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## *MADISON LECTURE*

### JUDICIAL INDEPENDENCE, COLLEGIALITY, AND THE PROBLEM OF DISSENT IN MULTI-MEMBER COURTS

THE HONORABLE BERNICE B. DONALD\*

*Threats to judicial independence are most commonly viewed as arising either from politically motivated deprivations by other branches of government, or from improper inducements or coercion from individuals or groups in the wider society. Both types of threats are external to the court. What of the internal environment within which judges operate, particularly the immediate environment comprised of their colleagues on the bench? Drawing on a judicial career spanning thirty-seven years, including fifteen as a U.S. District Court judge and the past seven in my present position on the U.S. Court of Appeals for the Sixth Circuit, as well as on legal scholarship and the perspectives of other jurists past and present, I will address what one scholar calls the “complicated interdependent decisions” faced by judges on multi-member courts. This Lecture will explore the often complex calculus and subtle intrajudicial considerations that go into a judge’s decision whether—and, if so, how—to dissent in a particular case. I encourage reflection both on the costs that dissent exacts on the individual judge and on the court as a whole, and on the enormous value it can have as an expression of legal conscience and even, on occasion, as a voice of prophecy pointing to future change in the law. Ultimately, I view the right to dissent as precious, and a pillar of judicial independence.*

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## I

### THE PROBLEM OF DISSENT IN A MULTI-MEMBER COURT

Dissent has variously been praised as “the only thing that makes life tolerable for a judge of an appellate court” by Justice William Douglas<sup>1</sup>—and derided as “petty ankle-biting.”<sup>2</sup> Dissent has been characterized as “fun” by Justice Robert Jackson<sup>3</sup> and “liberating” by Judge Patricia Wald.<sup>4</sup> Dissent has been revered as “record[ing] prophecy and shap[ing] history” by Justice Felix Frankfurter,<sup>5</sup> while conversely being faulted as a “bother” that “frays collegiality” and “usually has no effect on the law” by Judge Richard Posner.<sup>6</sup> Judge Learned Hand went so far as to condemn dissent as a “disastrous” signal of a court’s “disunity.”<sup>7</sup> This fascinating, historic, difficult, and inspiring phenomenon is a unique characteristic of the judicial profession, and in particular of the multi-member context that is characteristic of appellate courts.

This Lecture examines the phenomenon of dissent in multi-member courts. How do, and how should, judges approach the decision whether to dissent from a majority opinion? This often complex decision has implications for the individual judge, for the judges of the court as a whole, for the court as an institution, for the judiciary writ

<sup>1</sup> WILLIAM O. DOUGLAS, *AMERICA CHALLENGED* 4 (1960).

<sup>2</sup> Michael O’Donnell, *What’s the Point of a Supreme Court Dissent?*, *NATION* (Jan. 21, 2016), <https://www.thenation.com/article/whats-the-point-of-a-supreme-court-dissent>.

<sup>3</sup> Philip B. Kurland, *Robert H. Jackson*, in 4 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2543, 2563 (Leon Friedman & Fred L. Israel eds., 1969).

<sup>4</sup> Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. CHI. L. REV.* 1371, 1413 (1995).

<sup>5</sup> Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 *HARV. L. REV.* 121, 162 (1927).

<sup>6</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 32 (2008).

<sup>7</sup> MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE NATION’S CONSTITUTIONAL DIALOGUE* 9 (2015).

large, and for the confidence of society in the judiciary. Dissent also impacts judicial independence in perhaps unexpected ways.

First, an overview of the problem of dissent. Judicial independence has an often overlooked component, one internal to the court. Nearly without exception, observers approach the topic as branch (“institutional independence”) or individual (“decisional independence”), the concern being with influence or pressures external to the court.<sup>8</sup> In Professor Charles Geyh’s conceptual framework, *institutional* independence is viewed through the separation-of-powers lens, a matter of the judiciary’s attributions as against those of the other, coequal branches.<sup>9</sup> *Decisional* independence has to do with the exercise of judicial authority free from improper external threats or inducements.<sup>10</sup> The institutional and decisional facets of judicial independence can be thought of together as structural—in contrast to behavioral independence, which refers to the actual conduct of individual judges.<sup>11</sup> The concern of the behavioral approach is the extent to which judges exercise their legal reasoning and judgment independently of illegitimate constraints.<sup>12</sup>

In this Lecture, I will focus on the behavioral side—the exercise of judicial authority by individual judges. Unlike the external focus that predominates in scholarship on judicial independence, I will examine the influence brought to bear on individual judges by the internal, institutional context in which judges function.<sup>13</sup> While federal

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<sup>8</sup> ABA COMM’N ON SEPARATION OF POWERS & JUDICIAL INDEP., AN INDEPENDENT JUDICIARY 11–14 (1997).

<sup>9</sup> Charles Gardner Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. & SOC. SCI. 185, 191–92 (2014); see also ABA COMM’N ON SEPARATION OF POWERS & JUDICIAL INDEP., *supra* note 8, at 12–14. Arguably, the institutional variant is what is most often meant by “judicial independence.” The federal constitutional supports for institutional independence include lifetime judicial tenure and salary protection. See, e.g., Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1447 (2012) (citing U.S. CONST. art. III, § 1).

<sup>10</sup> Geyh, *supra* note 9, at 191–92. Examples of such improper influences include the offering of a bribe in return for a particular ruling on a matter before a court, or—what might be thought of as its converse—an impeachment threat by a legislator against a judge if the judge rules in a particular way hostile to the legislator’s preference. For a discussion of the impeachment threat, see Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 316–17, 339–42 (1999).

<sup>11</sup> Geyh, *supra* note 9, at 190–91.

<sup>12</sup> *Id.* at 191.

<sup>13</sup> A thoroughgoing analysis of the institutional context in which a judge operates, of course, must take account of more than just the colleagues who sit beside the judge on a particular panel. All of one’s fellow judges on a circuit court, for example, are a relevant part of the institutional environment within which a judge operates. The judges above and below (the Supreme Court Justices and the district court judges, respectively, in the case of a federal appellate judge) can also be thought of meaningfully as part of the institutional

circuit courts have numerous members, appeals are typically heard by three-judge panels; only infrequently do all the members of a court sit en banc. Thus, the appellate decisionmaking process is less “a series of individual, independent decisions,” and more a collection of “interdependent decisions.”<sup>14</sup>

Judicial independence, seen as an absolute value paramount over all others—a doctrine Professor Geyh refers to as that of “unqualified” judicial independence<sup>15</sup>—bears little resemblance to the real world, where judges face all manner of legitimate constraints. Normative assertions of unqualified judicial independence are a dead-end street, both jurisprudentially and politically.<sup>16</sup> This is because, as judges consider the questions and cases that come before them, they are clearly and quite properly limited in multiple ways: by the record, rules, precedent, applicable statutes, and more. The fundamental, common law ordering principle of stare decisis, and more specifically the controlling authority from the relevant circuit, as well as from the Supreme Court, impose a powerful constraint.<sup>17</sup> Judges are bound by the Constitution and by statute—even while called upon to interpret them. Another constraint arguably forms the most important struc-

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context. This Lecture, however, focuses on the more immediate context: the colleagues alongside whom a judge participates in reaching a decision about a particular case.

<sup>14</sup> See Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CALIF. L. REV. 1493, 1494 (2012) (“[J]udges decide some types of cases differently depending on the identities of their colleagues on a panel.”). Along similar lines, Ethan Bueno de Mesquita and Matthew Stephenson have observed that “while an extensive literature examines the judiciary’s strategic interaction with the other branches of government, less attention has been paid to the effects of the institutional structure of the courts themselves on patterns of judicial decision-making.” Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755 (2002) (citation omitted).

<sup>15</sup> Geyh, *supra* note 9, at 186–87.

<sup>16</sup> “Judicial independence” is widely seen as counterposed to “judicial accountability”—the former lauded as a safeguard, for instance, of minority rights, but the lack of the latter attacked as enabling judges to defeat the will of the democratic majority. See Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571 (1988) (describing the tensions between defending both judicial independence and judicial accountability). The main, but not sole, mechanism of accountability for federal judges is, of course, judicial review. Professor Geyh has noted that “judicial independence” seems to stand, in the public eye, as judicial “unaccountability” and therefore engenders popular fear and mistrust; “fair [and] impartial courts,” in contrast, is a phrase that appears to play much better to public opinion. Geyh, *supra* note 9, at 187. The broad term for the problem of federal and other unelected judges “flouting majoritarian preferences by exercising judicial review” is the “counter-majoritarian difficulty.” *Id.* at 192. Of course, whether or to what extent the latter phenomenon actually is a problem is a perennial topic of controversy; for a wide range of views on the subject, see the symposium volume *THE FRAGILE FORTRESS: JUDICIAL INDEPENDENCE IN THE 21ST CENTURY*, 47 U. MEM. L. REV. 999 (2017) and, in particular, the transcript of the vigorous panel discussion at that symposium, *Judicial Independence: Theory and Practice*, 47 U. MEM. L. REV. 1249 (2017).

<sup>17</sup> See *infra* text accompanying notes 36–37.

turing framework of all: the applicable standard of review. Judge Patricia Wald opines that, “more often than not [the standard of review] determines the outcome.”<sup>18</sup> Sometimes, the standard of review itself is in dispute among judges.<sup>19</sup>

Rules, however, are not the sole boundaries around the exercise of judges’ authority. Among the other constraints affecting a judge on a multi-member court are the judge’s relationships with colleagues. This Lecture is concerned with such internal constraints, springing from the institutional framework in which judges operate. In particular, we as judges examine what considerations constrain a judge on a multi-member court who differs from the majority in a case and is considering whether to write a dissenting opinion. This can be a difficult decision.

The very existence of this dilemma is historically bounded. At our national beginnings, the English common law tradition of seriatim opinions prevailed, with each judge (or Justice) writing separately.<sup>20</sup> The accession of John Marshall as Chief Justice in 1801 brought a major change: Marshall believed the issuance of a single opinion for the Court would best enhance the Court’s authority and promote con-

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<sup>18</sup> Wald, *supra* note 4, at 1391–94; *see also* Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 *STETSON L. REV.* 247, 259 (2003) (arguing that standards of review are “critically important in appellate decision making” because they will likely guide a court’s analysis of a particular issue in the case). Consider two examples of these numerous, greatly varying, and highly context-specific rules. An appeal from a district court’s sentencing determination is judged on a “substantive reasonableness” standard: “A sentence is substantively unreasonable if the district court ‘selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.’” *United States v. Zobel*, 696 F.3d 558, 569 (6th Cir. 2012) (quoting *United States v. Hall*, 632 F.3d 331, 335 (6th Cir. 2011)). An appeal of a district court’s denial of a sentence-reduction motion pursuant to 18 U.S.C. § 3582(c)(2), in contrast, is reviewed for abuse of discretion. *United States v. Metcalfe*, 581 F.3d 456, 459 (6th Cir. 2009) (citing *United States v. Ursery*, 109 F.3d 1129, 1137 (6th Cir. 1997)). Abuse of discretion occurs when a district court “relies on clearly erroneous findings of fact, applies the law improperly, or applies the incorrect legal standard.” *United States v. Watkins*, 625 F.3d 277, 281 (6th Cir. 2010) (citing *United States v. Washington*, 584 F.3d 693, 695 (6th Cir. 2009)).

<sup>19</sup> *See* Wald, *supra* note 4, at 1391. Judge Wald provides contrasting statements of the same standard (review of an administrative agency decision) by the same judge in two different cases about one year apart. One begins, “[t]he courts accord a very high degree of deference to administrative adjudications by the NLRB.” *Id.* at 1392 (quoting *United Steelworkers of Am. Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993)). The second decision, on the other hand, states that, “[t]his Court will not disturb an order of the NLRB unless, reviewing the record as a whole, it appears that the Board’s factual findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue.” *Id.* (quoting *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 651 (D.C. Cir. 1994)).

<sup>20</sup> DONALD E. LIVELY, *FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT*, at xxii (1992).

fidence and integrity.<sup>21</sup> Dissents would not become commonplace for at least another century.<sup>22</sup> Well into the twentieth century, more than nine out of ten Supreme Court decisions still took the form of “a single opinion of the Court.”<sup>23</sup> Moreover, even where a dissenting vote was cast, it was long common for Supreme Court Justices (and presumably appellate judges) simply to note a dissent without “writ[ing] an opinion explaining their disagreement.”<sup>24</sup>

Since 1925, however, when Congress through the Judiciary Act gave the Supreme Court control of its own docket, the Court has become more the specialized constitutional court it so largely is today.<sup>25</sup> As Professor Melvin Urofsky has rightly observed, “[g]iven that only the hardest cases reach the high court” and that each case involves “a multitude of precedents, rules, facts,” and other elements, “it is little wonder” Justices would not always agree.<sup>26</sup> The same would appear to hold true, to a significant extent, for the courts of appeals. Dissent, in light of these long-term changes in American law, has become more common and, some would say, more “troublesome.”<sup>27</sup>

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<sup>21</sup> *Id.* at xxiv–xxv. Justice Robert H. Jackson described the process of seeking to unite a majority of a court around an opinion, something often attributed to Chief Justice Marshall, as “oftentimes requir[ing] that you temper down your opinion to suit someone who isn’t quite as convinced as you are or has somewhat different grounds. That oftentimes presents great difficulty.” Kurland, *supra* note 3, at 2564.

<sup>22</sup> See UROFSKY, *supra* note 7, at 6 (discussing how dissents became more common after the Court gained more control over its docket in 1925).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Associate Justice Pierce Butler famously provided the lone dissenting vote, though perhaps it could not be characterized as a dissenting voice, in *Buck v. Bell*, 274 U.S. 200 (1927). The case was brought by a “feeble minded white woman,” who challenged the constitutionality of a 1924 Virginia statute mandating the sterilization of “mental defectives.” *Id.* at 205. The Court upheld the statute as a legitimate means for society to “prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” *Id.* at 207. The record of the Court’s opinion ends with two sentences, each comprising a separate paragraph: “Judgment affirmed.” and “Mr. Justice Butler dissents.” *Id.* at 208. For more information about the *Buck* case and the statute ultimately upheld by the Court, see Brendan Wolfe, *Buck v. Bell (1927)*, ENCYCLOPEDIA VA., [http://www.encyclopediavirginia.org/buck\\_v\\_bell\\_1927](http://www.encyclopediavirginia.org/buck_v_bell_1927) (last visited Jan. 10, 2019). For an exploration of the possible legal reasoning and convictions underlying Butler’s dissent, in the absence of any accompanying opinion, see Ashley K. Fernandes, *The Power of Dissent: Pierce Butler and Buck v. Bell*, 12 J. FOR PEACE & JUST. STUD. 115, 118–22 (2002). Justice Butler has been quoted as saying, “I shall in silence acquiesce. Dissent seldom aid[s] in the right development or statement of the law. They often do harm. For myself I say: ‘Lead us not into temptation.’” UROFSKY, *supra* note 7, at 4.

<sup>25</sup> See UROFSKY, *supra* note 7, at 6.

<sup>26</sup> *Id.* at 9.

<sup>27</sup> See Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 34 REC. ASS’N B. CITY N.Y. 543, 549 (1979) (referring to “deciding when to dissent, or, more precisely, deciding when not to dissent, despite [his] disagreement with the . . . majority,” as “the most troublesome aspects” of his duties as a judge of the Court of Appeals of New York).

## II

### THE DECISION TO DISSENT (OR NOT): THE INSTITUTIONAL CALCULUS

Dissent is inherently an individual act—one that sets a jurist apart from his or her colleagues, at least as to the particular case before the court.<sup>28</sup> Before exploring an individual judge's decision whether or not to dissent, let us take a brief look at the institutional costs implicated by the entry of a dissenting opinion—costs that militate in favor of carefully weighing the advisability of writing separately. There appear to be two chief institutional costs: (1) The public credibility or prestige of the particular court may be impaired by the entry of a dissent;<sup>29</sup> and (2) where a dissent is written, the length of the majority opinion increases, which may mean that the majority must work harder to reinforce the legal reasoning in their opinion.<sup>30</sup>

A common criticism of dissents is that they amount to a public display of weakness and lack of certainty that tend to reduce a court's authority and prestige.<sup>31</sup> Judge Learned Hand warned that dissent could be “disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”<sup>32</sup> In the same vein, what Alan Barth once wrote of the effects of Supreme Court dissents seems valid for appellate courts in general:

[A] dissenting opinion . . . casts a certain shadow on the majority opinion, which is . . . the authoritative view of the issue that the Court has considered. A dissent makes it plain that one or more jurists, as eminent as those who constitute a majority of the Court, think the matter has been wrongly decided. But this is unavoidable in a Supreme Court. Only difficult and troubling questions come before it.<sup>33</sup>

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<sup>28</sup> Of course, on the Supreme Court, or a circuit court sitting en banc, two or more judges may dissent collectively. The Supreme Court only issues approximately eighty opinions per year. But, on the three-judge panels through which nearly all federal appellate decisions are made, dissent is necessarily individual.

<sup>29</sup> See ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 5 (1974).

<sup>30</sup> See Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 101–04 (2011) (advancing and testing a model for explaining the occurrence of, and especially aversion to, dissent based on a hypothesis of “self-interested judicial behavior”).

<sup>31</sup> See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1190 (1992) (noting a foreign observer's initial dismay at the openness of dissent in a U.S. federal criminal appeal, followed by the observer's praise of the confidence and security of a judicial system able to withstand such frank exposition of disagreement by judges).

<sup>32</sup> UROFSKY, *supra* note 7, at 9.

<sup>33</sup> BARTH, *supra* note 29, at 5.

On the other hand, dissents can be seen as a confident show of strength by the court, as in the view of Justice Ginsburg.<sup>34</sup>

The majority itself, however, may play a part in whether a dissent actually occurs. In the words of Supreme Court historian Percival Jackson:

The judge who writes for the Court must not roam the fields; on the contrary, he must weigh his words within an ambit of discretion so that he *may secure agreement from his fellows*. He must avoid confusion and uncertainty not only to obtain unanimity but also to command respect from the bar and the public for the decision of the Court.<sup>35</sup>

Put somewhat differently, the strength of the collegiality on a court may inspire the majority to take minority reservations or objections into account, or may soften certain disagreements, such that a dissent is avoided.

The need for certainty—that is, for courts to decide cases in such a way that the law is clear and allows persons to adjust their behavior according to predictable rules—is one of the factors weighing against dissent. As Justice Brandeis's oft-quoted observation noted, “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>36</sup> A literal reading of Justice Brandeis's words, of course, is difficult to sustain; surely he did not mean that an incorrect decision is satisfactory as long as a controversy is resolved. Rather, we may infer that Justice Brandeis meant that, on very close questions, some resolution is preferable to none.

Ironically, Justice Brandeis's praise of the value of judicial certainty came in a dissent. In fact, Brandeis's words from two decades earlier widen, rather than narrow, the scope of judicial discretion—and, implicitly, for dissent: “The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court . . . .”<sup>37</sup>

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<sup>34</sup> See Ginsburg, *supra* note 31, at 1190 (noting a foreign observer's impression “that our system of justice is so secure, we can tolerate open displays of disagreement among judges about what the law is”).

<sup>35</sup> PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 15 (1969) (emphasis added); see also *supra* note 21 and accompanying text (describing Chief Justice Marshall's desire to reach a compromise in order to secure unanimous agreement with decisions).

<sup>36</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

<sup>37</sup> *Hertz v. Woodman*, 218 U.S. 205, 212 (1910). What the *Hertz* Court placed in the discretion of the court, Justice Douglas later located within the purview of each judge individually: “This re-examination of precedent in constitutional law is a personal matter

The second cost of dissents, extra work, is well known. A study by Lee Epstein, William Landes, and Richard Posner has shown that, in cases where a dissent is written, the majority opinion is twenty percent longer, on average, than in cases without a dissent.<sup>38</sup> Of course, we must beware of assuming that correlation equals causation. A possible alternative explanation is that such cases are more complex or difficult than cases decided unanimously, or that the legal issue in play is a closer question—both of which are also factors that contribute to an increased likelihood of dissent. Thus, the cost in effort occasioned by a dissent is borne in large part by the dissenter herself.<sup>39</sup>

Dissents do not solely impose costs; they also bring benefits. A common rationale for dissenting is to “flag an error for either a higher court or for the public.”<sup>40</sup> Dissents can also signal shifts in jurisprudence for a future generation to undertake, and they serve the important function of safeguarding a minority’s dignity and capacity to register deeply held views for the record. Perhaps most importantly, dissents like those of Justice Curtis in *Dred Scott v. Sandford*,<sup>41</sup> Justice Harlan in *Plessy v. Ferguson*,<sup>42</sup> and Justice Jackson in *Korematsu v. United States*,<sup>43</sup> add nobility to both legal and national history, sounding notes of moral and legal clarity that salvage hope for the future.

### III

#### THE DECISION TO DISSENT (OR NOT): THE INDIVIDUAL CALCULUS

The imagery in two striking phrases, each derived from the writings of a federal appellate judge, hints at the types of considerations with which we are concerned. Chief Judge Diane Wood of the Seventh Circuit adapts the poker metaphor from Kenny Rogers’s song, “The Gambler,” in examining the dynamics of the decision whether to write a dissent (“hold”) or go along with the majority (“fold”), or reframe

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for each judge who comes along.” JACKSON, *supra* note 35, at 11 (quoting WILLIAM O. DOUGLAS, *WE THE JUDGES* 431 (1956)).

<sup>38</sup> Epstein et al., *supra* note 30, at 102.

<sup>39</sup> See Wald, *supra* note 4, at 1412 (“A dissent . . . means extra, self-assigned work.”).

<sup>40</sup> Wood, *supra* note 9, at 1454.

<sup>41</sup> 60 U.S. (19 How.) 393, 564–633 (1857) (Curtis, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>42</sup> 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>43</sup> 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

the issue via a concurrence (“reshuffle”).<sup>44</sup> The other image comes from the observation by Judge Wald, formerly Chief Judge of the D.C. Circuit, that, “[t]hough certainly not as threatening as dissents, concurrences raise more collegial eyebrows, for in writing separately on a matter where the judge thinks the majority got the result right, she may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way.”<sup>45</sup> This observation is counterintuitive, for one would think a dissent to be a more extreme departure from one’s colleagues than a concurrence, and therefore more fraught in terms of the collegial relationship. With regard to separate writings in general, on the other hand, Justice Thurgood Marshall took a larger world view and urged jurists to “do what [they] think is right and let the law catch up.”<sup>46</sup> Dissent springs from perspective—one’s life lens.

With regard to the “concurrence versus dissent” distinction, and considering the separation of opinions more broadly, these vivid metaphors raise fascinating questions. When Chief Judge Wood invokes the decisionmaking of the poker player to help explain the choices faced by an appellate judge,<sup>47</sup> what is the judge staking? What is the judge’s equivalent of the gambler’s wager—the metaphorical chips? When Judge Wald refers to the “raise[d] . . . eyebrows” of colleagues,<sup>48</sup> what costs of dissent does she depict?

The answer, the “currency” in play, to extend the card-game metaphor, would appear to be the judge’s rhetorical or persuasive standing with her colleagues—not only on a particular panel, but also among all of her colleagues on the circuit court of appeals. We might use “credibility” in a particular, judicial sense. Chief Judge Wood refers to the “los[s of] credibility” that may be suffered by a “dissenter [who] becomes branded as a frequent complainer about one or more issues.”<sup>49</sup> Such “brand[ing]”<sup>50</sup> tends to lessen, and might even seri-

<sup>44</sup> Wood, *supra* note 9, at 1447; KENNY ROGERS, *The Gambler, on THE GAMBLER* (United Artists Records 1978) (“You got to know when to hold ‘em, know when to fold ‘em / Know when to walk away and know when to run.”).

<sup>45</sup> Wald, *supra* note 4, at 1413.

<sup>46</sup> Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992) (recalling Justice Marshall’s comment to Professor Rhode while she was working as one of his law clerks).

<sup>47</sup> See Wood, *supra* note 9, at 1447–48.

<sup>48</sup> Wald, *supra* note 4, at 1413.

<sup>49</sup> Wood, *supra* note 9, at 1463. One instance of collegiality strained past the breaking point, it appears, was the attitude of Justice Felix Frankfurter towards his colleagues on the Supreme Court, manifested in an “unrelenting effort to teach all his colleagues how to decide every case. [He] wrote his colleagues countless memos—often pretentious or patronizing—trying to persuade them to change their minds. . . . And he routinely lobbied

ously harm, a judge's future ability to persuade his or her colleagues.<sup>51</sup> How should this be weighed? Chief Justice Harlan Stone hinted at this anxiety when he confided once in a letter sent to Karl Llewellyn: “[I]f I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading [my separate opinions].”<sup>52</sup> This suggests dissent must be a measured decision.

These and other considerations lead to what Judge Richard Posner terms “dissent aversion.”<sup>53</sup> “Most judges[,]” he writes, “do not like to dissent[,]” though he sees Supreme Court Justices as an exception.<sup>54</sup> “Not only is it a bother and frays collegiality, and usually has no effect on the law, but it also tends to magnify the significance of the majority opinion.”<sup>55</sup> Nor do judges like being dissented from, in his view, because judges do not enjoy criticism, dislike having to revise a draft opinion to take a dissent into account, and “worst of all, [do not like] to lose the third judge to the dissenter.”<sup>56</sup> All of these factors may be considered potential costs to the individual dissenter in terms of his or her relationships with colleagues, both on the panel and in the circuit as a whole.

In the way we characterize dissent, however, we should avoid assuming too much. After all, we are exploring the narrowly circumscribed questions of what a judge does, or should do, when a majority has already formed around a conclusion different from that reached by the judge, and what is at stake in the judge's decision. Framing the question this way presupposes that the judge's viewpoint is in the minority. But where one or both of the judge's panel colleagues are still uncertain, the problem the judge faces cannot be said to be whether to dissent; rather, it is the problem of how to decide the case.

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the justices through their law clerks.” JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 277 (2004).

<sup>50</sup> Wood, *supra* note 9, at 1463.

<sup>51</sup> See Epstein et al., *supra* note 30, at 103–04. Even worse, Epstein and his colleagues also suggest that a dissenter may believe that members of the majority from which he is dissenting in a particular case may actually punish the dissenter “[b]y withholding or reducing collegiality in the future,” and that awareness of this reality or possibility may also deter some would-be dissenters. *Id.* at 4.

<sup>52</sup> WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 62 (1964) (quoting Letter from then Associate Justice Stone to Karl Llewellyn (Feb. 4, 1935)).

<sup>53</sup> POSNER, *supra* note 6, at 32.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* This observation presents an intriguing counterpoint to the more common belief that a dissent *undermines* the majority's decision. See *supra* notes 32–33 and accompanying text.

<sup>56</sup> POSNER, *supra* note 6, at 32. However, Judge Posner's contention that “[j]udges also do not like dissents from their decisions” seems at odds with his idea that dissents magnify the importance of the majority decision.

This point underscores the relational or interdependent nature of dissent: Substantively, a judge can come to a particular view of a case, but whether that view is a dissent depends on what the other judges on the court ultimately decide. Chief Judge Wood's comment on the risk of "becom[ing] branded as a frequent complainer"<sup>57</sup> also points to the time element: The judge's experience with the particular panel colleagues, and his or her reputation on the circuit more broadly, form an additional context in which the decision about dissenting plays out.<sup>58</sup> Ultimately, Chief Judge Wood concludes, "[M]ost judges will therefore think carefully before writing separately . . ."<sup>59</sup> The voice that repeatedly sounds in dissent can undermine its own effectiveness—like the boy who cried "Wolf!" too often, or perhaps like the guard dog whose barking is so constant that its owners pay no heed when it signals an actual armed intruder. That said, it is vitally important for the individual judge to be true to her view of legal principles in each case.<sup>60</sup> This will often result in dissent that serves a meaningful purpose. I well remember my mixed emotions at being introduced to a young lawyer at a national convention who exclaimed, upon hearing my name, "Oh, you are the dissenting judge!"

A troubling question arises as to whether the sort of pragmatic calculus we are discussing, involving considerations of collegiality and the currency of individual judicial credibility, constitutes a double-edged sword. The multi-member court is a social environment, and judges are not exempt from the pressure to conform that other human beings experience—though certain characteristics of judges' professional status likely reduce that pressure somewhat.<sup>61</sup> Prudent attention to the interpersonal environment in which one conducts one's work is laudable and necessary. All of us are called to exercise our judgment in every setting in which we operate—professional, personal, political—deciding on countless occasions whether to speak or hold our tongue. However, and here is the troubling question, could it be that this calculus imports into a judge's decisionmaking considerations that are inimical to his or her behavioral independence?

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<sup>57</sup> Wood, *supra* note 9, at 1463.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> International legal scholar Julia Laffranque has expressed the significance of dissent as primarily "an expression of mutual independence of the judges." Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 *JURIDICA INT'L* 162, 169 (2003). She sees a dissenting opinion, made public together with the votes of all the members of a court, as a guarantee of "dignity to the judge who remained in the minority[,] . . . enabl[ing] him to decide by his conscience" rather than necessarily acquiescing to the majority. *Id.*

<sup>61</sup> POSNER, *supra* note 6, at 34.

The logic of judicial choices in the collegial environment seems to lead, inexorably, to judges voting against their own “legal conscience,” at least some of the time.<sup>62</sup> If this is true, the implications are disquieting, for it would mean that the people are not always getting from judges what they have a right to expect and what judges are best equipped to give: their judgment as to what the law says and requires. Then Associate Justice Charles Evans Hughes, while acknowledging that published dissents undoubtedly “detract from the force of the judgment,”<sup>63</sup> also cautioned against a forced unanimity in the face of strong disagreement:

[W]hat must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.<sup>64</sup>

Thus, dissent not only imposes costs but also contributes value, at times pointing the way to future correction of costly mistakes.<sup>65</sup> Dissents at times “foreshadow[ ] . . . the law.”<sup>66</sup> Justice Frankfurter famously praised Justice Holmes’s dissents as “record[ing] prophecy and shap[ing] history.”<sup>67</sup> Justice Cardozo also expressed the prophetic role of dissent: “The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.”<sup>68</sup> Dissent can also challenge a majority to strengthen its reasoning: “When majorities are obligated to offer reasons to dissenting minorities, they expose their position to criticism[.]”<sup>69</sup> which not only offers the minority the chance to persuade the majority, but also helps “to achieve better outcomes

<sup>62</sup> The term is borrowed from the title of FELIX S. COHEN, *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* (Lucy Kramer Cohen ed., Archon Books 1970) (1960).

<sup>63</sup> CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67 (1928).

<sup>64</sup> *Id.* at 67–68.

<sup>65</sup> See UROFSKY, *supra* note 7, at 12; Wald, *supra* note 4, at 1412.

<sup>66</sup> LIVELY, *supra* note 20.

<sup>67</sup> Frankfurter, *supra* note 5, at 162.

<sup>68</sup> BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 36 (1931); see also Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 40 (2006) (arguing that democratic equality “requires both a chance to participate and a chance to be heard with dissenting views[.] . . . giv[ing] rise in turn to an obligation on the dominant group to supply reasons for their decisions”).

<sup>69</sup> Brown, *supra* note 68, at 40 (quoting AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 44 (1996)).

through meaningful accountability.”<sup>70</sup> On this view, dissent serves the interests of justice.

Is it possible, then, that the internal institutional context of multi-member courts is, in part, inimical to judicial independence—that it has effects deleterious to the fair and impartial administration of justice? And, if so, what, if anything, might be done about it? Or is the phenomenon an inevitable one, inherent in the logic of collegial courts? Conversely, we must also consider the possibility that the sorts of calculations with which we are concerned here are actually a positive feature of multi-judge adjudication—that there is a policy interest in enhancing the public credibility of the judiciary, and therefore it is salutary that a would-be dissenter carefully weigh the individual and collective costs of writing a dissenting opinion. On this latter view, “dissent aversion”<sup>71</sup> would not be an impediment to judicial independence, but rather a healthy set of considerations leading would-be dissenters to prioritize in which cases it seems most important to enter a dissent, or on which of their dissenting views they have the highest degree of certainty.

It seems clear, in any event, that dissent aversion can impose costs on the law and society. For instance, what is the effect when a “minority suppress[es] their different view in obeisance to judicial decorum and the interests of consequent certainty[?]”<sup>72</sup> It is worth noting, too, that the burden of deciding whether to dissent is borne disproportionately by those jurists who happen, through the vagaries of judicial philosophy and political change, to find themselves more often in the minority within their circuit. Those more often in step with the majority tend to be spared these sometimes agonizing decisions. Think about the position of Justice Thurgood Marshall late in his career, “waging a trying and for the most part unsuccessful holding action” as part of “an ever-dwindling, ever more frustrated liberal minority.”<sup>73</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> POSNER, *supra* note 6, at 32.

<sup>72</sup> JACKSON, *supra* note 35, at 8.

<sup>73</sup> Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2123 (1992) (quoting Geoffrey R. Stone, *Marshall: He's the Frustrated Conscience of the High Court*, NAT'L L.J., Feb. 18, 1980, at 24). During his first two terms on the Court, Justice Marshall authored opinions at approximately the average rate as did other Justices; over the next five terms, “Marshall rather consistently wrote fewer opinions than the average . . .” *Id.* at 2123–24 n.94.

#### IV THE UNIQUE NATURE OF JUDICIAL DISSENT

There is a view of dissents that we might characterize as skeptical and impatient, even irascible. One reviewer of Professor Urofsky's study of Supreme Court dissents remarks that "[a] dissenting opinion is not law and serves no official function; at times, it can seem like petty ankle-biting."<sup>74</sup> That a dissent "is not law" is, at one level, quite clear and often noted.<sup>75</sup> Yet one's attitude towards dissent can shift according to one's substantive sympathies and antipathies. Surely, moreover, a dissent can and sometimes does have a form of authority: persuasive authority. The axiom so often stated by courts and legal scholars that a dissent is not law, therefore, draws perhaps too bright a line.

Asserting what a dissent is not raises the even more interesting question of what a dissent *is*. In this regard, it may be useful to consider how an appellate court's output is like, and unlike, that of a legislative body. The chief output of a legislature is the text of the bills it enacts. Dissent is silent in a statute—the losing side does not, as a matter of right and custom, have the ability to memorialize its reservations or objections within the text of the legislation. A judicial dissent, in contrast, is a direct, accessible part of the public record of a court's decision, published alongside the opinion of the majority. This gives dissenting judges a prominent forum, with wide reach and potentially great influence. It is this visibility that underlies both the capacity of dissent to highlight a court's "disunity"<sup>76</sup> and its potential to prophetically "speak[ ] to the future."<sup>77</sup>

These characteristics point to the unique qualities of a judicial dissent and underscore what is at stake in a judge's decision whether to vote with the majority, and if not, on what terms and with what degree of vehemence to memorialize his or her differences with the majority. Let us now turn briefly to note some historic dissents. Among them are some that time has shown to be prophetic, and while

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<sup>74</sup> O'Donnell, *supra* note 2. It may be worth noting that O'Donnell's critique of dissents came in the context of a highly critical discussion of Justice Scalia's dissents and their pernicious effect (in O'Donnell's view) on the Court and the law.

<sup>75</sup> O'Donnell, *supra* note 2; *see also* POSNER, *supra* note 6, at 32 (observing that dissents "usually ha[ve] no effect on the law"); Wald, *supra* note 4, at 1412 ("A dissent makes no new law."). Dissents are often treated dismissively from the bench, as well. *See, e.g.*, *Catcove Corp. v. Heaney*, 685 F. Supp. 2d 328, 336 (E.D.N.Y. 2010) (dismissing a party's argument based on a Supreme Court dissent, noting that "a dissent is not law" and declining to "recognize a new Constitutional right that seven Supreme Court justices declined to accept").

<sup>76</sup> UROFSKY, *supra* note 7, at 9.

<sup>77</sup> CARDOZO, *supra* note 68, at 36.

that is not the case for all of them, each is a landmark of the judicial craft, underscoring the power of dissent.

*Dred Scott v. Sandford*<sup>78</sup>

Dred Scott was a slave from Missouri whose master had brought him north in 1836 into the Wisconsin Territory, where slavery was illegal.<sup>79</sup> He claimed he was a free man from that moment forward.<sup>80</sup> The Court, under the leadership of Chief Justice Roger Taney, ruled in a seven-to-two decision against Dred Scott's claims to freedom.<sup>81</sup> But the Court went further, ruling that blacks in the United States had no right to sue, as they were not citizens of the United States.<sup>82</sup> The Court also tore down the Missouri Compromise, stating that the federal government could not outlaw slavery in the territories.<sup>83</sup> In his dissent, Justice McLean took resolute exception to this latter holding:

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. . . . Where no slavery exists, the presumption, without regard to color, is in favor of freedom. . . . Does the master carry with him the law of the State from which he removes into the Territory[ ] and does that enable him to coerce his slave in the Territory?<sup>84</sup>

In answer to those rhetorical questions, Justice McLean responded that "property in a human being does not arise from nature or from the common law, but[ ] . . . 'is a mere municipal regulation, founded upon and limited to the range of the territorial laws[.]'"<sup>85</sup> The dissent went on to affirm in stirring terms the personality and humanity of those held in bondage: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."<sup>86</sup> Justice Curtis's dissent expressed similar unease over the Court's decision:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to

<sup>78</sup> 60 U.S. (19 How.) 393 (1857).

<sup>79</sup> *See id.* at 493 (Campbell, J., concurring).

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at 406 (majority opinion).

<sup>82</sup> *Id.*

<sup>83</sup> *See id.* at 451–52.

<sup>84</sup> *Id.* at 531, 548 (McLean, J., dissenting).

<sup>85</sup> *Id.* at 549.

<sup>86</sup> *Id.* at 550.

declare what the Constitution is, according to their own views of what it ought to mean.<sup>87</sup>

*Plessy v. Ferguson*<sup>88</sup>

In June 1892, Homer Plessy, a Louisiana citizen who was an “octoroon” (seven-eighths white and one-eighth black), was arrested for taking a seat in an all-white railcar in New Orleans.<sup>89</sup> Plessy argued before the Court that his rights had been violated under the Thirteenth and Fourteenth Amendments, which guaranteed him equal treatment as a citizen.<sup>90</sup> The Court, by a seven-to-one vote, ruled against him, holding that separate but equal facilities did not violate Plessy’s rights to equal treatment.<sup>91</sup> In dissent, Justice Harlan wrote:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>92</sup>

Justice Harlan went on to speak in ringing terms against the very notion that the state-sanctioned separation at issue was consistent with equality: “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.”<sup>93</sup> *Brown v. Board of Education* confirmed his views fifty-eight years later.<sup>94</sup>

*Olmstead v. United States*<sup>95</sup>

In 1924, Roy Olmstead and his associates, famous bootleggers of the Prohibition Era, were arrested after incriminating evidence was collected about their bootlegging activities.<sup>96</sup> The evidence was largely collected via wire-tapping.<sup>97</sup> Wire-tapping was officially sanctioned by

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<sup>87</sup> *Id.* at 621 (Curtis, J., dissenting).

<sup>88</sup> 163 U.S. 537 (1896).

<sup>89</sup> *Id.* at 541–42; CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 41 (1987).

<sup>90</sup> 163 U.S. at 542–43.

<sup>91</sup> *See id.* at 550–51.

<sup>92</sup> *Id.* at 559 (Harlan, J., dissenting).

<sup>93</sup> *Id.* at 562.

<sup>94</sup> 347 U.S. 483, 494–95 (1954) (overturning *Plessy* in holding that “separate but equal” public educational facilities are unconstitutional).

<sup>95</sup> 277 U.S. 438 (1928).

<sup>96</sup> *See id.* at 455–57.

<sup>97</sup> *Id.* at 456–57.

the Court in a closely divided five-to-four decision.<sup>98</sup> Justice Brandeis took the lead on the dissent, promoting the idea of a right to privacy implied by the Constitution.<sup>99</sup> In oft-quoted language affirming the broader principle that government must not be above the law, Justice Brandeis wrote:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. . . . [T]o declare that the Government may commit crimes in order to secure the conviction of a private criminal[ ] . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>100</sup>

*Korematsu v. United States*<sup>101</sup>

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, which authorized the Secretary of War to exclude all persons of Japanese descent from designated military zones on the West Coast, resulting in internment.<sup>102</sup> Fred Korematsu deliberately violated the exclusion order, arguing that his due process rights had been denied.<sup>103</sup> The Court, in a six-to-three decision, upheld the exclusion order on the grounds of military necessity.<sup>104</sup> Justices Roberts, Murphy, and Jackson each wrote separate dissents. Justice Jackson, troubled at the precedential implications of the majority's view, warned in his dissent:

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or

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<sup>98</sup> See *id.* at 465–66 (holding that wire-tapping did not constitute a search or seizure under the Fourth Amendment).

<sup>99</sup> See *id.* at 472–73, 475–76 (Brandeis, J., dissenting).

<sup>100</sup> *Id.* at 485.

<sup>101</sup> 323 U.S. 214 (1944).

<sup>102</sup> See *id.* at 215–17 (discussing petitioner's conviction for his refusal to leave a "Military Area" in contradiction of a civil exclusion order issued pursuant to Executive Order 9066).

<sup>103</sup> Cf. *id.* at 217–20 (noting the hardships of the exclusion order, yet holding that its issuance fell squarely within the War Powers of Congress); see also *id.* at 242 (Jackson, J., dissenting) ("Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.").

<sup>104</sup> See *id.* at 223–24 (majority opinion).

rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.<sup>105</sup>

*School District of Abington Township v. Schempp*<sup>106</sup>

Edward Schempp was a Unitarian who filed a suit against the local school board for forcing his son to read the Bible before class every day.<sup>107</sup> The Bible reading was mandatory under state law.<sup>108</sup> In an eight-to-one decision, the Court found the statute to be a violation of the plaintiffs' First Amendment rights.<sup>109</sup> The contentiousness of the decision is reflected in Justice Stewart's dissent. After quoting the Establishment and Free Exercise Clauses of the First Amendment, Justice Stewart opened his dissent with stinging language:

It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. . . . [W]hile in many contexts the [two clauses] fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.<sup>110</sup>

The dissent went on to inveigh against the dangers of the "sterile metaphor" of separation of church and state, a metaphor "which by its very nature may distort[,] rather than illumine[,] the problems involved in a particular case."<sup>111</sup> Nevertheless, the Court's decision paved the way for the end of school-led prayer in public schools.<sup>112</sup>

*FCC v. Pacifica Foundation*<sup>113</sup>

On October 30, 1973, a man was driving with his son in the early afternoon when the radio began playing a sketch by the irreverent comedian George Carlin.<sup>114</sup> In support of the FCC, the father argued that the radio station had illegally played a monologue comprised of

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<sup>105</sup> *Id.* at 246 (Jackson, J., dissenting).

<sup>106</sup> 374 U.S. 203 (1963).

<sup>107</sup> *See id.* at 205–06.

<sup>108</sup> *See id.* at 205.

<sup>109</sup> *See id.* at 222–23.

<sup>110</sup> *Id.* at 308–09 (Stewart, J., dissenting).

<sup>111</sup> *Id.* at 309.

<sup>112</sup> *See* *Wallace v. Jaffree*, 472 U.S. 38, 71 (1985) (O'Connor, J., concurring) (noting that courts have relied on *Schempp* to strike down similar state "moment of silence" statutes perceived to have the "purpose and effect . . . to encourage prayer in public schools").

<sup>113</sup> 438 U.S. 726 (1978).

<sup>114</sup> *See id.* at 729–30.

words normally barred from public airwaves.<sup>115</sup> The Court ruled in a five-to-four decision that the indecent—but not obscene—nature of the sketch, its perceived lack of societal value, and its appearance on public airwaves limited its First Amendment protections and provided the government a heavier hand in its regulation.<sup>116</sup> In dissent, Justice Brennan criticized the majority's embrace of FCC regulations in light of First Amendment concerns:

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. . . . I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover [this] patently wrong result . . . dangerous as well as lamentable. . . . [O]nly an acute ethnocentric myopia . . . enables the Court to approve the censorship of communications solely because of the words they contain.<sup>117</sup>

### *Lawrence v. Texas*<sup>118</sup>

On September 17, 1998, John Lawrence was arrested when police, responding to a 911 report, entered his house and discovered him engaging in a "sexual act" with another man.<sup>119</sup> At the time, such acts were illegal under Texas's anti-sodomy laws, and the Court was called upon to review the constitutionality of those statutes.<sup>120</sup> The Court ruled by a six-to-three majority vote that the Texas statute was an unconstitutional intrusion into the private life of American citizens.<sup>121</sup> Justice Scalia was amongst the dissenters. Expressing "surpris[e]" at the Court's "readiness to reconsider"<sup>122</sup> its decision of only seventeen years prior in *Bowers v. Hardwick*,<sup>123</sup> Justice Scalia signaled what he considered the frightening implications of the majority's opinion:

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<sup>115</sup> *See id.*

<sup>116</sup> *See id.* at 745–48.

<sup>117</sup> *Id.* at 766, 775 (Brennan, J., dissenting).

<sup>118</sup> 539 U.S. 558 (2003).

<sup>119</sup> *See id.* at 562–63.

<sup>120</sup> *See id.* at 562–64.

<sup>121</sup> *See id.* at 577–79.

<sup>122</sup> *Id.* at 586–87 (Scalia, J., dissenting).

<sup>123</sup> 478 U.S. 186, 194–96 (1986) (upholding as constitutional a Georgia statute that criminalized sodomy), *overruled by Lawrence*, 539 U.S. at 123 (2003).

[A]fter having laid waste the foundations of our rational-basis jurisprudence[,] the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. . . . If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution[ ]”?<sup>124</sup>

The dissent proved prophetic, though not as Justice Scalia might have wished. On June 26, 2015, the Supreme Court in *Obergefell v. Hodges* legalized gay marriage nationwide.<sup>125</sup> Justice Scalia’s dissent was, apparently, highly compelling.

## V COLLEGIALITY “VERSUS” DISSENT: RETHINKING THE BINARY

I now turn to the final portion of these reflections, a reconsideration of the supposed alternative, “collegiality ‘versus’ dissent.”<sup>126</sup> The notion of dissent as being opposed to collegiality deserves to be rethought in the era of modern courts. It would be a mistake to regard a judge who happens to be in the minority in deciding a case as having some sort of absolute duty of silent deference to the majority, whether to make the lives of the judges in the majority easier or to enhance “the majesty of the law.”<sup>127</sup> The premium placed on adherence and uniformity may be overly exalted. So, rather than thinking of collegiality and dissent as a binary—as mutually exclusive opposites—it is possible and salutary to regard collegiality as a quality that may be present or absent even in a dissent.

A command of language is an essential tool in a jurist’s arsenal, and jurisprudential disagreement in a dissent may sometimes be phrased in exceptionally strong and vivid terms. One dissent included the phrase: “I am deeply troubled by the majority’s deplorable disregard for fundamental fairness.”<sup>128</sup> “Deeply troubled” conveys intense unease, but the alliterative phrases that follow are exceptionally forceful; the adjective “deplorable,” in particular, carries a real barb.

<sup>124</sup> *Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting).

<sup>125</sup> 135 S. Ct. 2584, 2607–08 (2015).

<sup>126</sup> Judge Posner, for instance, refers to dissents as “fray[ing] collegiality.” POSNER, *supra* note 6, at 32.

<sup>127</sup> This high-sounding phrase was more often used in earlier eras of American law. *See, e.g., Missouri v. Lewis*, 101 U.S. 22, 33 (1879) (“Where the decisions of [a court] are final, they are clothed with all the majesty of the law . . .”).

<sup>128</sup> *Nixon v. Kent Cty.*, 76 F.3d 1381, 1403 (6th Cir. 1996) (Keith, J., dissenting).

The phrasing of another dissent is similarly strongly worded and takes the majority to task for “distorting” a particular legal standard and for the majority’s “outlandish refusal” to treat the relevant authority as the dissenter felt proper.<sup>129</sup>

The sharp wording of some dissents seems to testify to the existence of frayed relationships on a court and allows us to imagine how a dissent might even further fray those relationships. One state supreme court chief justice opened a dissent by quoting Justice Douglas’s remark about the right of dissent making an appellate judge’s life “tolerable,”<sup>130</sup> and then proceeded to write:

As is evident from the numerous separate opinions I have authored this term, I find ever more frequently the need to exercise my right to dissent, and to urge my brethren to refrain from torturing the law of this state, and/or usurping the role of the legislature, to achieve their desired result *du jour*.<sup>131</sup>

“Respectfully” is a term much used in dissents as a gesture of collegiality,<sup>132</sup> yet by itself it exerts no magical power. The use of that adverb sometimes does little to soften the tone, as with the dissent that included the statement: “Respectfully, reliance on [the] *Anderson* and *Green* [cases] exemplifies the majority’s confusion.”<sup>133</sup>

It is plain that a dissent can be expressed collegially, with genuine respect for the majority or, more broadly, for the court as an institution, and that a dissent can also be expressed in quite the opposite way. Not only in the decision of whether, but also in how, to dissent does a judge exercise important discretion. Moreover, although a judge clearly has no duty or obligation to silence her own dissent, a judge clearly does have a duty to reflect carefully on her motivations to dissent, the effect of doing so, and—if the judge decides that writing a dissent is necessary—the way she chooses to express that dissent. The considerations that make this true are both institutional and individual.

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<sup>129</sup> *Tavoulaareas v. Piro*, 817 F.2d 762, 840 (D.C. Cir. 1987) (MacKinnon, J., dissenting). Another example of extremely blunt language in a dissent comes from a California appellate case where the dissenter railed against “the majority’s wrongheaded approach.” *People v. Harrison*, 70 Cal. Rptr. 2d 185, 193 (Ct. App. 1997) (Huffman, J., concurring in part and dissenting in part).

<sup>130</sup> *State ex rel. McKenzie v. Smith*, 569 S.E.2d 809, 828 (W. Va. 2002) (Davis, C.J., dissenting) (quoting DOUGLAS, *supra* note 1, at 4).

<sup>131</sup> *Id.*

<sup>132</sup> For a discussion of the origins and rise of “respectfully” as a customary marker of collegiality in dissents, see Note, *From Consensus to Collegiality: The Origins of the ‘Respectful’ Dissent*, 124 HARV. L. REV. 1305 (2011).

<sup>133</sup> *Harrison*, 70 Cal. Rptr. 2d at 193 (Huffman, J., concurring in part and dissenting in part).

In the personal and institutional realms, dissent can manifestly have costs—potentially considerable ones. Yet the right to dissent is precious, and the reason for exercising the right is often compelling. Paradoxically, perhaps the deep value of that right is such that to safeguard it requires extreme prudence and moderation in its exercise. It may be in the interests of the individual judge to protect the ability to dissent effectively on a future occasion, and it may be in the interests of the court and of the law as a whole that a judge would decide that differences with the majority do not warrant being memorialized in a dissent.

These are clearly difficult decisions, requiring the exercise of a singularly challenging kind of judgment that is akin to, but distinct from, the legal judgment as to the rights and wrongs of fact and law that go into deciding a case. We might call it a judgment upon one's own judgment; a sort of "meta-judgment." It is this higher judgment, exercised with a broad view to the best interests of both the individual and the court, that judges on multi-member courts must often make.

As judicial officers and members of our local, state, and national legal communities, we do well when we exercise this judgment carefully and responsibly and respect the corresponding judgments by our colleagues. The greater the behavioral independence of each judge, the more meaningful a judge's agreement when it occurs. Acquiescence to the majority out of obligation, or a felt pressure to conform, ill serves justice. Genuine assent, drawn from the wellsprings of legal conscience and freely given, is a wholly different matter. The right to dissent, reinforcing as it does the value of assent, emerges in this light as a pillar of judicial independence.

I leave you with the words of Justice Thurgood Marshall: "We must dissent from [the] indifference. We must dissent from [the] apathy. We must dissent from the fear, the hatred, and the mistrust. . . . We must dissent because America can do better, [and] because America has no choice but to do better."<sup>134</sup>

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<sup>134</sup> See Derrick Bell, "Here Come de Judge": *The Role of Faith in Progressive Decision-Making*, 51 HASTINGS L.J. 1, 15 (1999).