one of two reasons. They may have used the seriatim method when they were in disagreement.[57] Or, they may have prepared seriatim opinions when they were facing constitutional issues.[58] Kelsh also relates at least three occasions on which Dallas "identified the opinion not as being given by the Court itself, but rather

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describes one of the Justices as "delivering" it, as an automobile dealer delivers a Chevy, or an obstetrician a baby. Rather thoughtlessly, I think, we assume that the delivery man is staking a claim to be the opinion's maker, as if the dealer made the Chevy or the obstetrician the baby. It is the agreement of at least four Justices other than the opinion's putative author that makes it the *Court's* opinion.

54. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140 (1999).

55. *See, e.g.*, Oswald v. New York, 2 U.S. (2 Dall.) 415, 415 (1793) (providing an early example of Dallas's "By the Court" designation).

56. *Id.* The Court used the seriatim practice in the first case reported by Dallas, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792). The first opinion in Dallas's report (Justice Thomas Johnson's) was a dissent (without, of course, label attached).

The Court had models for both styles in English practice. Appeal from judgments of colonial courts was to the Privy Council in England, and Privy Council recommendations to the King were announced anonymously, without separate opinions. This had been the case since 1627, when the Privy Council 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." Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 188 (1959) (quoting Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 207 (1923)). Common law courts, in contrast, issued seriatim opinions in the seventeenth and eighteenth centuries. *Id.* at 190–91.

57. Kelsh, *supra* note 54, at 140. His evidence is Justice Chase's remark in his seriatim opinion in *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800): "The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president; and therefore, I have not prepared a formal argument on the occasion." *Id.* at 43.

58. Kelsh, *supra* note 54, at 141. He relies on David Currie's finding that fourteen cases in the pre-Marshall era presented constitutional issues. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 3–54 (1985). Of these, the Justices prepared seriatim opinions in seven—a 50% rate. They used seriatim opinions in only eight of the balance—a 17% rate. Thus the rate in cases that presented constitutional issues is triple that in cases that did not.

as having been delivered by the Chief Justice."[59] It is this last method that Marshall pursued with crusading vigor.

For Marshall believed that it was only by presenting a united front that the Court could enhance its power vis-à-vis the legislature and the executive, as well as its prestige in the eyes of the public.[60] Jefferson had just won the election of 1800, and the judiciary was the last remaining branch of the national government to be dominated by Federalists. The Court was to confront the politically charged case of *Marbury v. Madison*[61]—the very case in which Marshall would assert the power of the Court to declare acts of Congress unconstitutional—soon after Marshall became Chief. Marshall thus persuaded his colleagues not to write separately.[62]

Marshall was able to hold his troops in line from January 1801, when he became Chief Justice, until February 25, 1804, when Justice Chase delivered a one-sentence (unlabeled) seriatim opinion concurring in the judgment in *Head & Amory v. Providence Insurance Co.*[63] Actually, this was a shorter spell of discipline than first meets the eye, for the anti-federalist Congress, in an "extraordinary legislative maneuver," forced adjournment of the Court for fourteen months, from December 1801 to February 1803.[64] Their motive was

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59. Kelsh, *supra* note 54, at 141.

60. LEONARD BAKER & JOHN MARSHALL, A LIFE IN LAW 414 (1974).

61. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

62. Marshall himself changed his vote upon occasion in order to achieve unanimity. *See* Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2075 (1995) (quoting DONALD E. LIVELY, FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT, at xxii (1992)). Between 1801 and 1806, the Justices reverted to the English style in only five cases—all when Marshall was either away or had recused himself. Kelsh, *supra* note 54, at 144. When the cat's away, the mice will play.

63. Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 169 (1804). John Kelsh believes that Justice Chase's concurrence accompanying a signed opinion for the Court was not the first. Kelsh, *supra* note 54, at 142. He cites Justice Iredell's separate opinion in *Sims Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799). *Id.* While Kelsh's work is on the whole indispensable, I disagree with his interpretation of Dallas's report. Dallas does say that "[t]he Chief Justice, on the last day of the term, delivered the opinion of the court," *Sims Lessee*, 3 U.S. (3 Dall.) at 456, but of Justice Iredell's concurrence he says in a note:

> The Chief Justice observed, at the conclusion of the opinion of the Court, that Judge Iredell (whose indisposition prevented his attendance) concurred in the result, but for reasons, in some respects, different from those which had been assigned. As I have since been favored with a copy of Judge Iredell's notes, I should think the report of the case imperfect without publishing them.

Id. at 457. It was Dallas's decision, not Justice Iredell's, to publish Justice Iredell's "notes," which had not been read in court as a proper "opinion." *Id.*

64. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: VOLUME ONE 1789–1821, at 222–23 (1922).

to delay a constitutional challenge to their repeal of the Federalists' Circuit Court Act of February 13, 1801, which had created the very judgeships that were at issue in *Marbury*.[65] So Marshall had sat as Chief Justice for what was effectively only two years—1801 and 1803—when the Court's reporter, Judge William Cranch, published Chase's concurrence.

We do not know why Chase broke rank. Perhaps he considered Marshall's avowed purpose—strengthening the Court as a co-equal branch of government—not germane to a case asking the Court to decide whether a circuit court had erred in directing a jury that certain communications between an insurance company and its insured formed a binding contract.[66] Perhaps he calculated that the storm over *Marbury* having been successfully endured,[67] the need for Marshall's discipline had passed. Perhaps he felt that there was no harm in a concurrence. Certainly Chase, a Washington appointee, was no enemy of Marshall's.

And enemies there were, who chafed under Marshall's practice. President Jefferson, who knew exactly what Marshall was up to, was particularly incensed. Years later, Jefferson wrote to Justice William Johnson, Jefferson's first Supreme Court appointee, who assumed office in 1804:

> The Judges holding their offices for life are under two responsibilities only. 1. Impeachment. 2. Individual reputation. But this practice 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. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all. That of seriatim argument shews whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve. It would certainly be right to abandon this practice in order to give to our citizens one and all, that confidence in their judges

65. *Id.* at 185, 222. Congress was right: The first case decided by the Court upon resuming judicial business in February 1803 was *Marbury*. *Id.* at 231.

66. *Head & Amory*, 6 U.S. (2 Cranch) at 169.

67. Interestingly, the Court's assertion of power to determine the validity of Congressional legislation attracted little notice. The storm was over what was actually dicta in Marshall's opinion: his assertion of the Court's power to issue mandamus to a Cabinet official acting at the direction of the President, were Marbury and his colleagues to resubmit their petitions in district court and were the matter to arrive in the Supreme Court by writ of error, the Supreme Court's original jurisdiction over petitions for mandamus having been found unconstitutional. *See* WARREN, *supra* note 64, at 232 (noting that public controversy over *Marbury* centered on Court's checking executive branch).

> which must be so desirable to the judges themselves, and so important to the cement of the union.[68]

In a letter to Thomas Ritchie in 1820 about the impracticability of using the threat of impeachment to control judges who were all too ready to support the expansion of federal power, Jefferson complained that Marshall's "habit of caucusing opinions" and "his practice of making up opinions in secret and delivering them as the orders of the Court" had made impeachment even less feasible. He scorned the Court's "opinion[s] 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 mind, by the turn of his own reasoning."[69]

We know that Johnson himself despised Marshall's practice. In 1822 he wrote to Jefferson:

> When I was on our State Bench, I was accustomed to delivering *seriatim* opinions in an Appellate Court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions. . . . But I remonstrated in vain; the answer was, he is willing to take the trouble, and it is a mark of respect to him. I soon, however, found out the real cause. Cushing was incompetent, Chase could not be got to think or write, Paterson was a slow man and willingly declined the trouble, and the other two Judges (Marshall and Bushrod Washington) you know are commonly estimated as one Judge.[70]

Johnson was being unfair to his political opponents. The first concurrence, after all, was Chase's, the man who "could not be got to think or write."[71] It was, to be sure, but a single sentence, but Chase had been one of the most active Justices on the pre-Marshall Court.[72] And the first dissent, following Chase's concurrence by only one year, belonged to Washington, the man who was with Marshall "commonly estimated as one Judge."[73]

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68. Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), *quoted in* DONALD G. MORGAN & JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE 169 (1954).

69. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *quoted in* WARREN, *supra* note 64, at 113–14.

70. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), *quoted in* WARREN, *supra* note 64, at 655. Marshall and Washington were close friends. G. Edward White, *The Working Life of the Marshall Court*, 70 VA. L. REV. 1, 14 (1984).

71. *Id.*

72. Kelsh, *supra* note 54, at 147.

73. *Id.*

The case was *United States v. Fisher*;[74] the question, whether an act of Congress of 1797, giving the United States a preference in bankruptcy over private creditors, was constitutional. The circuit court of Pennsylvania had determined that it was not. The Supreme Court, with Marshall delivering its opinion, reversed, holding that it was.[75] Washington wrote separately, albeit with reluctance:

> Although I take no part in the decision of this cause, I feel myself justified by the importance of the question in declaring the reasons which induced the circuit court of Pennsylvania to pronounce the opinion which is to be re-examined here.
>
> In any instance where I am so unfortunate as to differ with this court, I cannot fail to doubt the correctness of my own opinion. But if I cannot feel convinced of the error, I owe it in some measure to myself and to those who may be injured by the expense and delay to which they have been exposed to shew at least that the opinion was not hastily or inconsiderately given.[76]

Note the care with which Washington avoids characterizing his action as dissent. He takes "no part in the decision of this cause."[77] He feels himself "justified by the importance of the question."[78] He is "declaring the reasons which induced the circuit court of Pennsylvania to pronounce the opinion which is to be re-examined here."[79] He wants to show the parties to the litigation, who may have been "injured by the expense and delay to which they have been exposed . . . at least that the opinion [of the circuit court] was not hastily or inconsiderately given."[80] That is all. What is effectively dissent is presented as a display of reasons, out of consideration to the parties, justifying their expense and delay. The bonds of Marshall's quest for unanimity pulled strong on Washington, but did not quite break.

A clearer dissent was Justice Paterson's, in *Simms v. Slacum*,[81] one year after *Fisher*. Gone are the apologies that marked all previous dissents.[82]

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74. United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805).

75. *Id.* at 397.

76. *Id.* at 397–98.

77. *Id.* at 397.

78. *Id.*

79. *Id.*

80. *Id.* at 398.

81. Simms v. Slacum, 7 U.S. (3 Cranch) 300, 309 (1806) (Paterson, J., dissenting).

82. In *Wilson v. Daniel*, 3 U.S. (3 Dall.) 401 (1798), Justice Iredell wrote:

> I differ from the opinion, which is entertained by a majority of the Court on the second exception; though, if the merits of the cause had been involved, I should have declined expressing my sentiments. As, however, the question is a general

Paterson simply sets about the task of explaining his disagreement with Marshall. But he, too, carefully refrains from saying that he is dissenting. Even so, Marshall (or perhaps Cranch[83]) no longer feels able to say that Marshall was delivering "the opinion of the court": Now he is delivering "the opinion of the majority of the court."[84] The first full-throated dissent from an "opinion of the court" had to await the great dissenter himself, Justice William Johnson,[85] in *Ex parte Bollman*,[86] in 1807. Here Johnson writes with a flourish of "despair" that he is forced openly to acknowledge dissent:

> In this case I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt the opinion that this court has not authority to issue the writ of *habeas corpus* now moved for.[87]

And Marshall? He now styles himself (or Cranch styles him) as delivering "the opinion of the court."[88] The modern relationship of "opinion of the court" to dissent had arrived.

Marshall's associates could not wholly be weaned from the practice of delivering opinions seriatim—they continued occasionally into the Taney era.

> question of construction, and is of great importance, I think it a duty, briefly, to assign the reasons of my dissent.

Id. at 405 (Iredell, J., seriatim opinion). In *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796), Justice Wilson said: "I consider the rule established by the second proposition to be of such magnitude, that being in the minority on the decision, I am desirous of stating, as briefly as I can, the principles of my dissent." *Id.* at 324 (Wilson, J., seriatim opinion). Finally, in *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 416 (1793), Justice Iredell lamented: "It is my misfortune to dissent from the opinion entertained by the rest of the court upon the present occasion; but I am bound to decide, according to the dictates of my own judgment." *Id.* at 416 (Iredell, J., seriatim opinion).

83. Cranch did claim the rights of an author for the purposes of copyright. *E.g.*, 7 U.S. (3 Cranch), copyright notice page. Nevertheless, in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), a majority of the Court (in dictum) toppled the pretensions of Cranch and his successors: "[T]he court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court. . . ." *Id.* at 668. Later, in *Banks v. Manchester*, 128 U.S. 244 (1888), a unanimous Court reaffirmed that "[t]he whole work done by the judges . . . is free for publication to all," *id.* at 253 (citing Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886)), but distinguished annotations, editorial work, and the like, *id.* I am grateful to my colleague Justin Hughes for pointing me to these opinions.

84. Simms v. Slacum, 7 U.S. (3 Cranch) at 306.

85. For Johnson's role as the Jeffersonian dissenter on the Marshall Court, see MORGAN & JOHNSON, *supra* note 68.

86. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

87. *Id.* at 101 (opinion of Johnson, J.).

88. *Id.* at 93.

But by 1808, the practice had begun to die.[89] The practice of delivering per curiam opinions in the style of the pre-Marshall Court lasted somewhat longer. By the period 1814 to 1817, however, the Court was reporting only 4% of its opinions per curiam,[90] and for the balance of the century, until its revival in the 1880s, the per curiam opinion all but disappeared.[91]

The American practice of opinion delivery had its origin, then, in the political and institutional ambitions of a particular Chief Justice sitting at the head of a particular court facing a unique constellation of forces. Even so, Marshall's achievement of massing the Court while fixing responsibility for the opinion of the Court upon a single Justice, together with Johnson's achievement of legitimating dissent from the mass, became the norm throughout the United States, in both state and intermediate federal appellate courts. Hence, the specific practice of the Supreme Court of the United States must have appealed to needs felt generally in the American judiciary.

Perhaps the story is as simple as one of emulation. But that story is not wholly credible, for in the first half-century of the Court's existence state supreme court justices could well have considered their courts superior to Federal courts; they were the inheritors of the plenary common law jurisdiction of the King's courts sitting in Westminster, which Federal courts did and do not have. John Rutledge, recall, quit the Court to accept a position as Chief Justice of South Carolina.[92] Perhaps judges sitting on the highest courts of their states faced struggles and harbored ambitions resembling Marshall's. But this would not explain why judges sitting on intermediate federal courts, who did not face such struggles or harbor such ambitions, embraced Supreme Court practice as well. One is thus permitted to imagine that a different need, felt across a continent of jurisdictions, impelled them towards a uniform approach.

I would like to suggest that the need animating American practice was the imperative for unity. In England and on the Continent, in contrast, unity is assumed (but for very different reasons). This is not to say that English and Continental judges do not face heterogeneity in fact. They do, however,

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89. *See* Kelsh, *supra* note 54, at 144–45 (stating that by 1808, justices other than Marshall had abandoned seriatim opinions).

90. *Id.* at 145.

91. *See* Arthur J. Jacobson, *The Ghostwriters*, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000, at 190 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002) (stating that prior to 1883, the Court had designated only two opinions per curiam). The Court began the practice of labeling its "By the Court" opinions "per curiam" only in 1839, in *West v. Brashear*, 76 L. Ed. 1341 (1839). Jacobson, *supra*, at 190.

92. WARREN, *supra* note 64, at 56–57.

have a very different stance towards it than do Americans. Heterogeneity is for them an aberrance, a failure, a departure from the norm. It threatens social order, as they understand social order. In the United States all this is about-face. Heterogeneity is the social order, the norm. It is neither aberrance nor failure. It is the expected, often exalted, condition of life. The political constitution of the United States displays this assumption perspicuously: Our nation was forged as the unity of thirteen separate sovereigns maintaining a plurality even as they are one. Our states are not *départements*. The great theme of *The Federalist* is an argument for union expressed in answer to three questions: "What is union? Why must we have it? What political form should it take?"[93] We do not assume union, but that it must be sought and won. Government, as we understand it, does not reflect unity—the unity of a nation, of a class, of a language; it forges unity instead. Openness in a department of government to the idea that judgment must be massed and that exhibiting the process of its massing is an indispensable task of governance should not in the least surprise. It would be unthinkable to conceal the process by publishing only the opinion of the court. It would also be undesirable not even to attempt the process, publishing opinions seriatim. American judicial practice thus reflects and re-enforces our deepest experience of politics, our persisting understanding of what it is that must be done.

The structure of our legal profession in the early years of the nineteenth century also supported this understanding. The legal professions on the Continent and in England earned the assumption of unity in two ways, neither of which was available to the legal profession in the United States. The first, paramount in both systems, was education. Civilian jurisdictions bore the stamp over time of a single vision of learning, emanating from a single source and striving to maintain its unity. Unity was not only achieved as a fact, more or less, but also espoused as a norm—a *ius commune* for all of Christian Europe. Similarly, the profession of barrister in England possessed

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93. Arthur J. Jacobson & Bernhard Schlink, *Constitutional Crisis: The German and American Experience*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS 337 n.23 (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper trans., 2000). As Professor Schlink and I say in a note:

> This series of questions roughly tracks the structure of argument in *The Federalist*. After an introduction, Numbers 2 through 14 are devoted to the argument for union. Numbers 15 through 22 discuss the defects of confederation as a device for union, and Numbers 23 through 46 detail the powers a national government must have for union and the powers that may be reserved to the states. Numbers 45 to the end defend the exact structures of government proposed by the Framers to instantiate national power.

Id.

a "third university,"[94] a "common erudition,"[95] in the Inns of Court (not to mention the civil and common law faculties at Oxford and Cambridge). Continental lawyer and English barrister shared the intense and youthful union of an education in common, an education apart. The Inns of Court supplemented this youthful experience with the cultivation of sociability throughout a barrister's entire professional life—the Inns of Court as a club. The second way of earning the assumption of unity was thus peculiar to England. The profession of barrister has always been an intimate one, aided by excluding from litigation lawyers who had not been educated in the Inns and were therefore not eligible for membership. The barrister in the course of his career would experience, in fellowship and in contention, a wide swath of his profession. Sustained intercourse over tasks in common is welcome ground for the growth of similar turns of mind.[96]

None of these conditions held in the United States. Legal education in the first decade of the nineteenth century was, for the most part, law office education.[97] It was education as the by-product of practice, not a comprehensive survey of a unified system of thought. It was isolated, not in common; dispersed, not cloistered up. It looked towards no ideal, had no club. There clung about it something of the illegitimate, for in a democracy, how could a privileged profession claim a monopoly on law?[98] As the population of the country exploded, moreover, the profession lost any chance for the intimacy

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94. J.H. BAKER, THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW 3 (2000).

95. J.H. BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY 67 (2001).

96. Dawson makes the point that the common law judiciary was minuscule by comparison with, say, the judiciary in France. "[F]rom 1200 to 1800," he says, "the permanent judges of the central courts of common law and chancery, all taken together, rarely exceeded fifteen." DAWSON, *supra* note 3, at 3. By the eighteenth century the thirteen Parlements, or high appellate courts, of France had over 1,200 judges. *Id.* at 2.

97. Perry Miller surveys the scattering of law schools:

> Tapping Reeve's at Litchfield from 1784 to 1833, the lectures of James Wilson, already famed as a statesman and jurist, at Philadelphia in 1790, the tentative beginnings under Kent at Columbia in 1793, plus the tuition of Wythe and Tucker at William and Mary, the professorship at Transylvania in 1798, the Harvard Law School in 1817, and the Yale School in 1843. . . .

PERRY MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 109–10 (1965).

98. *See id.* at 108 (chronicling resentment of elite judiciary's continued adherence to English common law in newly independent United States). Miller does record the remarkable rise of the legal profession despite hostility in the three or four decades after 1790. *Id.* at 109. It was Tocqueville who famously described the aristocratic, anti-democratic character of the American legal profession in the early nineteenth century. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282–90 (Henry Reeve trans., Vintage Books 1945).

it might once have had.[99] It could not bring unity ready-made to the table of governance.

From this perspective, it is of the highest importance that judges in the United States are drawn from the ranks of practicing lawyers, not from a separate judicial career track as in civilian systems (and not from a sodality of barristers[100]). Judges come to the bench—I am tempted to say, are thrown on the bench—without years of specifically judicial training and collegial interaction in a professionalized judicial setting. The judge who has made a life's work of judging—who has lived in a disciplined institution and mastered its ways—is not the American judge. The civilian judge who renders an opinion would undoubtedly find it odd to sign or write a separate opinion. He is the representative of an institution, after all, and when the institution is functioning properly—when it is educating and professionalizing its members up to the mark—he expects that any member of the institution ought to be able to replace him in a given decision without altering the result or even the reasoning. American lawyers and judges, in contrast, are comfortable with different results and disparate reasoning. Not only are we blessed with a multitude of jurisdictions (and in states like New York, a number of departments within one jurisdiction), but every judge and every lawyer knows in his bones that if two different juries hear the same case (in a multi-victim accident, for example), the results can and often will be discrepant. That for us is mother's milk. For all these reasons, the American judiciary really does expect an opinion written by a judge, even if for the court, to be *his* opinion; if another judge composed it, the opinion really would be different. So *he* must sign; *he* must take responsibility.

The effect of American exceptionalism in the practice of dissent has, I believe, enormous jurisprudential and political implications; it would be anomalous indeed if the history and institutions of the three systems—the civilian, the English, and the American—did not reflect and inform profound jurisprudential and political differences. Lawyers in common law jurisdictions expect legal rules to be the site of ongoing conflict between clashing visions of justice, rather than, as in civilian jurisdictions, the expression of a single vision of justice or the definitive triumph of one vision over another. For the process

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99. The population of the United States in 1790 was 3,929,214; in 1850 it was 23,191,876. Population density in 1790 was 4.5 per square mile; in 1850 it was 7.9. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 7, *available at* http://www.census.gov/prod/2004pubs/04statab/pop.pdf.

100. The practice of drawing judges from the ranks of serjeants, rather than from the clergy, was, according to Dawson, the result of a gradual process that began in the middle of the thirteenth century. DAWSON, *supra* note 3, at 10–11.

by which common law arrives at rules is agonistic rather than inquisitorial. The rule engraves the visions of justice that the rule appears to have rejected (and often quite directly, when the majority opinion refers to and argues with a concurrence or dissent). I say "appears," because future applications of the rule will always return the rejected visions to active duty. Far from dictating a "right answer," the rule simply channels inquiry in a certain direction.[101] It is a first draft of justice, subject to recall and revision. By publishing dissents along with majority opinions common law honors losing visions of justice; it suggests that it would be legitimate and appropriate for them one day to form a majority; it makes law in principle infinitely revisable.[102] Rules thus never shake their agonistic origin.

To be sure, forces tending to muffle the distinctive character of rules in common law systems abound. We have one right here, in the subject of this colloquium: the American practice of depublication. To depublish an opinion is to suppress a court's own dissent to its own decision. Dissent without opinion is another.[103] More important, the presence in England of only a single jurisdiction and, until recently, a homogeneous population, together with the control of litigation by barristers, suggests that rules in English common law ought to differ systemically from rules in the American. English rules are the product of a craft guild with a craft sensibility. There is good craft, and there is bad. While English judges are free, effectively, to concur, I am told by my English colleague, Peter Goodrich, that judges rarely use majority judgments to express truly different *rationes*; rather, judgments elaborate or emphasize an

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101. *Cf.* KARL LLEWELYN, THE CASE LAW SYSTEM IN AMERICA §§ 52, 56 (Paul Gewirtz ed., Michael Ansaldi trans., Univ. of Chi. Press 1989) (asserting that rule's applicability to doubtful case is unknown until judge, largely guided by facts, renders decision).

102. Richard Primus has pointed out that certain dissents to Supreme Court decisions that came over time to be regarded as errors, such as Justice Holmes's dissent to *Lochner v. New York*, 198 U.S. 45 (1905), and Justice Harlan's dissent to *Plessy v. Ferguson*, 163 U.S. 537 (1896), have come to be regarded as authoritative, even though the Court has never formally overruled the decisions. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245–46 (1998).

103. My colleague, Jonathan Silver, together with Bernard Wolfman and Marjorie Silver, has written a scathing indictment of Justice Douglas's all-too-frequent dissents without opinion in tax cases. In his most extreme period, 1959–1964, he was the lone dissenter in nine of the eighteen cases in which he dissented. In six of the nine he dissented without opinion. BERNARD WOLFMAN ET AL., DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES 43–44 (1975).

The authors quote a view Justice Douglas expressed in a speech in 1949 that implicitly condemns this practice: "[W]hatever the view on the merits all will agree, I think, that the recent Court was more faithful to the democratic tradition. It wrote in words that all could understand why it did what it did. That is vital to the integrity of the judicial process." *Id.* at 136–37 (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949)).

aspect of the case not elaborated or emphasized by others. By the same token, judges do not fundamentally believe that they are brokering visions of justice; the answer to the question posed is always already present in the record of prior judicial decision, however difficult or laborious or rent by dispute may be the process of teasing it out. England, remember, never received American legal realism—a remarkable fact of twentieth century English legal history—and realism never had any purchase on English judges; its main proponent within the English academy was not a lawyer but a political scientist, Harold Laski. I do not mean to say that England's common law is devoid of conflicting visions—they do, after all, still have the jury, though in vastly attenuated form, and English rules of common law do still have an agonistic source. Nevertheless, the expectation that rules will be the site of ongoing conflict amongst discordant visions of justice takes a very different form in England than in the United States, and, from a certain perspective, is vastly curtailed.

By signing opinions, common law judges take moral and political responsibility for the positions they shoulder in the conflict of visions, just as the parties whose disputes they resolve assume responsibility for their positions. Rather than oracles of the law bearing legal truth to a feckless mass, common law judges are participants with citizens in an ongoing struggle over plural visions of justice. Rather than ersatz legislators issuing rules from out of a potpourri of competing principles and policies, judges more nearly resemble co-adjutants in the resolution of disputes amongst antagonists unable to ravel them without assistance. Common law makes disputation on the bench continuous with the disputes that occasion it; it invites ordinary citizens to see themselves as part of the process of disputation. It thus reduces the gulf between judge and lawyer, between judge and citizen. The English system is, in this respect, even more effective than the American: The old serjeant (as to some degree the barrister today) participated in the process of appellate decision as virtually the equal of the judge.[104] In both, however, the publication of dissent and the consequent clarity that it is the majority mobilized by the court's opinion, not the opinion itself, that establishes an opinion's validity, reduces the risk that judges will claim a radically different relationship to legal wisdom than that possessed by lawyers. The principle of decision is and is seen to be no different than the principle of decision in the political branches of government. Dissent democratizes law, throws open the doors of law, to those who are its clients.[105] The jury has a cognate and powerful democratizing

104. *See* DAWSON, *supra* note 3, at 1 (describing judges as "first among equals" in group of judges and pleaders).

105. My colleague Kevin Stack maintains that the practice of dissent in the Supreme Court may be legitimated through consideration of the constitutional commitment to the ideal of

effect: It is the one moment in the United States Constitution in which the people as such participate directly, not indirectly through representatives, in their own governance.

At the same time, common law, by forcing judges to sign opinions, celebrates them as individuals.[106] This emphasis on the individuality of judges makes judicial consistency into a public, and—in its American version—a problematic, virtue.[107] Unlike his English counterpart, the American judge writing for the majority speaks not for himself, but for the court. His opinion must sometimes reflect compromises needed to mass the court. Yet he cannot sign unless he is prepared to have those compromises entered upon his judicial record and held up to scrutiny for consistency with it.[108] To be sure, the

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deliberative democracy; the publication of dissents, he argues, shows the Court to be engaged in a deliberative process, just as Congress is. Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2246 (1996); *cf.* Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 853 (2001) (discussing tension between democratic ideal and judicial review of legislative action).

106. Justice Brennan has described a certain class of dissenter in almost heroic terms:

> The most enduring dissents . . . are the ones in which the authors speak, as the writer Alan Barth expressed it, as "Prophets with Honor." These are the dissents that often reveal the perceived congruence between the Constitution and the "evolving standards of decency that mark the progress of a maturing society," and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law.

William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430–31 (1986), *reprinted in* 50 HASTINGS L.J. 671, 674–75 (1999) (footnote omitted) (citing ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT (1974)). Justice Hughes has drawn a direct link between dissent and individuality:

> Dissenting opinions enable a judge to express his individuality. He is not under the compulsion of speaking for the court and thus of securing the concurrence of a majority. In dissenting, he is a free lance. 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.

CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS 68 (Garden City Publ'g Co. 1936) (1928).

107. Kelsh, *supra* note 54, at 142 ("It is ironic, then, that Marshall adopted the innovation of having one Justice speak for the Court as a means of unifying the Court. This same innovation also introduced heightened concepts of judicial consistency that later became an excuse for many Justices to write separately." (footnote omitted)).

108. The need for consistency has led some judges writing a majority opinion on assignment to write a separate opinion as well. Professor Herz has pointed me to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in which Justice Blackmun delivered the opinion of the Court *and* filed a separate opinion for himself and two other Justices. He did not style the separate opinion a concurrence—indeed, he did not style it anything at all ("Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR

doctrine of stare decisis does provide refuge from consistency, but one that is by no means complete. Sooner or later a case comes along that is sufficiently similar to a prior case to bring to mind the principles that decided it but not similar enough to engage the doctrine of stare decisis. The judge who agreed to the compromise result or reasoning in the prior case may well have a problem: either be consistent and extend the old principles to new and undesired territory or decline to extend the old principles and suffer the sting of inconsistency.[109] The need to mass the court has, as a consequence, the ironic tendency to fragment it.[110]

While the practice of dissent may breed division and heighten tensions on appellate panels[111] and even in society at large, I believe that it also has the

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join."). He opens the separate opinion by saying:

> The Court's opinion, *ante*, considers appellant Logan's due process claim and decides that issue in his favor. As has been noted, Logan also raised an equal protection claim and that issue has been argued and briefed here. Although the Court considered that it was unnecessary to discuss and dispose of the equal protection claim when the due process issue was being decided in Logan's favor, I regard the equal protection issue as sufficiently important to require comment on my part, particularly inasmuch as a majority of the Members of the Court are favorably inclined toward the claim, although, to be sure, that majority is not the one that constitutes the Court for the controlling opinion.

Id. at 438 (footnote omitted). In the omitted note he quotes from a separate opinion written by Justice Jackson, who also delivered the opinion of the Court in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949): "It cannot be suggested that in cases where the author [in writing by assignment] is the mere instrument of the Court he must forego expression of his own convictions." *Logan*, 455 U.S. at 438 n.1 (quoting *Wheeling Steel*, 337 U.S. at 576).

109. For a detailed discussion of judicial approaches to the relationship between dissent and stare decisis, see Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227. Justice Marshall and Justice Brennan famously dissented to dozens of denials of certiorari in death penalty cases, sometimes without comment and sometimes accompanied by a brief statement of reasons. Doing the following search in the "sct" file in Westlaw yields eighty-three documents—all, so far as I can tell, death penalty cases in which the Court denied certiorari: "Justice Marshall, with whom Justice Brennan joins, dissenting" & "certiorari is denied."

110. *See* Kelsh, *supra* note 54, at 142 (stating that desire to maintain individual doctrinal consistency motivates justices to write separate opinions).

111. On this see Brennan, *supra* note 106, at 429 ("Very real tensions emerge when one confronts a colleague with a dissent."). Justice Brennan tells the story of "a famous Master of the Rolls in England, presiding on a three-judge panel:"

> After hearing a half hour argument, he turned to his colleague on his right and said, "John, haven't we heard enough of this—surely we must allow this appeal." "Oh no, Chief," said John, "I couldn't possibly vote to do that." "Oh well, John," said the Master of the Rolls, "you're entitled to be mistaken." He then turned to his colleague on the left. "Tom," he said, "surely you agree that this appeal must be allowed." "Oh no, Chief," said Tom, "I emphatically agree with John." "Well then," said the Master of the Rolls, "the appeal will be allowed and you two argue between yourselves who will write the dissent."

effect of inculcating the political virtue of toleration. I have written elsewhere of a second paradox of toleration to flank Karl Popper's.[112] His, recall, was that tolerant citizens must be intolerant of the intolerant.[113] Mine holds that one source of intolerance is the very condition of general societal toleration. For like-minded citizens will gather in what I called "congregations" (to remind us that the only sacred duty in a tolerant society is the honest expression of opinion) in which all members share the same opinions, and to which members have loyalty only insofar as the congregation's opinions match their own. Members who disagree are free to start or join a more congenial congregation down the road. The congregation as well has no stake in fighting dissenters for their opinion, and can expel them without violating the norm of toleration.[114] The result, I argued, is that tolerant citizens "splinter into a welter of rigidly defined, sharply divided, and intolerant congregations,"[115] in which members hear only their own opinions and the virtue of toleration atrophies. The remedy I proposed for this second paradox of toleration was that congregations must be brought to publish the opinions of dissenting congregants. Only when dissenters see their opinions enrolled on the public record and accorded the respect that enrollment entails will they have any reason for remaining in the congregation. Only then will the congregation want to fight them for their opinions. The compulsory, public experience of conflict is the soil in which toleration thrives.

Justice, Stuart Hampshire once proposed, is conflict.[116] In this, as in all the political virtues, the judiciary is our indispensable teacher. A judiciary that

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Id.

112. Arthur J. Jacobson, *The Tolerant Congregation*, 1 S'VARA: J. PHIL. & JUDAISM 33 (1990).

113. 1 K.R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 265 n.4 (5th ed. rev., Princeton Univ. Press 1966) (1945).

114. My authority for this is Locke. He asks "how far the duty of toleration extends, and what is required from everyone by it?" He answers:

> And, first, I hold that no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to offend against the laws of the society. For these being the condition of communion and the bond of the society, if the breach of them were permitted without any animadversion the society would immediately be thereby dissolved.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 23 (William Popple trans., Bobbs-Merrill Co. 1950) (1689).

115. Jacobson, *supra* note 112, at 34.

116. STUART HAMPSHIRE, JUSTICE IS CONFLICT *passim* (Princeton Univ. Press, reprint ed. 2001) (2000). In opposition to Plato and the entire tradition of Western political thinking, Hampshire argues that institutionalized conflict is the only antidote to tyranny, because conflict presumes openness, diversity, and challenge to authority. *Id.*

publishes dissents and concurrences serves as the exemplar of justice. The propagation of separate opinions throughout the judiciary is, as Judge Kellogg of the New York Court of Appeals wrote of the survival of another oddity of common law, "a cause for gratulation rather than regret."[117]

117. Allegheny Coll. v. Nat'l Chautauqua Co. Bank of Jamestown, 159 N.E. 173, 178 (1927) (Kellogg, J., dissenting) (referring to survival of rule of consideration).