Washington University Law Review

Volume 77 | Issue 1

1999

The Opinion Delivery Practices of the United States Supreme Court 1790-1945

John P. Kelsh

Follow this and additional works at: http://digitalcommons.law.wustl.edu/lawreview

Recommended Citation

John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 Wash. U. L. Q. 137 (1999).
Available at: http://digitalcommons.law.wustl.edu/lawreview/vol77/iss1/3

This work is brought to you free of charge by the Wash U Law Repository. To explore the repository, click here (http://digitalcommons.law.wustl.edu/). For more information, contact repository@wulaw.wustl.edu

THE OPINION DELIVERY PRACTICES OF THE UNITED STATES SUPREME COURT 1790-1945

JOHN P. KELSH*

"I think it useless and undesirable, as a rule, to express dissent . . . ."

—Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

For concurring opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 593.
For concurring opinion of MR. JUSTICE DOUGLAS, see *post*, p. 629.
For concurring opinion of MR. JUSTICE JACKSON, see *post*, p. 634.
For concurring opinion of MR. JUSTICE BURTON, see *post*, p. 655.
For opinion of MR. JUSTICE CLARK, concurring in the judgment of the Court, see *post*, p. 660.
For dissenting opinion of MR. CHIEF JUSTICE VINSON, joined by MR. JUSTICE REED and MR. JUSTICE MINTON, see *post*, p. 667.
. . .
MR. JUSTICE BLACK delivered the opinion of the Court

—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 580, 582 (1952) (quoting Syllabus).

I. INTRODUCTION

The juxtaposition of these two quotes demonstrates that Supreme Court Justices have not always had the same attitude toward the expression of dissent. Oliver Wendell Holmes, known to us as the "Great Dissenter,"[1] criticizes the practice, calling it "useless and undesirable."[2] By contrast, seven separate Justices file their own opinions in the *Steel Seizure Case*.[3]

---

* Associate, Sidley & Austin, Chicago, Illinois. Law Clerk to the Honorable William H. Rehnquist, Supreme Court of the United States, 1997-1998; Law Clerk to the Honorable David B. Sentelle, United States Court of Appeals for the District of Columbia, 1996-1997. I would like to thank my wife, Kristine, without whose encouragement and help this Article never would have seen the light of day. I would also like to thank Professor Steven G. Calabresi, who helped both in formulating the original idea for this Article and in guiding it to completion.

1. *See* PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 3 (1969).
2. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).
3. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 580, 582 (1952).

Wash U Law Repository

Statistics from the respective eras suggest that each of these quotes is representative of its age. During Holmes' tenure on the Court, 1902-32, opinions were presented unanimously 91% of the time.[4] In the October 1951 Term, when the Court decided *Youngstown*, only 22% of the Court's opinions were presented unanimously. The 1951 Term was not an aberration. The Vinson Court averaged a unanimity rate of only 27%.[5]

This statistical difference between the Holmes and Vinson eras is part of a larger history of changes in the way the Supreme Court delivers opinions. This Article tells the story of those changes, at least for the years 1790-1945.[6] Proceeding era by era, I describe both external and internal change in the Court's practices.

By external change, I mean change either in the form in which opinions were delivered or the frequency with which individual Justices expressed opinions separate from the opinion of the Court. From this perspective, the story is rather simple. Prior to John Marshall's appointment as Chief Justice, the Court used no set form to deliver opinions. During his tenure, three important practices were established. First, an overwhelming majority of opinions were delivered by a particular Justice speaking for the Court. Second, other Justices were able to express their views separately from the view of the Court. Third, a great majority of cases were decided unanimously. These practices had great staying power. It wasn't until 1941 that any major external change took place. In that year the nonunanimity rate, which had been low ever since the Marshall Court, exploded. The rate more than doubled between 1940 and 1941 and by 1948 rose to the approximate level it occupies today.[7]

The more interesting part of this history, however, details the Court's internal change. By internal change, I mean the attitudes that the Justices had at different times toward the practice of writing separately from the Court. Evidence of these attitudes is taken from the opinions themselves. Early Justices

---

4. This percentage excludes cases decided by per curiam opinions and does not count dissents and concurrences without opinion.

5. These statistics for the Vinson era are taken from a variety of sources, including the annual *Harvard Law Review* report on the workings of the Supreme Court and ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES app. at 137-41 tbl.9 (1978).

6. These boundaries were chosen because 1790 is the year the Court first sat and by 1945 the methods the Court uses to deliver opinions today were firmly in place.

In collecting data for this paper, I looked at every separate opinion filed on the Court during these years. In completing this arduous task I had the assistance of numerous friends who helped by identifying which cases had separate opinions. I am grateful to everyone who assisted in the completion of the project, but I am particularly grateful to Peter Wall, whose contribution was remarkable.

7. Nonunanimity rates for the years 1800-1992 are represented graphically in Chart A, *infra* p. 175.

believed that separate opinions were appropriate only in important cases, importance being defined by the presence of a constitutional issue or public interest. This attitude changed gradually over the years. During the Taney period, Justices began to express the belief that dissent was acceptable to protect their own records. This was part of a larger shift toward a view of the Court as atomized rather than unified. Further change manifested itself during the 1864-1940 period. Justices of that era expanded the universe of cases in which dissent was appropriate, paid more attention to the thinking of individual Justices, and began to view separate opinions as a legitimate part of the American legal system. All of these shifts in attitude were an important precursor to the post-1941 explosion in nonunanimity rates. They are also the intellectual source of today's view that dissent is appropriate in any kind of case at all.

II. HISTORY

A. 1790-1801

The published cases from the pre-John Marshall Supreme Court are found in volumes 2-4[8] of *United States Reports*.[9] A review of these *Reports* reveals that many of the Court's practices during these years were unsettled.[10] Even the *Reports* themselves were irregular: volume 2 was not published until 1798; volume 3 came out in 1799; and volume 4 was delayed until 1807.[11] Three different men served as Chief Justice.[12] A fourth man turned down the post[13] and it was vacant in 1800. The Court was continually issuing new practice rules. These rules covered subjects ranging from the procedure for service of

8. Volume 1 of *United States Reports* contains opinions of the Pennsylvania state courts.

9. Alexander James Dallas was the Reporter for all of the pre-Marshall era. Julius Goebel notes that Dallas left out some of the Court's cases from those years. *See* JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801 app. at 795 ("Dallas' Reports are not indicative of the actual number of cases in error and disposed of by the Court.").

10. The Court's struggle to develop its own practices is understandable given that there was no precise analog for the Supreme Court in any of the legal systems with which the Framers were familiar. The Privy Council heard appeals from the colonies. Its opinions, which in theory were only advice to the King, were delivered unanimously. The common-law courts of England, by contrast, delivered their opinions seriatim. *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 187-91 (1959).

11. *See* GOEBEL, *supra* note 9, at 665.

12. The three men were John Jay, John Rutledge, and Oliver Ellsworth. Jay left to run for governor of New York, Rutledge left when the Senate rejected his appointment, and Ellsworth left when he fell ill in France. *See* GOEBEL, *supra* note 9, *passim*.

13. William Cushing was nominated and confirmed but turned down the post in 1796. *See* GOEBEL, *supra* note 9, at 749.

Wash U Law Repository

process on states[14] to the form for evidence in motions for the discharge of prisoners on bail.[15]

Given this state of flux, it is not surprising that the Court used no set form in presenting its opinions. In the approximately sixty-three[16] cases that Alexander Dallas reported for the years 1790-1800, the Court used a wide variety of opinion-delivery methods. The most popular was stating that the opinion was being issued "By the Court," without any attribution to a particular Justice.[17] Forty-five of the sixty-three cases (71%) Dallas reported were in this form. These brief opinions usually contained very little legal analysis. The Court often indicated in these orders that its opinion was unanimous.[18] It would occasionally, however, give no indication as to the vote[19] and, on at least one occasion, indicated that the per curiam order was being issued by a divided Court.[20]

The second most frequently used method was delivering opinions seriatim. This practice was patterned after that of the English common-law courts.[21] In the seriatim style, each Justice prepared and read his own opinion. The individual opinions were frequently followed by a per curiam order stating briefly the Court's disposition of the case. Fifteen of the sixty-three pre-Marshall decisions (24%) were reported in this form.

It is not clear what factors the Justices[22] relied on in choosing whether to use the seriatim style. The cases present two possibilities. First, Justice Chase's remark in the preface to his opinion in the seriatim case *Bas v. Tingy*[23] suggests that seriatim opinions were used when the Justices were in disagreement: "The

---

14. "Ordered, That when process at common law, or in equity, shall issue against a state, the same shall be served on the Governor, or Chief Executive Magistrate, and Attorney General of such state." Sup. Ct. R., 3 U.S. (3 Dall.) 335 (1796).

15. "Ordered, That all evidence on motions for a discharge of Prisoners upon bail, shall be by way of Deposition, and not Viva Voce." Sup. Ct. R., 3 U.S. (3 Dall.) 120 (1795).

16. Any unattributed numbers are from my own count.

17. I will refer to these opinions as per curiam, although the Justices themselves did not use the term.

18. *See, e.g.*, Jones v. LeTombe, 3 U.S. (1 Dall.) 384 (1798); West v. Barnes, 2 U.S. (2 Dall.) 401 (1791).

19. *See, e.g.*, Jennings v. Brig Perseverance, 3 U.S. (3 Dall.) 336 (1797).

20. *See* United States v. Peters, 3 U.S. (3 Dall.) 121, 129 (1795). *Peters* is interesting also in that the Court adjourned for a brief period to give the parties time to compromise. When the parties failed to do so, the Court returned with its order. *See id.*

21. This was also the method used by the House of Lords when it rendered its decisions. *See* ZoBell, *supra* note 10, at 189-90.

22. I do not know at what point the Justices began referring to themselves as Justices rather than as Judges. In these early *United States Reports*, the Reporter uses the term Justice while the Justices refer to each other as Judge.

23. 4 U.S. (4 Dall.) 37 (1800).

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."[24]

A second possible determinant of when seriatim opinions were used is the presence of a constitutional issue. In his book *The Constitution in the Supreme Court*, Professor David P. Currie identifies those cases throughout the Court's history that have presented constitutional issues. Currie identifies fourteen such cases for the pre-Marshall era.[25] The Court issued its opinion seriatim in seven of these cases. This is a rate of 50%. The Court used the seriatim style in only eight of the forty-nine cases (17%) that Currie does not cite.[26] The rate of seriatim opinion usage in cases presenting a constitutional question is therefore nearly three times that of other cases.

While the pre-Marshall Court used the per curiam and seriatim styles most frequently, it experimented with other styles as well. Two of its innovations were later adopted by the Court. The first innovative opinion-delivery style was the practice of having the Chief Justice deliver an opinion "for the Court." On at least three occasions, the Reporter identified the opinion of the Court not as being given by the Court itself, but rather as having been delivered by the Chief Justice.[27] This minor semantic shift became important for two reasons—one short-term and one long-term.

The short-term significance is that John Marshall was to seize upon this method of opinion delivery and use it almost exclusively during the early years of his tenure as Chief Justice.[28] The long-term effect is that this new practice

---

24. *Id.* at 43. Justice Chase's comment is odd given that there was no Chief Justice during the 1800 Term.

It was by no means always the case that seriatim opinions were used only when there was disagreement. Justice Wilson's comment in the seriatim case *Talbot v. Janson* proves this point. "As I decided this cause in the Circuit Court, it gives me pleasure to be relieved from the necessity of giving any opinion on the appeal, by the unanimity of sentiment that prevails among the judges." 3 U.S. (3 Dall.) 133, 168 (1795).

25. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 3-54 (1985).

26. My guess is that the most reliable determinant of which opinions were delivered seriatim is the attention that the public gave to a case. I have discovered no reliable way to measure public interest. Cases with constitutional issues may be a reliable stand-in for cases that generated public attention. G. Edward White has noted that during the early Marshall period, newspapers covered the Court "almost exclusively in the context of constitutional law decisions." G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 928 (Paul A. Freund & Stanley N. Katz eds., 1988). Presumably, this was also true of the pre-Marshall Court.

27. *See* Sims v. Irvine, 3 U.S. (3 Dall.) 425, 456 (1799); Clarke v. Russel, 3 U.S. (3 Dall.) 415, 424 (1799); Brown v. Barry, 3 U.S. (3 Dall.) 365, 366 (1797).

28. I should note that there is no evidence that Marshall responded specifically to Chief Justice Ellsworth's innovation. Leonard Baker speculates that Marshall may have gotten the idea from Lord Mansfield, who used the practice while Chief Justice of the King's Bench in England from 1756 to 1788,

Wash U Law Repository

dramatically increased the importance of a particular Justice's thinking. This method focused attention not on what the Court did, but on what an individual Justice thought. This enshrinement of a particular Justice's opinion as the operative opinion of the Court raised the stakes in opinion writing. Opinions were no longer delivered by either unanimous Courts or for Justices writing only for themselves. Now, what individual Justices thought was of serious consequence.[29] The increased concern with what each Justice said naturally led to an increased concern with each Justice's doctrinal consistency.[30] Concern over doctrinal consistency became, by the end of the Taney period, an important reason for Justices to write separately. 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[31] that later became an excuse for many Justices to write separately.

The second innovative opinion-delivery practice is related to the first. This was the practice of having an individual Justice write separately from the Court. In *Sims v. Irvine*,[32] Chief Justice Ellsworth delivered the opinion of the majority of the Court. Justice Iredell, who was unable to attend the reading of the opinion due to "indisposition," later delivered a concurrence which began: "Though I concur with the other Judges of the Court in affirming the Judgment of the Circuit Court, yet as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly."[33]

This opinion was the first time that an individual Justice had separated himself from an opinion that had been expressed by a single Justice speaking for the Court. This practice became established in the Marshall Court[34] and of

---

or from Edmund Pendleton of the Virginia Court of Appeals, who also used the practice. *See* LEONARD BAKER, JOHN MARSHALL, A LIFE IN LAW 414-15 (1974).

29. Of course it is not really Ellsworth's shift but rather Marshall's enshrinement of it that had these effects.

30. G. Edward White has made the point that the Justice who delivered the opinion was not necessarily the author of the opinion. *See* G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 36-37 (1984). Concern over the consistency of individual Justices would presumably not have become important until that link was established.

31. It may have also introduced concepts of judicial responsibility. William Cranch made this point when he began reporting cases. Cranch wrote in the introduction to his first volume:

> [T]he least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit the discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. . . . The avenues to corruption are thus obstructed, and the sources of litigation closed.

William Cranch, *Preface*, 5 U.S. (1 Cranch) iii (1804).

32. 3 U.S. (3 Dall.) 425 (1799).

33. *Id.* at 457.

34. *See infra* notes 53-80 and accompanying text.

course flourishes today.

Summary

The opinion-delivery practices of the pre-Marshall period appear at first glance to have had little relevance for anything that was to follow. The most widely-used methods for delivering opinions, per curiam and seriatim, quickly fell out of favor.[35] On closer inspection, however, it is clear that several important events took place. The first was the birth of the practice of having one Justice speak for the entire Court. The second was the appearance of the first opinion written by a Justice seeking to distance himself from an opinion that had been delivered for the Court by another Justice. The third was the beginning of the trend whereby Justices wrote separately at a higher rate if constitutional questions were involved. All of these events were to take on added significance during the Marshall period.

B. Marshall Period

Overview

John Marshall came onto a Supreme Court that had no set procedure for the delivery of opinions. During his tenure three important developments took place. First, nearly all opinions came to be delivered by one Justice speaking for the Court. Second, by the end of his tenure, Justices were free to file concurring and dissenting opinions when they disagreed with the majority. Third, Justices who filed separate opinions felt compelled to explain why they did so. This subsection describes and analyzes these developments.

Chief Justice Marshall, For the Court

The first and perhaps most important development of the Marshall years was that the innovation of having opinions delivered by one Justice speaking for the whole Court was enshrined as normal practice. The contrast with the Court's pre-Marshall years is striking. The early *United States Reports* include opinions from all of the Justices; the *Reports* from the early Marshall years are dominated by Marshall himself.[36]

Historians of the period agree that Marshall instituted the practice as a

35. *See infra* notes 42-47 and accompanying text.

36. Remember the earlier-referenced point that G. Edward White made: Just because an opinion was delivered by Marshall does not mean that he was its author. *See* White, *supra* note 30, at 36-37.

Wash U Law Repository

means of strengthening the Court.[37] In an era when the Supreme Court received considerably less attention than the other branches of the federal government,[38] Marshall apparently believed that presenting a unified front would bolster the Court's prestige. Statistics from the Marshall era show how successful Marshall was at establishing his new practice.

In the years between 1801-06, the Court delivered non-per curiam opinions[39] in sixty-seven cases. Marshall delivered the opinion of the Court in sixty of these cases, Justices other than Marshall delivered the opinion in two,[40] and in five cases the Court reverted to the seriatim style. In every one of these five seriatim cases, the Reporter noted that Marshall was either absent or had recused himself.[41]

These post-Marshall seriatim cases demonstrate the importance of Marshall himself to the development of the practice whereby an individual Justice spoke for the whole Court. The other Justices clearly preferred the seriatim system and employed it when their Chief Justice was not present. Marshall's persistence, however, eventually paid off. By 1808, the other Justices began to abandon the practice of delivering opinions seriatim.[42] Justices other than Marshall began delivering opinions for the Court, both when Marshall was not involved in a

---

37. *See* BAKER, *supra* note 28, at 414; JACKSON, *supra* note 1, at 21; DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER 173-75 (1954).

38. The best evidence of this is that the Court had to meet in a room in the basement below the Senate chamber because the Capital planner had forgotten the Court in his design of the city. *See* MORGAN, *supra* note 37, at 174.

39. For a discussion of the eventual demise of the use of per curiam opinions, see *infra* notes 45-48 and accompanying text.

40. The first of these cases was *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), in which Marshall recused himself. Marshall's recusal patterns seem curious to the modern observer. He recused himself in *Stuart* because he had tried the case in the lower court, *see id.* at 308, and in *Marine Insurance Co. v. Wilson*, 7 U.S. (3 Cranch) 187 (1805), because he was "in a remote degree interested in the stock of the insurance company." *Id.* at 191. Yet he did not recuse himself in *Marbury v. Madison*, 5 U.S. (1 Cranch) 37 (1803), despite his involvement with Marbury's commission. *See also* White, *supra* note 30, at 11-20 (describing Marshall's involvement in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), despite his recusal on grounds of financial involvement). White contends that Marshall drafted the claimant's petition for a writ of error and arranged for his friend Bushrod Washington to sign it. *See id.* at 14.

The other case was *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272 (1804), where the opinion was delivered by Justice Cushing. The Reporter did not state in *Ogden* that Marshall was not present. *See id.*

41. *See* Randolph v. Ware, 7 U.S. (3 Cranch) 503, 513 (1806); United States v. Heth, 7 U.S. (3 Cranch) 399, 414 (1806); Marine Ins. Co. v. Tucker, 7 U.S. (3 Cranch) 357, 384 (1806); Marine Ins. Co. v. Wilson, 7 U.S. (3 Cranch) 187, 191 (1805); Lambert's Lessee v. Paine, 7 U.S. (3 Cranch) 97, 117 (1805).

42. The practice wasn't completely abandoned. In *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), the four Justices in the majority delivered their opinions seriatim. In addition, the seriatim style was revived in several important cases of the Taney era, *see, e.g.*, cases cited *infra* note 99, and could even be said to be alive today.

decision[43] and when he seemingly was there.[44]

The demise of the seriatim practice suggests that by 1808 the other Justices had accepted the idea that opinions should be delivered by one Justice speaking for the Court. Further evidence of the general acceptance of this idea is found in the decline of the use of per curiam opinions.[45]

The pre-Marshall Court delivered per curiam opinions in 71% of its reported opinions.[46] The early Marshall Court continued to use this method.[47] The Justices used the per curiam opinion frequently even after they stopped giving opinions seriatim in Marshall's absence. In 1808-09 the Court delivered its opinion per curiam in 18% of all reported cases.

This percentage, however, began to drop dramatically in 1814, when the Court reported its opinion per curiam in only two of forty-eight reported cases (4%). This percentage remained stable for the next three years.[48]

By 1814, then, after twenty-four years of experimentation, the Court had developed a practice whereby nearly all of its opinions were delivered by an individual Justice speaking for the entire Court. The seriatim opinion had all but disappeared, and the Court had drastically reduced the number of opinions it issued per curiam.[49]

John Marshall had succeeded, but his new practice was soon criticized. The most vocal critic was Thomas Jefferson.[50] Jefferson argued that the practice of having one Justice speak for the entire Court limited the accountability of the individual Justices. In a letter to Justice William Johnson, Jefferson urged a return to the use of seriatim opinions:

> 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

---

43. *See, e.g.*, Blaine v. The Ship Charles Carter, 8 U.S. (4 Cranch) 328, 331 (1808); Dawson's Lessee v. Godfrey, 8 U.S. (4 Cranch) 321, 322 (1808).

44. *See, e.g.*, M'Ilvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 211 (1808).

45. I use the term per curiam here to indicate all opinions that came not from an individual Justice but from the body as a whole. The Marshall Court did not use the term per curiam.

46. *See supra* notes 16-17 and accompanying text.

47. The Court delivered its opinion per curiam in sixteen of the first forty-seven cases (34%) reported during the Marshall era.

48. From 1815-17, the Court used the per curiam style in only 4% of its reported cases.

49. The Court continued to deliver nearly all of its opinions through the opinion of a single Justice until 1896, when it again began to dispose of a significant number of cases with per curiam opinions. *See* BLAUSTEIN & MERSKY, *supra* note 5, at 137-41.

50. *See* MORGAN, *supra* note 37, at 172.

Wash U Law Repository

> 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 which must be so desirable to the judges themselves, and so important to the cement of the union.[51]

In another letter, Jefferson complained that "an opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge."[52]

Jefferson's views never prevailed. The Court never returned to the frequent use of seriatim opinions. Jefferson did, however, achieve a partial victory in the adoption during those years of another practice that was to endure to the present day. That practice was the delivery of separate opinions. The next subsection considers the Marshall Court's practices regarding the delivery of separate opinions.

Separate Opinions

Dissents and concurrences were relatively rare in the early Marshall years. Justice Chase, who had been one of the most active[53] of the pre-Marshall Justices, was the first to break rank, issuing a one-sentence concurrence in an 1804 insurance case.[54] Justice Washington followed the next year with the Marshall Court's first recorded dissent.[55] This slow pace of separate opinions

---

51. Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), *quoted in* MORGAN, *supra* note 37, at 169.

52. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *quoted in* JACKSON, *supra* note 37, at 24.

53. Justice Chase was active both in terms of reported seriatim opinions and in terms of reported questions during the presentation of the case. Dallas reported more of the lawyers' presentations than did Cranch.

54. *See* Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 169 (1804) (Chase, J., concurring).

55. *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 397 (1805) (Washington, J., dissenting). Washington's opinion is interesting because he explained his reasons for dissenting:

I feel myself justified by the importance of the question in declaring the reasons which induced the circuit

continued through 1806 and 1807. In each of these years only one separate opinion was filed.[56]

The statistics show, however, that a change took place in 1808. In that year, the Justices began to issue an increased number of separate opinions. This slight increase in dissent activity continued through 1809 and 1810. In 1809 Justice Johnson wrote separately in six cases and Justice Livingston concurred once. In 1810 the separate opinions were more evenly spread. Justices Todd,[57] Johnson,[58] and Livingston[59] each delivered one separate opinion. Even Chief Justice Marshall got into the act, delivering his first dissent in a case that he thought had already been decided.[60]

From 1812-16[61] this pattern more or less held. Nonunanimity rates were still low, but many Justices contributed dissents.[62] Two observations can be made about this brief flurry of dissent. First, the Justices of this period rarely gave reasons for writing separately. It would later become almost pro forma for

---

> 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.

Id. at 397-98. Justices in later periods would echo many of Justice Washington's themes from this first dissent. Many other early dissenters gave no explanation for writing separately. It became much more common to give such explanations in the late Marshall and early Taney periods. *See infra* notes 81-87 and accompanying text.

56. This count includes only cases in which there is a majority opinion for the Court and does not include seriatim opinions. Justice Paterson dissented in *Simms v. Slacum*, 7 U.S. (3 Cranch) 300, 309 (1806). Justice Johnson dissented in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807). This dissent was Johnson's first. He became the Marshall Court's most frequent dissenter. Johnson explained his dissent in *Bollman*: "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 [dissent]. . . ." *Id.* at 101.

57. *See* Finley v. Lynn, 10 U.S. (6 Cranch) 238, 252 (1810).

58. *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 323 (1810) (Johnson, J., concurring).

59. *See id.* (Livingston, J., concurring).

60. *See* Hudson v. Guestier, 10 U.S. (6 Cranch) 281, 285 (1810) (Marshall, C.J., dissenting) ("MARSHALL, C.J., observed, that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in that he was mistaken. The opinion was concurred in by one judge. He was still of opinion that the construction then given was correct.").

61. Cranch reported no cases from 1811. Volume 10 ends in 1810. Volume 11 begins in 1812. There are also no 1811 cases in the Court's manuscript minutes. Due to illness and vacancies, the Court had no quorum. *See* Letter from Herb Johnson, Professor, University of South Carolina, to David Daskal, Circulation Director, Northwestern University Law Library (Nov. 29, 1995) (on file with author). Marshall was late for the beginning of the 1812 term due to an injury he received "by the over-setting of the stage coach on his journey from Richmond." Hudson v. Guestier, 11 U.S. (7 Cranch) 1, 1 n.* (1812).

62. During this five-year period, Justices Johnson and Story each wrote separately eight times, Livingston six times, Marshall four times, and Duvall twice. Only Justice Todd failed to deliver a separate opinion.

Wash U Law Repository

Justices to express their regret at having to dissent and to give reasons for doing so.[63] Justices of the early Marshall period occasionally gave their reasons for choosing to write separately,[64] but more frequently did not.[65] From the historian's perspective, it seems odd that later Justices would feel obliged to explain their decision to write separately, but the initiators of the practice would find explanation largely unnecessary.

Second, this initial period when many different Justices found it acceptable to write separately was extremely short-lived. In 1817 the only separate opinion was a dissent from Chief Justice Marshall.[66] In 1818 Justice Johnson delivered four separate opinions. No other Justice delivered any. From 1818 until 1827, Justice Johnson was virtually the only Justice who wrote any separate opinions. In these ten years Justice Johnson wrote a total of seventeen concurrences and dissents. All of the other Justices combined wrote a total of six—and two of these came in *Dartmouth College*.[67]

These statistics suggest that Johnson was alone in fighting to establish the practice of allowing Justices to write separately from the majority of the Court. Writings from the period support this as well. In 1822 Johnson wrote Jefferson

---

63. *See, e.g.*, *supra* note 56. Justices in later years cited the importance of the case and a desire to remain consistent as two of the most popular reasons for writing separately.

64. *See, e.g.*, The Commercen, 14 U.S. (1 Wheat.) 382, 395 (1816) (Marshall, C.J., dissenting); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816) (Johnson, J., concurring); The Venus, 12 U.S. (8 Cranch) 253, 287 (1814) (Story, J., concurring).

65. Justice Livingston, for example, never once explained what motivated him to make his disagreement public. Justices who chose to make their disagreement public nearly always explained why they believed the majority was incorrect. I say "nearly" always because this period also saw the first dissent without opinion. *See* Herbert v. Wren, 11 U.S. (7 Cranch) 370, 382 (1813) (Johnson, J., dissenting). What I am referring to in the text is reasons given for chooosing to make disagreements known, rather than merely acquiescing in the majority's opinion.

66. *See* Shipp v. Miller's Heirs, 15 U.S. (2 Wheat.) 316, 326 (1817) (Marshall, C.J., dissenting). This particular dissent is the most mundane of the nine Marshall wrote. Marshall sometimes explained his reasons for writing separately, saying on one occasion that the issue was "very interesting to the United States." The Commercen, 14 U.S. (1 Wheat.) 382, 395 (1816). In *Shipp*, however, Marshall gave no such explanation, beginning his dissent by writing: "I am not satisfied that the call for the buffalo road ought to be discarded as immaterial. It appears to me to bear a strong analogy to a call for a *marked tree*." *Shipp*, 15 U.S. (2 Wheat.) at 326-27 (Marshall, C.J., dissenting) (emphasis in original).

67. 17 U.S. (4 Wheat.) 518 (1819). Justices Washington and Story concurred in *Dartmouth College*. Duvall dissented without opinion. Dissenting without opinion in one of the most important cases of his time somehow seems appropriate for Justice Duvall, who some have argued is the most insignificant Justice of all time. *Compare* Irving Dilliard, *Gabriel Duvall*, *in* 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978, at 419 (Leon Friedman & Fred L. Israel eds., 1980), *with* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983). Duvall wrote very few opinions of any sort. He seems to have suffered from a lack of respect right from the start. In the Banks & Brothers edition of *Cranch's Reports*, Duvall's name is spelled incorrectly in the *Report* for 1812, his first year on the bench. *See, e.g.*, Freeland v. Heron, Lenox & Co., 11 U.S. (7 Cranch) 147 (1812).

in response to Jefferson's urging that he push the Court to return to the use of seriatim opinions. Johnson detailed the difficulty he had encountered in expressing his own opinion:

> Some case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all.[68]

Marshall himself had made his preference for unanimity public in an 1819 article he published in a Philadelphia newspaper:

> The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.[69]

Marshall was also known to acquiesce silently when his own opinion did not command a majority[70] and even on occasion write opinions with which he did not agree.[71]

Johnson, however, was resistant to the pressures of his colleagues and persisted in the issuance of separate opinions. He eventually settled on a compromise. He wrote to Jefferson in 1823: "On the subject of seriatim opinions in the Supreme Court I have thought much, and have come to the resolution to adopt your suggestion on all subjects of general interest; particularly constitutional questions. On minor subjects it is of little public importance."[72]

Eventually, it seems, Johnson won out. By 1827 opinion-delivery practices

---

68. *See* Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), *quoted in* MORGAN, *supra* note 37, at 182.

69. *See* JACKSON, *supra* note 1, at 22 (citing 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 320 (1919)).

70. In one case, Marshall began a dissent, "I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion . . . ." Bank of United States v. Dandridge, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting).

71. *See* JACKSON, *supra* note 1, at 25.

72. *See* Letter from William Johnson to Thomas Jefferson (Apr. 11, 1823), *quoted in* MORGAN, *supra* note 37, at 184.

Wash U Law Repository

began to change. Johnson was no longer the only Justice willing to write separately. In *Ogden v. Saunders*,[73] the four Justices in the majority delivered their opinions seriatim and Justice Marshall dissented.[74] There was evidence apart from *Ogden*, however, that attitudes towards separate opinions had shifted. Marshall,[75] Washington,[76] and Thompson[77] each dissented in one other case.

Things slowed down again in 1828-29 as Thompson's one dissent was the only non-Johnson separate writing.[78] In 1830-32, however, separate writings flourished among all members of the Court, with Story, Johnson, Thompson, Baldwin,[79] Marshall, and McLean all registering at least one separate writing. In 1833-35, nonunanimity rates were down again, as Johnson, Duvall, and Marshall all left the Court.[80] But the tradition of writing separately survived. When Roger Taney took over as Chief Justice in 1836, concurrences and dissents were frequent.

Rationales

Not only had Johnson's habit of writing separately survived, so too had his categorization of which cases justified the public expression of dissent. As noted above, Johnson wrote to Jefferson that he would write separately "on all subjects of general interest; particularly constitutional questions."[81] This is the pattern Johnson followed for most of his career. Johnson frequently said that

---

73. 25 U.S. (12 Wheat.) 213 (1827).

74. This was Marshall's only dissent in a constitutional case. This is unusual in that nonunanimity rates for the Court as a whole were higher in constitutional cases. For a discussion of these statistics, see *infra* notes 89-90 and accompanying text.

75. *See* Bank of United States v. Dandridge, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting).

76. *See* Mason v. Haile, 25 U.S. (12 Wheat.) 370, 379 (1827) (Washington, J., dissenting).

77. *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827) (Thompson, J., dissenting).

78. *See* Weston v. City Council, 27 U.S. (2 Pet.) 449, 473 (1829) (Thompson, J., dissenting).

79. Baldwin, appointed to the Court in 1830, began to dissent even more frequently than Johnson. Baldwin frequently registered dissents without opinion. Baldwin was unusual in other ways as well. The Reporter noted on several occasions that Baldwin failed to deliver to him a copy of a separate opinion that he had prepared. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 596 (1832). Baldwin seems to have recognized that he was different from the other Justices. He referred on one occasion to the "peculiarity" of his own views. Poole v. Fleeger, 36 U.S. (11 Pet.) 212 (1837) (Baldwin, J., concurring). This concurrence is printed in the Banks & Brothers version of the *United States Reports*, but not in the DeSilver, Thomas & Co. edition.

80. By 1835 the Court had stopped taking constitutional cases because there were so few Justices. *See, e.g.*, Mayor of New York v. Miln, 34 U.S. (9 Pet.) 85 (1835) ("The Court cannot know whether there will be a full Court during the term; but as the Court is now composed, the constitutional cases will not be taken up."). As discussed *infra* notes 89-90 and accompanying text, cases presenting constitutional cases drew separate opinions at a higher rate than cases which did not.

81. *See* Letter from Johnson to Jefferson, *supra* note 72, at 182.

dissent was appropriate when the question before the Court was important. He usually defined important cases as those involving constitutional issues or questions of great interest to the public.[82]

When dissents began to pick up again in the years between 1827 and 1833, many of the Justices who wrote separately explained their reasons for doing so. The reasons they gave echoed those that Justice Johnson had been giving all along.[83] The Justices spoke of their obligation to make their own opinions known in important cases, in cases presenting constitutional issues, and cases of great public interest. Justice Thompson prefaced an 1827 dissent by writing:

> It is with some reluctance, and very considerable diffidence, that I have brought myself publicly to dissent from the opinion of the Court in this case; and did it not involve an important constitutional question . . . I should silently acquiesce in the judgment of the Court, although my own opinion might not accord with theirs.[84]

Marshall wrote in the same term:

> I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion, did I not believe that the judgment of the Circuit Court of Virginia gave general surprize to the profession, and was generally condemned.[85]

Similarly, Justice Washington explained:

> It has never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this Court. Nor should I do so upon the present

82. *See, e.g.*, Weston v. City Council, 27 U.S. (2 Pet.) 449, 470 (1829) (Johnson, J., dissenting) ("Entertaining different views . . . from the majority of the Court, and wishing generally that my reasons for my opinions on constitutional questions should appear, where they cannot be misunderstood or misrepresented, I will briefly state the ground upon which I dissent from the decision now rendered."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 222 (1824) (Johnson, J., concurring) ("I have, also, another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 363 (1816) (Johnson, J., concurring) ("I have another reason for expressing my opinion on this occasion. I view this question as one of the most momentous importance; and one which may affect, in its consequences, the permanence of the American union."); Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (Johnson, J., dissenting) ("As it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I [dissent]. . . .").

83. Justices other than Johnson had made such explanations before. The rate at which they appeared, however, increased during 1827-33, and the explanations began to all sound the same.

84. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449-50 (1827) (Thompson, J., dissenting).

85. Bank of United States v. Dandridge, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting).

Wash U Law Repository

> occasion, did I not believe, that the opinion just delivered is at variance with the fundamental principles [of] *Sturges v. Crowninshield*, and *Ogden v. Saunders* . . . . A regard for my own consistency, and that, too, upon a great constitutional question, compels me to record the reasons upon which my dissent is founded.[86]

Justice McLean invoked similar language in explaining his decision to write separately in 1832.[87]

At one point or another, nearly all of the other Justices[88] expressed Johnson's idea that dissenting was acceptable in important cases, importance being measured by public interest or presence of a constitutional issue.[89] Statistics show they practiced what they preached. Nonunanimity rates were considerably higher in constitutional cases throughout the Marshall era. In the seventy-four cases that Professor Currie[90] cites as presenting a constitutional issue, Justices filed separate opinions in twenty-six—a rate of 35%. This is nearly four times higher than the 9% nonunanimity rate that prevailed in the 917 Marshall-era cases that Currie does not cite.

Summary

When John Marshall began his term in 1801, opinion-delivery practices were unsettled. By the time he died in 1835, a number of important practices had become firmly entrenched. Opinions were nearly always delivered by one Justice speaking for the Court. Other Justices were free to deliver separate opinions of their own. Justices who did write separately referred frequently to the importance of the case before them.

Some of these developments would last until the present day. The Court still nearly always announces its decisions through the opinion of a single Justice speaking for the Court and other Justices are still free to write separately. In the period following the Marshall years, however, there was a major change in the rationales that Justices gave for writing separately. A discussion of these shifting rationales is the focus of much of the remainder of this Article.

---

86. Mason v. Haile, 25 U.S. (12 Wheat.) 370, 379 (1827) (Washington, J., dissenting).

87. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 563 (1832) (McLean, J., concurring).

88. Not every Justice seems to have bought into these explanations for writing separately. Justice Baldwin dissented frequently without explaining himself.

89. The practice of explaining dissents became entrenched during the early Taney years. Taney Court Justices dissented more regularly than Marshall Court Justices, but they were also more consistent, at least in the early years, at explaining their dissents. It became almost pro forma for them to express regret at having to dissent but then to say that it was appropriate in such an important case.

90. *See* CURRIE, *supra* note 25, at 61-198

C. The Taney Court

Overview

In the early years of the Taney Court, the opinion-delivery practices of the Marshall Court continued largely unchanged. Opinions were still given by a single Justice speaking for the entire Court and other Justices were allowed to write separately. Nonunanimity rates increased somewhat, but the overwhelming majority of opinions were still presented without recorded dissent.[91] When Justices did dissent, they felt compelled to offer an explanation and the explanation given most frequently was that the case was important. By the late Taney period, however, there had been a change.

Nonunanimity rates stayed more or less the same, and the form of the opinion did not change, but Justices began to offer different reasons for writing separately. Justices began to say that they were compelled to write separately to maintain personal consistency. The separate opinion was a means by which the individual Justices accomplished the newly-important goal of defending their own judicial records. This new attitude toward dissent was part of a larger shift in the Justices' conception of the Court. Justices for the first time began to think of the Court less as a cohesive whole and more as a collection of individuals.

The Early Taney Court

The Marshall Court, which had been hampered in its later years by illnesses and vacancies,[92] came to an official end with Marshall's death in 1835. His office was not immediately filled, however, and the Court was without a Chief Justice for the 1836 Term. This was a year of remarkable unity on the Court. Only one dissenting opinion was reported for the entire term.[93]

---

91. Nonunanimity rates were, however, higher than those in the Marshall era. *See infra* note 96 and accompanying text.

92. *See supra* note 80.

93. *See* Boone v. Chiles, 35 U.S. (10 Pet.) 177 (1836) (McLean, J., dissenting). McLean stated, "Under the peculiar circumstances of this case, I am constrained to state, as succinctly as I can, the reasons why I dissent from the opinion just delivered." *Id*. at 234. McLean's emphasis on succinctness is echoed by many later dissenters in the Taney period. Perhaps because they were embarrassed at registering dissent at all, a number of Justices introduced dissents with promises of brevity. *See, e.g.*, Silsby v. Foote, 61 U.S. (20 How.) 378, 387 (1857) (Grier, J., dissenting); Florida v. Georgia, 58 U.S. (17 How.) 478, 496 (1854) (Curtis, J., dissenting).

In his famous *Dred Scott* dissent, Justice Curtis offered the following eloquent explanation for the length of his opinion:

> I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to

Wash U Law Repository

When Taney took office for the 1837 Term, the number of dissenting and concurring opinions rose. In 1837 Justices on the Court delivered three concurring opinions and five dissents.[94] In 1838 the Justices delivered a total of seven separate opinions.[95] Both of these totals were higher than all but the most contentious of the Marshall years.[96] As a whole the Taney Court had a higher nonunanimity rate than had the Marshall Court (20% vs. 11%).

In addition to raising the nonunanimity rate, the early Taney Court also introduced a couple of slight variations in opinion-delivery style. The first was an increase in the number of cases with multiple separate opinions. Such cases, now so commonplace, were extremely rare during the late Marshall years.[97] In 1837 alone, however, three of the twenty cases before the Court resulted in multiple separate opinions.[98] The Court retained this practice throughout Taney's tenure. In many of the important cases of the era, the Taney Court delivered its opinions in a modified seriatim style.[99]

A second minor innovation of the early Taney Court was the practice of declining to give an opinion when the vote was evenly split.[100] This happened on

---

> exhibit fully the grounds of my opinion. To have done either more or less, would have been inconsistent with my views of my duty.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 633 (1856) (Curtis, J., dissenting).

94. For these statistics, the author's count differs slightly from the numbers provided in BLAUSTEIN & MERSKY, *supra* note 5, at 137-41. I have relied on my own count whenever there has been a discrepancy.

95. In addition to these written expressions of disagreement, Justice Baldwin dissented frequently without opinion, making the nonunanimity rates for these two years—31% and 47%—higher than they had ever been.

96. The 1831 Term featured nine separate opinions.

97. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

98. *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). Interestingly, all three of these cases were held over from the Marshall Court. Story dissented in all three cases. In *Miln* Story said that he knew that Marshall would have voted with him. *See Miln*, 36 U.S. (11 Pet.) at 160.

99. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). I say a "modified" seriatim style because during the Taney era there was usually one Justice who spoke for the Court. In the classic seriatim style this is not the case.

In some of the Taney Court's seriatim cases, however, there is no Justice who speaks for the Court. *See, e.g.*, Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 427 (1853) (Taney, C.J.) ("In this case the judgment of the Supreme Court of the State of Ohio is affirmed. But the majority of the court who give this judgment, do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion . . . ."); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 561 (1840) (Taney, C.J.) ("The members of the Court, after the fullest discussions, are so divided that no opinion can be delivered as the opinion of the Court.").

These opinions could be the first plurality opinions in the Court's history.

100. The number of Justices fluctuated during the Taney era. For example, only seven Justices sat in 1837. The number rose to nine in 1838.

at least two occasions.[101] In these situations, the Court allowed the lower court's opinion to stand.

Despite these minor differences, what is most significant about the Taney Court's opinion-delivery practices is how similar they were to those of the Marshall Court. When Marshall became Chief Justice he made sweeping changes to the way the Court delivered its opinions.[102] Taney did no such thing. He may have tinkered with the Marshall Court's model, but all of the basic practices were continued.

Not only were the basic opinion-delivery practices continued, the Justices' attitudes toward dissent also stayed the same. This is evident in two ways. First, Justices in the early Taney period, as had their Marshall Court predecessors, often apologized for dissenting. The most frequent apologizer during the Taney Court was Justice Daniel, who joined the Court in 1841.[103] Daniel spoke at various times of his "unaffected diffidence"[104] and "unfeigned regret"[105] at having to differ with the majority. He did so on one occasion in spite of his "profound[] respect for the opinions of [his] brethren"[106] and hoped on another that "the magnitude of these topics would . . . excuse the hazard of prolixity."[107]

Second, and more importantly, the Justices also accepted the Marshall Court Justices' reasoning regarding what types of cases justified dissent.[108] By the end of the Marshall period, nearly all of the Justices had expressed a belief that dissent was acceptable in important cases—importance being defined by the presence of a constitutional issue or the attention of the public.[109] Taney-era Justices apparently shared the belief that dissent was acceptable in these types

---

101. *See* Ellis v. Jones, 42 U.S. (1 How.) 197, 201 (1843); Strout v. Foster, 42 U.S. (1 How.) 89, 95 (1843). The Court did this same thing in January 1996 when it split 4-4 on the question whether menus in a computer operating system were entitled to copyright protection. *See* Lotus Dev. Corp. v. Borland Int'l, Inc., 516 U.S. 233, 233 (1996) ("The judgment of the United States Court of Appeals for the First Circuit is affirmed by an equally divided Court.").

102. *See supra* notes 36-42 and accompanying text.

103. Justice Daniel was also the Taney Court's most frequent dissenter.

104. Barnard v. Adams, 51 U.S. (10 How.) 270, 308 (1851).

105. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 636 (1842).

106. Searight v. Stokes, 44 U.S. (3 How.) 151, 180 (1845).

107. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 593 (1852).

108. This is not surprising, given that many of the Justices were the same.

109. These two definitions of "important" are hard to differentiate, as the Court was regarded as a leader only in public law. *See* CARL B. SWISHER, THE TANEY PERIOD, 1836-64, at 321 (1974).

Public interest in the Court's decisions would therefore have been limited to public law issues. Also mentioned occasionally as a justification for expressing dissent was the importance of the issues to the parties. *See, e.g.*, Bend v. Hoyt, 38 U.S. (13 Pet.) 263, 273 (1839) (Thompson, J., dissenting) ("[T]he practical effect it is to have upon the course of business at the customhouse . . . must be my excuse for publicly dissenting.").

Wash U Law Repository

of cases. In *Kendall v. United States ex rel. Stokes*[110] Taney wrote: "As this case has attracted some share of the public attention, and a diversity of opinion exists on the bench; it is proper that I should state the grounds upon which I dissent . . . ."[111] In *Rhode Island v. Massachusetts*[112] he wrote: "It has, I find, been the uniform practice in this Court, for the justices who differed from the Court on constitutional questions, to express their dissent. In conformity to this usage, I proceed to state briefly the principle on which I differ . . . ."[113]

Taney's views were expressed by many other Justices. Story wrote in 1837:

> I offer no apology for this apparent exception to the course which I have generally pursued, when I have had the misfortune to differ from my brethren, in maintaining silence; for in truth it is no exception at all, as upon constitutional questions I ever thought it my duty to give a public expression of my opinions, when they differed from that of the court.[114]

Justice Campbell began his *Dred Scott* opinion: "I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion."[115] Justices Woodbury[116] and McLean[117] made similar points in 1846 and 1847.

As was true of the Marshall period, statistics from the Taney Court show that dissent was more prevalent in constitutional cases than in other areas. Professor Currie identifies 103 cases that presented a constitutional question to the Taney Court.[118] Justices registered at least one separate opinion in forty-five of these cases—approximately 44%. In the 1337 cases that Currie does not cite, the Taney Court Justices registered at least one separate writing in 242—approximately 18%. Nonunanimity rates were almost two and one-half times higher in constitutional cases than they were in all other cases. The idea that dissent was appropriate in constitutional cases and cases in which the public had

---

110. 37 U.S. (12 Pet.) 524 (1838).
111. *Id*. at 626.
112. 37 U.S. (12 Pet.) 657 (1838).
113. *Id.* at 752.
114. Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837) (Story, J., dissenting).
115. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 493 (1856) (Campbell, J., concurring).
116. *See* Wilson v. Rousseau, 45 U.S. (4 How.) 646, 693 (1846) (Woodbury, J., dissenting) ("I consider it due to the importance of this subject to the parties and the public . . . to state the reasons for my dissent.").
117. *See* Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847) (McLean, J., dissenting) ("I dissent from the opinion of the court, and, as this is a constitutional question, I will state the reasons of my dissent.").
118. *See* CURRIE, *supra* note 25, at 201-81.

an interest was expressed throughout the Taney era. As time went on, however, Justices began to mention it less frequently. Although Justice Taney in particular continued to emphasize that dissent was acceptable in important cases,[119] by the Civil War[120] these refrains were less commonly heard. The still-low nonunanimity rates suggest that the Court had institutionalized a belief that dissent was generally to be avoided, but Justices less frequently gave voice to that belief.

There began, however, to develop another trend that was to have significant consequences for the Court's opinion-delivery practices. Justices began to state that dissent was acceptable in order to protect or maintain their own records or reputations. Justices began to defend dissent less by reference to the issues involved and more by reference to themselves.

Concern with Consistency—A New Reason To Dissent

Up until approximately 1839, Justices who explained why they chose to write separately nearly always placed their emphasis on the issue involved. Beginning in approximately 1841, however, Justices started to express another set of rationales for choosing to write separately.[121] Justices frequently noted that they wrote separately because they did not wish to be individually associated with the majority's opinion.

Two early examples of this appeared in the slavery case *Groves v. Slaughter*.[122] It is no surprise that the earliest expressions of concern for consistency would arise in a case concerning slavery, the most contentious issue of the day. In *Groves* Justice McLean raised in a concurrence a question the majority had avoided: whether Congress had the power to regulate traffic in slaves between the different states.[123] Justice Taney stated in his concurrence

119. *See, e.g.*, Taylor v. Carryl, 61 U.S. (20 How.) 583, 600-01 (1857) (Taney, C.J., dissenting) ("I dissent. . . . The principle upon which the case is decided is so important, and will operate so widely, that I feel it my duty to show the grounds upon which I differ. This will be done as briefly as I can . . . .").

120. As Chart A shows, *infra* p. 175, nonunanimity rates during the Civil War were extremely low. The decline in the frequency of the appearance of the importance rationale, however, began before the Civil War drop-off in nonunanimity rates.

121. I do not mean to suggest that no Justice before 1839 ever expressed such a rationale. My point is that before 1839 there was no regular pattern of Justices doing so. After 1839, there was such a pattern.

122. 40 U.S. (15 Pet.) 449 (1841). It is perhaps significant that this early expression of concern for individual consistency arose in a slavery case. Slavery cases were both constitutional in nature and of great interest to the public—so it would have been appropriate anyway for Justices to write separately. *See supra* notes 78-86 and accompanying text. Throughout the Taney period, the two common rationales for expressing dissent often appeared together. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 626 (1842) (Taney, C.J., concurring).

123. *See Groves*, 40 U.S. (15 Pet.) at 506.

Wash U Law Repository

that he had not originally intended to write separately, but now that Justice McLean had stated his opinion on this question, Taney was "not willing, by remaining silent, to leave any doubt as to [his own beliefs]."[124] Justice Baldwin also expressed regret that Justice McLean had raised the unnecessary question. He explained, however, that now that one of the Justices had raised the question, he was "not willing to remain silent; lest it may be inferred that my opinion coincides with that of the judges who have now expressed theirs."[125]

As the Taney years went on, this rationale began to appear more frequently. Many different Justices explained their decision to dissent in terms that echoed those of Taney and Baldwin in *Groves*. In an 1853 case, Justice Catron explained his decision to write separately: "[M]y object here is not to express an opinion in this case further than to guard myself against being committed in any degree to the [following] doctrine . . . ."[126] The next year Justice Daniel dissented briefly in a case involving admiralty jurisdiction. Daniel declined to elaborate on his legal reasons for dissenting—saying that he had made them clear in earlier cases. He closed his dissent by writing: "My purpose is simply to maintain my own consistency in adhering to convictions which are in nowise weakened."[127] Justice Grier used similar language in 1861: "I cannot consent, by my silence, that an inference should be drawn that I concur in the opinion just delivered."[128]

This practice of justifying dissent by reference to a need to maintain intellectual or ideological consistency was without precedent. Marshall-era Justices justified dissent only by reference to the issue involved.[129] Taney-era Justices justifying dissent also made reference to the issue involved, but they began as well to make reference to their own judicial reputations.[130] These

124. *Id.* at 508.

125. *Id.* at 510.

126. Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 442 (1853) (Catron, J., concurring).

127. The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152, 156 (1854) (Daniel, J., dissenting). Daniel, the Taney era's most frequent dissenter, made this same assertion on numerous occasions. *See, e.g.*, *supra* text accompanying note 135.

128. United States v. Vallejo, 66 U.S. (1 Black) 541, 555 (1861) (Grier, J., dissenting).

129. When they chose to justify it, that is. Frequently, they just launched right in to their argument on the merits.

130. Taney-era Justices also developed a habit of justifying writing separately by reference to how far off their opinions were from those of the majority. Justice Catron began an 1846 concurrence by writing, "In this case, my opinion is founded on considerations that differ so much from those proceeded on in the principal opinion . . . ." Smyth v. Strader, 45 U.S. (4 How.) 404, 417 (1846). This explanation for dissent fits well with my thesis that the Taney era saw a shift in the Justices' focus. Justices began to be less concerned with the Court as a whole and more concerned with their individual roles.

explanations for dissent suggest that Taney-era Justices began to conceive of their role more as an individual effort and less as a part of a cohesive unit.[131]

Two other pieces of evidence from the opinion-delivery practices of the Taney Court support this contention. First, the Taney period saw a dramatic increase in the use of dissents and concurrences without opinion. The Marshall Court had used these sparingly, registering a total of forty-one during its thirty-five year run. By contrast, the Taney Court, which ran for thirty-three years, registered 389.[132] The dissent or concurrence without opinion is useful only as a way of separating the individual Justice from the Court. It makes no effort to convince future courts to adopt a different course or to persuade the current majority to tighten its reasoning. It simply preserves for the public and for history that this Justice disagreed. The increased use of the dissent and concurrence without opinion demonstrates the Taney era's increased emphasis on the role and opinions of the individual Justices.

Second, the late Taney Court saw an increased incidence of hostility in individual opinions. Marshall Court Justices had gone out of their way to express their respect for the opinions of their brethren.[133] During the Taney Court, cordiality was still the norm, but during the Court's later years Justices occasionally began their separate opinions with expressions of scorn or disdain. Separate opinions began to lack the civility that had marked the Marshall and early Taney Courts. Justice Grier began an 1860 dissent:

> I wholly dissent from the opinion of the majority of the court in this case, both as to the law and the facts. But I do not think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so . . . .[134]

Similarly, in 1854 Justice Daniel wrote:

> In expressing my dissent, I shall not follow the protracted argument throughout its entire length; my purpose is, chiefly, to free myself on any

131. This was perhaps inevitable, given the publicity and emotion that surrounded the dissents in *Dred Scott*.

132. These numbers are taken from BLAUSTEIN & MERSKY, *supra* note 5, at 137-41. The Taney Court heard more cases per year than the Marshall Court, so the difference in the frequency of appearance of these dissents and concurrences without opinion is not as stark as this comparison makes it seem.

133. *See supra* note 89.

134. Gaines v. Hennen, 65 U.S. (24 How.) 553, 631 (1860) (Grier, J., dissenting).

Wash U Law Repository

> future occasion from the trammels of an assent, either expressed or implied, to what are deemed by me the untenable, and, in this case, the irrelevant positions [of the majority].[135]

These expressions of disdain, which are also found in the opinions of other Justices,[136] are further evidence that the Taney-era Justices began to conceive of the Court less as a unified whole and more as a collection of individuals.

Summary

The Taney Court inherited the Marshall Court's practices and attitudes regarding opinion delivery. These they left largely intact. Just as the Marshall Court had, the Taney Court delivered its opinions through one Justice speaking for the Court with other Justices free to dissent or concur. In addition, the Taney Court adopted the Marshall Court's belief that dissent was particularly appropriate in important cases.

The Taney Court differed from the Marshall Court, however, in one important respect. The Taney Court developed a belief that dissent was acceptable to protect an individual Justice's record. This belief was part of a larger Taney Court trend toward conceiving of the Court more as nine individuals and less as a cohesive whole. This trend was to accelerate over time. It was to have an important impact on the historical development of the Court's opinion-delivery practices.[137]

D. 1864-1940

Overview

At first glance, it appears the Court's opinion-delivery practices changed little in the period between Chief Justice Taney's death in 1864 and Harlan Fiske Stone's elevation to Chief Justice in 1941. The Court continued to present its opinions in the format it had settled on during the Marshall period.[138] The

---

135. Fontain v. Ravenel, 58 U.S. (17 How.) 369, 396 (1854) (Daniel, J., concurring in the judgment).

136. *See, e.g.*, Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 207 (1863) (Miller, J., dissenting) ("[T]he principle on which the court rests its decision is one, not only essentially wrong . . . but one which, if steadily adhered to in future, may lead to consequences of the most serious character."); United States v. Boisdore, 52 U.S. (11 How.) 63, 103 (1850) (Wayne, J., dissenting) ("I dissent from . . . every position of fact or argument in the opinion of the court . . . .").

137. Specifically, it was an important precondition for the mid-twentieth century boom in nonunanimity rates. *See infra* notes 234-59 and accompanying text.

138. For a discussion of the history of the Marshall Court's opinion-delivery practices, see *supra*

average nonunanimity rate per term was 18%, very comparable to the Taney Court's 20%.[139] Justices of the period frequently echoed their Taney-era predecessors in expressing their reluctance to dissent.[140]

Despite these superficial similarities, this period saw a significant change in the attitude Justices took toward writing separately. First, the Justices expanded the universe of cases where dissent was appropriate. While the Justices still said that dissent was acceptable in "important" cases, they also said that writing separately was justified when a case had significant practical consequences, or when the majority ignored stare decisis, or when they just plain disagreed.[141] Second, Justices between 1864 and 1940 continued the trend towards viewing the Court more as atomized and less as unified. Citation to the views of individual Justices became more and more frequent and the Court developed distinct ideological blocs. Third, there was an increased sense that dissents were a legitimate and important source of law. Justices began to distinguish between unanimous and nonunanimous cases, citations to dissents for propositions of law became more frequent, and several dissents were written into law. All of these changes laid the groundwork for the post-1941 explosion in nonunanimity rates.

General Similarities

In three important respects, opinion-delivery practices between 1864 and 1940 were remarkably stable. First and foremost, the form the Court used for presenting its opinions changed very little. Just as the Taney and Marshall Courts had, the Court in this era decided the great majority of its cases by the opinion of a single Justice speaking for the Court, with other Justices free to concur or dissent on their own. While the predominant form remained largely the same, the Court did develop a few relatively insignificant innovations. This era saw the development of the plurality opinion,[142] the practice of Justices concurring in part and dissenting in part,[143] and a sharp increase in the number

---

notes 36-90 and accompanying text. For a discussion of three minor structural changes that took place between 1864-1940, see *infra* notes 142-50 and accompanying text.

139. *See supra* notes 96-97 and accompanying text.

140. *See infra* notes 145-49 and accompanying text.

141. *See infra* notes 152-71 and accompanying text.

142. This actually was not much of a change. There were only 18 of these issued prior to 1938. By contrast, there were 15 issued in 1970 alone. *See* John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60.

143. *See, e.g.*, Vance v. W.A. Vandercook Co., 170 U.S. 438, 457 (1898) (Shiras, J., dissenting in part); Standard Oil Co. v. United States, 221 U.S. 1, 82 (1911) (Harlan, J., concurring in part and dissenting in part).

Wash U Law Repository

of cases disposed of with per curiam opinions.[144]

Second, the Justices seemed to have retained, at least for most of the period,[145] the idea that writing separately was generally to be avoided. Justices throughout the period introduced their separate opinions by announcing their "regret" at having to write separately.[146] They spoke of their "respect" for the opinions of their brethren.[147] Justices frequently explained why they chose to write separately, the implication being that in the ordinary case it was to be avoided.[148] Justice Holmes captured this sentiment when he began his first dissent, "I think it useless and undesirable, as a rule, to express dissent . . . ."[149]

Third, the Court's nonunanimity rate for nearly this entire period was very similar to that of the Taney Court. The Taney Court's nonunanimity rate was 20%—the nonunanimity rate for the 1864-1940 period was 18%.[150] The most unusual thing about the nonunanimity rate for the 1864-1940 period is that the last ten years saw a sustained increase. This rate was to shoot up dramatically in the first years of the Stone Court, but the beginnings of the rise can be seen around 1930.

Structurally, everything looked the same. When one looks at the rationales the Justices were giving for their decision to dissent, however, it is clear that significant changes had taken place.

Rationales

1. Case-Specific Rationales

---

144. *See* BLAUSTEIN & MERSKY, *supra* note 5, at 137-41.

145. It is hard to know what the Justices thought about separate opinions during the 1930s. By then, they had all but stopped explaining why they chose to write separately.

146. *See, e.g.*, James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937) (Roberts, J., dissenting); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 650 (1895) (White, J., dissenting); Texas v. White, 74 U.S. (7 Wall.) 700, 737 (1868) (Grier, J., dissenting).

147. *See, e.g.*, Irwin v. Gavit, 268 U.S. 161, 169 (1925) (Sutherland, J., dissenting); Evans v. National Bank, 251 U.S. 108, 117 (1919) (Pitney, J., dissenting).

148. For a description of the rationalizations Justices of this era used to justify their decision to write separately, see *infra* notes 152-71 and accompanying text.

149. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). While sentiments such as these were expressed often, it is important to note that many, many separate opinions in this era began right in with a discussion of the issue, without any explanation of the Justice's decision to dissent. Furthermore, explanations for dissent had all but disappeared by the second half of the 1930s. This is interesting, because this is also the only time during this 77-year period that there is a sustained increase in the nonunanimity rate. This correlation is further support for my general thesis that changes in judicial attitudes toward dissent were at least partly responsible for the sharp increase in the nonunanimity rate during the Stone Court. *See infra* notes 234-59 and accompanying text.

150. Nonunanimity rates for 1800-1992 period are shown in Chart A, *infra* p. 175.

Just as the Justices of the Taney Court had, Justices during the 1864-1940 period frequently explained why they chose to write separately. As was the case with the Taney period, these explanations can be divided into two categories—those that pertained to the particular case, and those that pertained to the particular Justice.[151] Case-specific rationales will be treated in this subsection. Justice-specific rationales will be treated in the next.

The Justices of the 1864-1940 era inherited most of the case-specific rationales that Justices had expressed during the Taney era. As was the case during that period, the most frequent rationale for writing separately was that the case before the Court was "important." Justices used this excuse in dozens of cases throughout the period.[152] On some occasions, Justices indicated that it was the "importance" of the legal principles involved that warranted dissent.[153] More frequently, however, Justices simply stated that the case was important without providing any explanation as to what made it so. Justice Field's 1891 statement is typical of this style, "I concur . . . . As a correct solution of the questions involved is of vital importance . . . I will venture to make some observations, in addition to those of my brethren . . . ."[154]

Justices of this era also followed the Taney Court in explaining that dissent was appropriate in constitutional cases.[155] This rationale was not expressed frequently, but it never completely disappeared. In 1872 Justice Bradley said, "On a constitutional question involving the powers of the government it is proper that . . . no member of the court should hesitate to express his views."[156] Justice Frankfurter made a similar point in 1939:

> I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave

151. *See supra* notes 103-33 and accompanying text for a description of the Taney Court Justices' explanations for writing separately.

152. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934) (Sutherland, J., dissenting); Chicago, Burlington & Quincy Ry. Co. v. Williams, 214 U.S. 492, 495 (1909) (Holmes, J., dissenting); Tucker v. Alexandroff, 183 U.S. 424, 449 (1902) (Gray, J., dissenting); The Great Western, 118 U.S. 520, 526 (1886) (Matthews, J., dissenting); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 634 (1871) (Field, J., dissenting).

153. *See, e.g.*, Tyler v. Campbell, 106 U.S. 322, 323 (1882); Woodson v. Murdock, 89 U.S. (22 Wall.) 351, 374 (1874).

154. Knight v. United States Land Ass'n, 142 U.S. 161, 189-90 (1891).

155. Justice Brandeis spoke of the need for dissent in constitutional cases, saying "what is done is what you call statesmanship, [and hence] is never settled." Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 608 (1994) (citation omitted).

156. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 554 (Bradley, J., concurring).

Wash U Law Repository

> expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced . . . .[157]

The one case-specific rationale that the Justices of this era did not carry over from the Taney Court was the belief that dissent was appropriate in cases in which the public had a great interest.[158] This popular Taney-era idea was rarely, if ever, expressed by Justices in the post-Taney years.

Post-Taney Justices did not, however, limit themselves to the categories of cases that Taney-era Justices believed warranted dissent. As the years went by, they developed three other rationales for writing separately. These new rationales existed side by side with the rationales they inherited from the Taney Court. The effect was to expand greatly the universe of cases for which dissent was considered appropriate.[159]

The first new rationale was that the "consequences" of a particular case justified writing separately. Justices frequently opened separate opinions with references to the "far-reaching,"[160] "grave,"[161] "injurious,"[162] "serious,"[163] or "alarming"[164] consequences of the Court's opinion. Consequences such as these, the Justices often argued, justified the delivery of a separate opinion. Justice Pitney's 1917 statement is a good example of this genre: "I deem it proper, in view of the momentous consequences of the decision, to present some additional considerations."[165]

---

157. Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurther, J., concurring) (footnote omitted). This statement came in Frankfurter's second concurrence. He of course was not correct that the Court abandoned the seriatim style because of the pressures generated by increasing case volumes. *See supra* notes 37-38 and accompanying text.

158. *See supra* notes 115-22 and accompanying text.

159. This expansion in the universe of cases, of course, did not result in a significant increase in the actual rate of dissent until the early 1930s. Even if the categories of cases in which a Justice could dissent expanded, Justices still shared the belief that dissent was not desirable. This kept nonunanimity rates low. Harlan Fiske Stone was aggressive in attacking this reluctance to dissent during his early years as Chief Justice. *See* Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988). This attitude shift was important, but it would not have had the effect it had unless this complementary shift in belief—that dissent was not limited to a certain subset of cases—had not already occurred. If Chief Justice Stone's change in attitude was the spark that started the inferno of dissent, the attitude shifts described in this section were the kindling.

160. Freeport Water Co. v. Freeport City, 180 U.S. 587, 601 (1901) (White, J., dissenting).

161. Dooley v. United States, 182 U.S. 222, 237 (1901) (White, J., dissenting).

162. Kean v. Calumet Canal & Improvement Co., 190 U.S. 452, 461 (1903) (White, J., dissenting).

163. Slocum v. New York Life Ins. Co., 228 U.S. 364, 400 (1913) (Hughes, J., dissenting).

164. Northern Pac. Ry. Co. v. Boyd, 228 U.S. 482, 511 (1913) (Lurton, J., dissenting).

165. Southern Pac. Co. v. Jensen, 244 U.S. 205, 223 (1917) (Pitney, J., dissenting). Sometimes the Justices did not justify dissent by vague references to categories of consequences (that is, "grave" or "alarming"), but rather by the specific consequences of the case at hand. For example, a number of Justices said that a case with consequences for a person's life or liberty justified writing separately. *See*,

A second major new rationale that the Justices developed during this period was that it was appropriate to register dissent when the majority departed from principles established by earlier cases. Justices announced in several cases that they had a "duty" to call attention to the Court's disregard of its own precedents.[166]

A corollary to this idea that dissent was acceptable to protect stare decisis was the principle that dissent was appropriate when the dissenter believed the majority's errant opinion had the potential to affect many other cases. This idea did not clearly emerge until 1912.[167] Justice Brandeis stated it clearly in 1927:

> Mere difference of opinion in the construction of intricate statutes can rarely justify expression of dissent. This is especially true where the two views lead, in the particular case, to the same result. But, in this instance, the construction adopted by the Court may have in other cases . . . regrettable results.[168]

The third and final new justification for writing separately was the least restrictive of the three. In a number of cases, Justices announced that they were going to state their views separately for no reason other than that they disagreed with the majority of the Court. This rationale, which is really no rationale at all, was a particular favorite of Justice Harlan's. He concluded an 1892 dissent by stating: "Believing the doctrine announced by the court to be unsound, upon principle and authority, [I] do not feel at liberty to withhold an expression of [my] dissent from the opinion."[169]

The development of these new rationales for expressing dissent significantly enlarged the universe of cases in which dissent was considered appropriate.

---

e.g., Valdez v. United States, 244 U.S. 432, 446 (1917) (Clarke, J., dissenting) ("I greatly regret that I cannot concur . . . and the fact that the decision must cost two men their lives impels me to state as briefly as I may my reasons for dissenting from it."); Diaz v. United States, 223 U.S. 442, 461 (1912) (Lamar, J., dissenting) ("[t]he fact that the defendant's liberty is involved . . . justifies a brief statement of . . . this dissent.").

166. *See, e.g.*, Louisiana v. Jumel, 107 U.S. 711, 746 (1882) (Harlan, J., dissenting) ("Having a deep conviction that the opinion of the court is in conflict with the spirit and tenor of our former decisions . . . I deem it my duty to dissent from it."); Kountze v. Omaha Hotel Co., 107 U.S. 378, 396 (1882) (Miller, J., dissenting) ("The decision of the court . . . is so wide a departure from the former practice in similar cases . . . that I feel it to be my duty to dissent . . . ."). This rationale was often expressed in conjunction with at least one other. *See, e.g.*, Freeport Water Co. v. Freeport City, 180 U.S. 587, 601 (1901) (White, J., dissenting) ("The far-reaching consequences which must result from the principles upon which this case is decided, and the conflict between those principles and what I conceive to be previous well-settled rules of law, impel me to state the reasons for my dissent.").

167. *See* Diaz v. United States, 223 U.S. 442, 461 (1912) (Lamar, J., dissenting).

168. Maul v. United States, 274 U.S. 501, 512 (1927) (Brandeis, J., concurring).

169. Brenham v. German Am. Bank, 144 U.S. 173, 197 (1892) (Harlan, J., dissenting).

Wash U Law Repository

Justices were no longer limited to the Taney-era category of important cases,[170] with importance being defined by the presence of a constitutional question or public interest. The new categories were significantly broader than the old ones had been. The number of cases that presented a constitutional issue or a question of interest to the public was limited by factors external to the Justices themselves; the new categories were not. Justices could decide for themselves, on any type of case presented to them, that the consequences were serious, or that the majority had ignored stare decisis, or that their disagreement was intense enough. These new rationales, taken together, seemed to suggest that dissent was acceptable in any type of case at all. The subject matter of a case no longer needed to be referenced in deciding whether to write separately.

Given this great broadening in the categories of cases in which dissent was acceptable, one would expect that the Justices would have stopped justifying their decisions to write separately. This is, in fact, what happened. Between 1930-40, Justices rarely offered these excuses.[171]

One would also expect that this significant broadening of the categories of cases for which dissent was acceptable would lead to a great increase in the nonunanimity rate. To some extent this happened, in that the nonunanimity rate jumped between 1930-40. A far more substantial rise, however, was to occur in the years following 1941, long after these new post-Taney rationales had become established. The explanation for this anomaly is that these new rationales for which types of cases warranted dissent coexisted with the general belief that dissent was to be avoided.[172] The tension between these two ideas[173] kept the nonunanimity rate from rising too high.[174]

2. Justice-Oriented Rationales—"Consistency"

The second major explanation that Taney-era Justices offered for choosing

170. For a definition of "important," see *supra* notes 108-20 and accompanying text.

171. There were some exceptions to this. Frankfurter occasionally made reference to the constitutional question rationale, *see, e.g.*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring), and Black opened one of his initial dissents with an expression of the importance rationale. *See* McCart v. Indianapolis Water Co., 302 U.S. 419, 423 (1938) (Black, J., dissenting).

172. Chief Justices prior to Stone had carried on a "no dissent unless absolutely necessary" tradition. Walker et al., *supra* note 159, at 382 (citations omitted).

173. The two ideas are (1) that dissent was acceptable in a wide range of cases and (2) that dissent was generally to be avoided.

174. For a discussion of the post-1941 explosion in dissent rates, see *infra* notes 234-59 and accompanying text.

to write separately was that they needed to be consistent.[175] Justices often stated that they needed to write separately to protect their own records or to show that they were personally repulsed by the Court's opinion.[176] The expression of these rationales was part of a larger Taney-era movement toward a conception of the Court less as a unified whole and more as a collection of nine individuals.[177] As was true with the case-specific rationales, Justices of the post-Taney era inherited these beliefs and pushed them in new directions.[178]

Justices throughout the 1864-1940 period echoed their Taney-era predecessors in stating that dissent was appropriate to explain or protect one's record. Justices frequently stated that they were choosing to write separately to make it clear that they, as individuals, had no part in the majority's opinion. Justice Bradley opened an 1873 concurrence by saying:

> Whilst I concur in the conclusion to which the court has arrived in this case, I think it proper to state briefly and explicitly the grounds on which I distinguish it from the *Slaughter-House Cases* . . . . I prefer to do this in order that there may be no misapprehension of the views which I entertain in regard to the application of the fourteenth amendment to the Constitution.[179]

Justice Field echoed him fourteen years later:

> I . . . make this special concurrence in the opinion of the majority because of language in it expressing approval of the positions taken by the court in *Louisiana v. Jumel*, from which I dissented . . . . I adhere to my dissenting opinions in those cases, and in concurring in the judgment in this case I do not in any respect depart from or qualify what I there said.[180]

Justices throughout this period used this need to maintain consistency as an

---

175. *See supra* notes 121-36 and accompanying text.

176. *See id.*

177. *See supra* notes 136-37 and accompanying text.

178. It is important to re-emphasize here that Justices frequently did not explain why they felt justified in dissenting.

179. Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 135 (1873) (Bradley, J., concurring). The Justices who dissented in the *Slaughter-House Cases* seem to have been particularly worried that their views were being misrepresented. Concurring in this same case, Justice Field wrote, "[A]s there has been some apparent misapprehension of the views of the dissenting judges in the *Slaughter-House Cases*, I feel called upon to restate the grounds of their dissent." *Id.* at 141.

180. *In re* Ayers, 123 U.S. 443, 509-10 (1887) (Field, J., concurring).

Wash U Law Repository

excuse for stating their opinions separately.[181]

The Justices also followed the example of the Taney Court in writing that the majority's opinion was so repulsive to them that they had no choice but to dissent. For example, Justice Miller wrote in 1873, "I regret to have to dissent, but I think the precedent of making laws in this manner too pernicious to be acquiesced in by my silence."[182] Justice Brewer sounded a similar note thirty-two years later: "I am unable to concur in the foregoing opinion, and, believing that a grievous wrong is done . . . will state the reasons for my dissent."[183]

It was noted above that this pattern of using separate opinions to clarify a Justice's own record was part of a shift during the Taney period toward conceiving of the Court less as a cohesive unit and more as a collection of nine individuals.[184] Other evidence from separate opinions between 1864-1940 suggests that this trend accelerated during this era.

First, Justices often used the separate opinion as a forum to discuss their own views on a particular area of law.[185] For example, Chief Justice Chase

---

181. *See also* Pound v. Turck, 95 U.S. 459, 465 (1877) (Clifford, J., concurring).

182. Sykes v. Chadwick, 85 U.S. (18 Wall.) 141, 151 (1873).

183. San Francisco Nat'l Bank v. Dodge, 197 U.S. 70, 89 (1905) (Brewer, J., dissenting). Opinions of this sort occasionally included biting and sarcastic descriptions of the majority's opinion. These comments are sometimes humorous. Justice Brown started a dissent by writing: "I concur in the opinion of the court that the question involved in this case needs little more than its bare statement to indicate the answer that should be made to it. But I do not concur in the answer made by the court." Swan Land & Cattle Co. v. Frank, 148 U.S. 603, 613 (1893). Justice Field started an 1871 dissent as follows:

> It is . . . with diffidence that I venture to dissent . . . a diffidence which is greatly augmented by the declaration of the majority, that it is impossible to escape the conclusion which they have reached.
>
> But for this conclusion I should have supposed that it would have been impossible . . . to obtain a decree confiscating the property of a citizen . . . .

Henderson's Distilled Spirits, 81 U.S. (14 Wall.) 44, 65 (1871) (Field, J., dissenting). Justice McKenna introduced his understanding of the majority's opinion in a 1924 case by stating, "Let me state the proposition of the [majority] opinion denuded of the confusion of its words." United States v. New River Co., 265 U.S. 533, 543 (1924).

184. *See supra* notes 131-37 and accompanying text.

185. It is also possible that the increased attention the Justices paid to the consistency and development of their own views was the result of change in the nature of the commentary on the Court. Prior to the twentieth century, the dominant form of legal commentary had been the treatise. Early treatise writers attempted to synthesize entire bodies of law and relied heavily on English cases. *See* Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 745 (1985). The Supreme Court, presumably, was not a major focus of these treatises. By 1930 nearly 43 law schools had law reviews, and non-treatise-style academic writing was the dominant form of legal commentary. *See id*. at 787. The rise of the law review format likely resulted in increased analysis of Supreme Court opinions. Earlier forms of legal commentary had either focused on the development of the common law, *see id*. at 742-48, in which the Court had played little role, or the personalities and events of local bars. *See id*. at 750-55. The change in the format of specialized legal commentary meant that the Court was subject to more analysis. The increased analysis perhaps meant that Justices were more eager to make sure that their views were properly understood.

spent several pages in his *Legal Tender Cases* dissent explaining why his position in that case was not inconsistent with the position he had taken as Secretary of the Treasury.[186] Justice Brewer wrote in a 1904 dissent, "I have heretofore dissented in several cases involving the exclusion or expulsion of the Chinese . . . my views on the questions are unchanged."[187] Justice Stone opened a 1930 dissent by writing "I agree with . . . Mr. Justice Holmes . . . but as I concurred, on special grounds, with the result in *Farmers Loan & Trust Co. v. Minnesota* and *Safe Deposit & Trust Co. v. Virginia*, I would say a word of the application now given to those precedents."[188] Justices throughout the period clearly thought it important that there be no mistake as to the views that they, as individuals, had on certain legal questions.

Second, just as individual Justices began to pay more attention to their own records, so too did they begin to pay more attention to the records and analyses of other Justices.[189] Justices began with greater frequency to link propositions of law with the Justice who spoke for the Court, rather than saying simply that the proposition had come from the Court itself. Sometimes reference to a specific Justice was made to bolster the legal point being made. Justice Nelson argued for his view of an issue by noting: "We have, therefore, the deliberate opinions of Marshall, and Taney, and Story concurring in this construction . . . ."[190] Other times, the views of a particular Justice were explored to see which way the Court would have gone on a specific issue.[191] Whatever the purpose,[192]

186. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 575-77 (1871) (Chase, C.J., dissenting).

187. United States v. Sing Tuck, 194 U.S. 161, 171 (1904) (Brewer, J., dissenting). The *Chinese Exclusion Cases*, which sprang up around the end of the nineteenth century, sparked some of the most passionate dissents of the entire era. *See, e.g.*, *Sing Tuck*, 194 U.S. at 170; Fong Yue Ting v. United States, 149 U.S. 698, 732, 744, 761 (1893).

188. Baldwin v. Missouri, 281 U.S. 586, 596 (1930) (Stone, J., dissenting) (citations omitted).

189. This, perhaps, was not all that new. Recall how Justice Story noted in two of his 1837 dissents that Chief Justice Marshall would have agreed with him had he still been alive. *See* Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 328 (1837) (Story, J., dissenting); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 160 (1837) (Story, J., dissenting). Perhaps the respect a particular line of analysis has been accorded has always been contingent on the Justice who authored it. It seems, however, that concern with the expressions of particular Justices became more intense in this period.

190. Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 147 (1868) (Nelson, J., dissenting); *see also* Educational Films Corp. v. Ward, 282 U.S. 379, 398 (1931) (Sutherland, J., dissenting) (noting in detail the views of then Judge Cardozo).

191. *See, e.g.*, Smoot Sand & Gravel Corp. v. Washington Airport, Inc., 283 U.S. 348, 350 (1931), where Justice Holmes wrote "[w]ith regard to that it is to be noticed that Mr. Justice Day, who wrote the earlier decision, took part also in the later and seems to have agreed with it." *See also* Brass v. North Dakota *ex rel*. Stoeser, 153 U.S. 391, 405 (1894) (Brewer, J., dissenting) ("It is a significant fact that in *Sinking Fund Cases*, and in *Wabash, St. Louis & Pacific Railway v. Illinois*, Mr. Justice Bradley and Mr. Justice Miller, who concurred in the judgment in *Munn v. Illinois*, each sought to limit and qualify the scope of the language used by the Chief Justice in that case." (citations omitted)).

Wash U Law Repository

during this period more and more emphasis was placed on what individual Justices thought.[193]

The third piece of evidence from separate opinions that the Court was becoming more atomized was the development of ideological blocs.[194] For most of the Court's history, a great majority of the separate writings had been penned by a handful of Justices, who nearly always wrote only for themselves. Justices Johnson, Daniel, Clifford, and Harlan were each the dominant dissenter of their times, and they usually operated alone. By the twentieth century, however, subgroups of Justices developed.[195] These tandems, first Holmes and Brandeis, later Holmes, Stone, and Brandeis, and later still the Four Horsemen,[196] seemed to set themselves off from the rest of the Court. These blocs had a particular point to make, and they used separate opinions to repeat that point over and over. Dissents by Holmes very frequently emphasized that the Court was not authorized to act as a superlegislature.[197] The Four Horsemen repeatedly emphasized the limited regulatory powers of state governments.[198] The development of these blocs, which is seen most clearly in the pattern of the separate opinions, made the Court appear less as a unified whole searching for truth and more as a collection of factions, each struggling for votes.[199]

The cumulative effect of all of these developments was to make the Court much more focused on the views of the individual Justice than it had ever been. The Legal Realist perspective, which had come to dominate the academy from which so many of these Justices had been drawn, now dominated the Court as

---

192. It should be noted that this development was not at all limited to separate opinions. Majority opinions also made more frequent reference to the views of specific Justices.

193. One particularly funny example of this took place in 1888 when Chief Justice Fuller announced that a majority of the Court "adhered to the views expressed by Mr. Justice Harlan in the opinion of the court in this case delivered at the last term." Marshall v. United States, 131 U.S. 391, 391 (1888). Justice Harlan then wrote a dissent saying that he now believed that his opinion from the previous year was wrong. *See id*. at 392 (Harlan, J., dissenting).

194. Thank you to Peter Wall and Eric Wunsch for first bringing this to my attention.

195. C. Herman Pritchett's influential 1948 book, *The Roosevelt Court*, details how the Court had split into liberal and conservative camps in the years preceding 1941. *See* C. HERMAN PRITCHETT, THE ROOSEVELT COURT 32-45 (1948). Pritchett details how the liberal-conservative split played itself out in areas as diverse as labor, crime, and economic regulation. *See id*. at 253-63.

196. The Four Horesemen were Justices Pierce Butler, Willis Van Devanter, George Sutherland, and James McReynolds.

197. *See, e.g.*, Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

198. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 430 (1937) (Sutherland, J., dissenting).

199. G. Edward White wrote that the Marshall Court's concern with unanimity was at least in part attributable to the view of the day that law was found and not made. *See* White, *supra* note 30, at 47. By the 1930s Legal Realism held sway. The view of Legal Realism was just the opposite. The competing factions conception of the Court fits well with the Legal Realist conception of law.

well. Law was no longer considered to be found, rather it was made.[200] Given this shift in conception of law, an increased focus on individual Justices was inevitable. By the end of this period, the Court had moved even further from Marshall's conception of a unified Court and closer to what Justice Holmes purportedly referred to as "nine scorpions trapped in a bottle."[201] As will be explained later, the increasing importance attached to the views of the individual Justices was an important precursor to the post-1941 explosion in the issuance of dissent.

Acceptance of Dissent

There was a final important development in the history of the Court's opinion-delivery practices that took place during this period. To an extent never before seen, during the 1864-1940 period separate opinions became a widely-accepted part of the legal culture. Justices began to view separate opinions as having an important and legitimate role in the process of deciding cases. Four pieces of evidence demonstrate this point.

The first[202] is the frequent reference by Justices to whether or not a relied-upon case had been decided unanimously. Justice McReynolds in *Myers v. United States*[203] attempted to make a point by noting anachronistically that *Marbury v. Madison* had been "concurred in by all."[204] A few years later he used the opposite tactic, noting that "[t]he plan under review in the *Legal Tender Cases* was declared within the limits of the Constitution, but not without a strong dissent."[205] The point of these references, presumably, was that unanimous precedents were stronger than disputed precedents. Separate opinions thus played an important and legitimate role in distinguishing between strong and weak precedents.

---

200. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

201. *See* ROGER K. NEWMAN, HUGO BLACK 322 (1994). In a similar vein, Justice Powell later described the Court as "nine small, independent law firms." DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 122 (1986).

202. The first sign might not have come from the Justices at all. The Reporter for volume 71 explained that Congress had authorized the previous year's cases to be printed in two volumes rather than the traditional one. The Reporter noted that "[o]ne purpose of Congress [in providing for two volumes] was that the great constitutional questions in which opinions had been given at the late term—questions on which professional, public, and even judicial opinion, as was known, had been much divided—should be reported with more than usual fulness." John William Wallace, *Preface*, 71 U.S. (4 Wall.) ix (1867). Congress wanted these dissents to be made more available to the public. It would not have done this did it not believe that the dissenting opinion was an important part of the legal culture.

203. 272 U.S. 52 (1926).

204. *Id.* at 215 (McReynolds, J., dissenting).

205. Gold Clause Cases, 294 U.S. 240, 369 (1935) (McReynolds, J., dissenting).

Wash U Law Repository

The second piece of evidence that separate opinions had come to be regarded as an accepted and legitimate part of the legal culture was the increased frequency with which Justices began citing them. Justices started citing both their own separate opinions and those of other Justices. Justices would use citations of their own separate opinions as a way of bolstering or establishing their record on a particular issue. In separate opinions, Justices were freed from the burden of having to tailor their thinking to win the approval of the other Justices. This made them the best possible reference points for Justices eager to explain their own thinking. For example, Justice Brewer opened an 1894 dissent by noting:

> I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on *Munn v. Illinois*, and *Budd v. New York*. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said.[206]

Another example is Justice Cardozo's *Schechter Poultry* concurrence,[207] in which he took great care to reconcile his position with what he said in his *Panama Refining Co.* dissent.[208]

Justices also cited frequently to the separate opinions of other Justices. Sometimes they did so to show where the Court stood on a particular issue. Dissents and concurrences provided occasional hints as to the thinking of particular Justices on specific issues.[209] More frequently, Justices would cite to separate opinions for propositions of law. In many of these instances, Justices seemed to give as much weight to separate opinions as would be given to opinions for the Court. Justice Brewer opened an 1891 dissent:

> I dissent . . . . The main proposition upon which [the judgment and opinion] rest is, in my judgment, radically unsound. It is the doctrine of *Munn v. Illinois* reaffirmed. . . . The elaborate discussions of the question in the dissenting opinions in that case . . . seem to forbid

206. Brass v. North Dakota *ex rel.* Stoeser, 153 U.S. 391, 405 (1894) (Brewer, J., dissenting).

207. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

208. Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935) (Cardozo, J., dissenting).

209. *See supra* notes 192-93 and accompanying text; *see also* Hawaii v. Mankichi, 190 U.S. 197, 238 (1903) (Harlan, J., dissenting) ("In these views the minority in *Downes v. Bidwell*, constituting four other members of this court, substantially concurred.").

anything more than a general declaration of dissent.[210]

Brewer's citation to a dissent was somewhat rare for the nineteenth century. This practice did not become popular until somewhat later. In 1926 Justice McReynolds wrote in dissent: "In an elaborate dissent Mr. Justice Field, Mr. Justice Gray and Mr. Justice Brown expressed the view that it was beyond the President's power to remove the judge of any court during the term for which appointed. They necessarily repudiated the doctrine of illimitable power."[211]

In *Untermyer v. Anderson*,[212] Justice Brandeis quoted Justice Holmes' statement in *Adkins v. Children's Hospital* on the "vague contours of the Fifth Amendment," without noting that Justice Holmes had dissented in *Adkins*.[213] In his concurring opinion in *W.B. Worthen Co. v. Thomas*,[214] Justice Sutherland argued that the "reasons set forth in the dissenting opinion in the *Blaisdell* case and the long line of cases . . . there cited, fully support this conclusion."[215] By the end of this period, Justices oftentimes made no distinction between propositions of law stated by the Court and propositions of law stated by a Justice writing for himself.[216]

The third indication that the separate opinion had become more widely accepted was the relative infrequency with which Justices offered explanations for their decisions to dissent. By the 1930s the familiar judicial language of regret, reluctance, and diffidence[217] had all but disappeared. The absence of such explanations suggests that Justices had fully accepted the view that separate opinions had a legitimate role in the American legal system.

The fourth and most compelling sign that separate opinions were now viewed as playing an important role was that during this period, several separate opinions were written into law, either by statute or by subsequent overruling of the opinion for the Court. A number of these elevations of dissent occurred on issues of great public concern. The first and most significant example of this

---

210. Budd v. New York, 143 U.S. 517, 548-49 (1892) (Brewer, J., dissenting).

211. Myers v. United States, 272 U.S. 52, 225 (1926) (McReynolds, J., dissenting).

212. 276 U.S. 440 (1928).

213. *Id.* at 454 (Brandeis, J., dissenting) (quoting Adkins v. Children's Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting)).

214. 292 U.S. 426 (1934).

215. *Id*. at 434 (Sutherland, J., concurring).

216. This practice, of course, still continues. For examples, look to Justice Jackson's famous concurrence on the separation of powers in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952), and the second Justice Harlan's Fourth Amendment concurrence in *Katz v. United States*, 389 U.S. 347, 396 (1967). Both of these opinions became more famous than the majority opinions they accompanied.

217. *See supra* notes 146-47 and accompanying text.

Wash U Law Repository

was the passage of the Fourteenth Amendment, which overturned *Dred Scott*[218] and vindicated Justice Curtis' dissent. Other examples abound. The *Legal Tender Cases*,[219] which upheld the validity of paper money in 1872, overruled[220] *Hepburn v. Griswold*.[221] *Hepburn* had been delivered in 1870 over a strong dissent.[222] *Humphrey's Executor v. United States*,[223] which dealt with the power of the President to remove executive branch officials, rejected the logic of *Myers v. United States*.[224] *Myers* had featured an elaborate, eighteen-section dissent from Justice McReynolds.[225] Cases such as *Nebbia v. New York*[226] were a sub silentio endorsement of Holmes' dissent in *Lochner v. New York*.[227] Justices seemed to be saving their best efforts for their separate opinions.[228] More and more, these separate opinions were ultimately triumphing.[229] This is the strongest possible evidence that they were now accepted as a legitimate and important part of the American legal system.[230]

Summary

This Section started by noting the continuities in opinion-delivery practices between the Taney era and the period between 1864-1940. The Justices retained the opinion-delivery form that had been developed during the Marshall period, they continued to express a reluctance to write separately, and the nonunanimity

218. 60 U.S. (19 How.) 393 (1856).
219. 79 U.S. (12 Wall.) 457 (1871).
220. *Id*. at 553.
221. 75 U.S. (8 Wall.) 603 (1870).
222. More important, of course, than the strength of the dissent was the appointment to the Court—on the same day the *Hepburn* decision was announced—of two new Justices, William Strong and Joseph Bradley, both of whom supported the constitutionality of the Legal Tender Acts. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 157-58 (1993). *Hepburn* had been decided by an eight Justice Court that split 5-3. With the addition of Strong and Bradley, and the departure of Justice Grier, who had sided with the *Hepburn* majority, the *Legal Tender Cases* majority overruled *Hepburn* in a 5-4 decision.
223. 295 U.S. 602, 626 (1935).
224. 272 U.S. 52 (1926).
225. *Id.* at 182-239.
226. 291 U.S. 502 (1934).
227. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).
228. Think for a moment about the career of Justice Holmes. He is known as one of the greatest Justices of all time, but nearly all of his famous opinions are dissents or concurrences. It is hard to think of a single majority opinion of Holmes that is as well-remembered as his dissents in *Lochner v. New York*, 198 U.S. 45, 74 (1905), *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918), or *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904).
229. See *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), and the whole "revolution" of 1937.
230. This account leaves out what is probably the most famous dissent of all time—that of Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

rate remained about the same.

A close look at the separate opinions of the period reveals, however, that several important changes took place. First, the Justices greatly expanded the universe of cases in which dissent was considered acceptable.[231] Second, more attention was paid to the thinking of individual Justices.[232] Third, separate opinions had come to play an important and respected role in the American legal system.[233] All of these changes were important precursors of the explosion in dissent rates that was soon to occur.

E. The Stone Court

In 1941 Harlan Fiske Stone assumed leadership of a Court whose opinion-delivery practices had been stable for well over a century. There had been no significant change in the form in which opinions were delivered since the Marshall period. The rate at which these opinions were presented unanimously had also been remarkably constant.

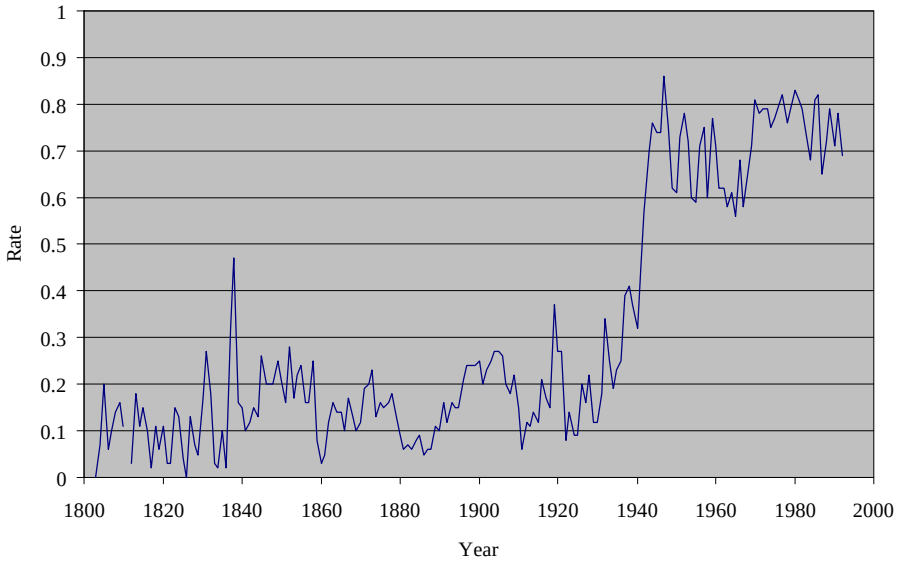
The Stone Court, however, saw the beginnings of a significant change. While the form used to present opinions stayed the same, the rate at which dissent was expressed increased dramatically. Two statistics capture the significance of the Stone Court shift. The first is the nonunanimity rate, which is shown in Chart A.[234] As the Chart reveals, the nonunanimity rate was relatively constant between the beginning of the Marshall Court and the early 1930s.[235] From the early 1930s through 1940 the rate rose slowly but steadily. Beginning in 1941, however, the rate exploded. It peaked at 86% in 1947.[236] It has hovered around 75% ever since.[237]

---

231. *See supra* notes 152-74 and accompanying text.
232. *See supra* notes 185-93 and accompanying text.
233. *See supra* notes 202-30 and accompanying text.
234. This number, as well as all others, excludes per curiam opinions.
235. There is one aberrational increase in 1837 and 1838. During those years, Justice Baldwin issued a large number of dissents and concurrences without opinion.
236. This number and all numbers before 1947 are from the author's own count. Nonunanimity rates for subsequent years are taken from the *Harvard Law Review*'s annual collection of statistics on the Supreme Court.
237. The rate fell to 58% in both 1963 and 1967.

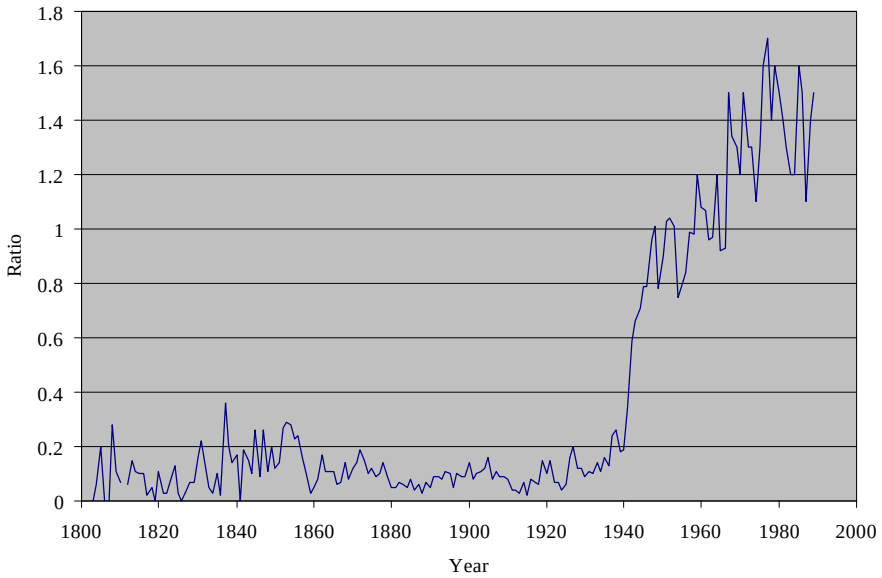
Wash U Law Repository

Chart A
Nonunanimity Rates



The second statistic that shows this dramatic change is the ratio of separate opinions to opinions of the Court.[238] This statistic, which has not yet been discussed, is shown in Chart B. As was the case with the nonunanimity rate, this number was remarkably stable between 1800 and 1940.[239]

Chart B
Total Separate Opinions Divided by Total Opinions For the Court - 1801-1989



238. These statistics exclude per curiam opinions and dissents and concurrences without opinion.

239. This is not to say that there had not been any variations. During the first few years of the Marshall Court there were no separate opinions, so the rate was zero. In the years immediately preceeding 1941 there was a gradual, but steady, increase in the frequency of separate writings. This uptick may be attributable in part to the passage of the Judiciary Act of 1925, ch. 229, 43 Stat. 936 (codified as amended at 28 U.S.C. § 1254 (1994)), which gave the Justices greater control over their docket. *See infra* notes 245-47 and accompanying text.

Wash U Law Repository

The following table[240] gives the ratio of separate opinions to majority opinions during each of the following Chief Justice's tenure:

John Marshall	.07
Roger B. Taney	.18
Salmon P. Chase	.12
Morrison R. Waite	.08
Melville W. Fuller	.12
Edward D. White	.07
William H. Taft	.10
Charles E. Hughes	.17

As was the case with the nonunanimity rate, however, the 1941 Term was the beginning of a dramatic change. In 1941 the separate opinion to majority opinion ratio jumped from .19 to .34. The ratio continued to climb until 1948, when it topped 1.0 for the first time, meaning that the total number of dissents and concurrences in 1948 was higher than the total number of opinions for the Court.[241] As Chart B indicates, the ratio hovered around 1.0 between 1948 and 1966 and has not dropped below that mark in any subsequent term.[242]

---

240. These statistics are taken from BLAUSTEIN & MERSKY, *supra* note 5, at 137-41.

241. The Justices developed two new practices during the Stone Court that contributed to this rise. First, they began to write concurrences for the explicit purpose of responding to points made in dissents. *See, e.g.*, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 619 (1944) (Black, J. and Murphy, J., concurring) ("We agree with the Court's opinion and would add nothing to what has been said but for what is patently a wholly gratuitous assertion as to Constitutional law in the dissent of Mr. Justice Frankfurter."); New York, Chicago & St. Louis R.R. Co. v. Frank, 314 U.S. 360, 373 (1941) (Douglas, J., concurring) ("While I agree with the opinion of the Court, I think an elaboration of the point, which is the nub of the case, is desirable in view of certain observations in the dissenting opinion."). These concurrences were a natural result of the increased focus given to dissenting opinions.

Second, Justices during the Stone Court began to concur to indicate that they felt bound by a precedent with which they disagreed. *See, e.g.*, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) (Jackson, J., concurring). Justice Jackson stated:

> I concur with the opinion of the Chief Justice. If the Court were to reconsider *Williams v. North Carolina*, 317 U.S. 287, in the light of the views expressed by Mr. Justice Black [in his dissenting opinion in this case], I should adhere to the views I expressed in dissent there. Until we do so, I consider myself bound by that decision.

See id. at 447. Both of these practices increased the ratio of separate opinions to opinions for the Court.

242. At least it never dropped below that mark in the years between 1966 and 1989. Chart B stops in 1989.

Judge Frank Easterbrook believes that simple counting exercises are of limited use. He argues that while Justices may be writing more separate opinions in recent terms, the rate of real disagreement since the 1940s has stayed steady at around 20%. Easterbrook defines real disagreement as disagreement over legal principles—as opposed to disagreement over facts or procedure. *See* Frank H. Easterbrook, *Agreement Among the Justices: An Empirical Note*, *in* 1984 THE SUPREME COURT REVIEW 389 (Philip

This increase in the frequency of the issuance of separate opinions is a central event in the history of the Court's opinion-delivery practices. Before the shift, unanimity was the norm; afterwards, fragmentation was expected. This sharp rise has generated much commentary, some by Supreme Court Justices themselves.[243] Most of this commentary has been abstractly normative, asking whether the increased number of separate opinions was good or bad.

At least two groups of scholars, however, have attempted to explain why the rate rose at the time it did.[244] The first scholars to do so were Stephen Halpern and Kenneth Vines.[245] Halpern and Vines argue that the passage of the Judiciary Act of 1925, popularly known as the Judges' Bill, was the primary cause of the Stone-era increase in the nonunanimity rate. The Judges' Bill gave the Justices increased control over their docket.[246] Halpern and Vines note a slight increase in the nonunanimity rate for the years following the passage of the Bill. They tie this increase to the greater freedom the 1925 Bill gave to the Justices, writing: "developing and articulating a coherent judicial philosophy perhaps took on a greater significance for individual Justices after the Act."[247]

The second group of scholars to consider the question, Thomas Walker, Lee Epstein, and William Dixon, conclude that the Judges' Bill is not the primary reason for the Court's increased issuance of separate opinions.[248] This group notes that the rate at which separate opinions were issued did not begin to increase significantly until 1941, fifteen years after the Judges' Bill had taken effect.[249] They reject three other possible explanations[250] as well and argue that

---

B. Kurland et al. eds., 1985).

243. *See, e.g.*, Fred M. Vinson, *Supreme Court Work: Opinion on Dissents*, 20 J. OKLA. B.A. 1269 (1949); William O. Douglas, *Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104 (1948); Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC'Y 78 (1942). For more recent writings by Justices on the role of dissent, see Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33; Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L. J. 427 (1986); Ruth Bader Ginsburg, *The Obligation To Reason Why*, 37 U. FLA. L. REV. 205 (1985).

244. I am not here including C. Herman Pritchett, whose influential book *The Roosevelt Court* also deals with the increase in nonunanimity during the Stone Court. *See supra* note 195.

245. *See* Stephen Halpern & Kenneth Vines, *Institutional Disunity, The Judges' Bill and the Role of the Supreme Court*, 30 W. POL. Q. 471 (1977).

246. *See id.* at 474.

247. *Id.* at 482-83. This analysis corresponds with the increased concern each Justice had about his own record during this period. The historical record reviewed above, however, shows that this concern manifested itself before 1925. *See supra* notes 117-29 and accompanying text.

248. *See* Walker et al., *supra* note 159, at 364-66.

249. *See id.* at 365-66.

250. The other rejected explanations are that the rise was caused by changes in the makeup of the Court's caseload, the promotion of a sitting Associate Justice to be Chief Justice, and changes in the Court's composition. *See id*. at 366-78.

Wash U Law Repository

it was the leadership of Harlan Fiske Stone that was responsible for the increase in the dissent rate. Not only was Stone ineffective as a leader,[251] he also was the first Chief Justice to believe that "imposed unanimity was no virtue in developing the law."[252] Earlier Chief Justices had created a "no dissent unless absolutely necessary" tradition.[253] Stone rejected this tradition and urged his colleagues to do the same. The Associate Justices, many of whom were new on the bench, readily agreed, and the tradition favoring unanimity was snuffed out forever.[254]

Both the Halpern and Vines and the Walker, Epstein, and Dixon studies are helpful as short-term explanations of what happened in 1941. It is undoubtedly true that the increased control over the docket led to a proliferation of harder cases that carried with them greater opportunities for dissent. It is also true that the sharp increase would not have occurred had Chief Justice Stone not broken with his predecessors' attitude regarding the propriety of dissent.

Both of these explanations, however, are limited by a narrow temporal focus. The passage of the Judges' Bill and the elevation of Stone were important, but only as immediate causes. The Stone-era changes can be understood in another way.

Rather than being viewed as the result of specific changes made in 1925 or 1941, the Stone-era rise can also be explained by reference to the historical trends discussed above. By 1941 attitudes toward separate opinions had changed dramatically. Justices no longer needed to justify a decision to write

---

251. *See id.* at 379.

252. *Id.* at 384.

253. *Id.* at 382 (citations omitted).

254. *See id.* at 386. It is clear from an examination of the cases, however, that the pro-unanimity norm had weakened considerably in the years immediately before Stone took over as Chief Justice. In the 1930s, Justices very rarely expressed regret at having to dissent. The few Justices who did so were, ironically, the Justices that were most likely to write separately. Justice Frankfurter, for example, wrote in 1939:

> I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced . . . .

Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring) (footnote omitted). Frankfurter, however, was second only to William Douglas among all of the Stone and Vinson Justices in terms of frequency of issuance of separate opinions. *See* BLAUSTEIN & MERSKY, *supra* note 5, app. at 147-49 tbl. 11. Justice Black's comments regarding dissent are also interesting. In his first term on the bench, Black several times explained why he chose to dissent. *See, e.g.*, McCart v. Indianapolis Water Co., 302 U.S. 419, 423 (1938) (Black, J., dissenting) ("The importance of the questions here involved leads me to set out some of my reasons for this belief."). Black quickly ceased explaining himself. In 1938 he wrote separately 12 times and never once offered an explanation.

separately.[255] The universe of cases for which dissent was appropriate had expanded dramatically.[256] Much more attention was paid to the thinking of individual Justices, and Justices frequently used separate opinions to explain themselves.[257] Separate opinions were cited for propositions of law and several had ultimately triumphed and become law.[258]

Had these changes not occurred, the passage of the Judges' Bill and the elevation of Stone to Chief Justice would have had little effect on the rate at which Justices expressed dissent.[259] These changes conditioned the attitude of the Justices, so that by the time Stone announced his attitude shift, they were more than willing to follow. Unlike previous generations of Justices, these Justices had inherited a tradition in which separate opinions were seen as having many uses.

The changes identified by Halpern and Vines and Walker, Epstein, and Dixon are therefore best understood as catalysts for change. Such changes would not have had the effect they did had the underlying attitude toward separate opinions not undergone the historical shift outlined above.

III. CONCLUSION

As should be apparent, the system the Supreme Court now uses to deliver opinions is a product of the historical choices and changes described above. The basic structure of opinion delivery—whereby opinions are delivered by a single Justice speaking for the Court and other Justices are free to write separately—was first established in the Marshall years.[260] The current attitude that separate opinions play a legitimate role in many different areas of law is an extension of views first developed in the years between 1864-1940.[261] The freedom that Justices today feel to write separately is a product of these views and the Stone-era explosion in individual judicial expression.

It should be equally apparent, however, that the system could have evolved in other ways. Chief Justice Marshall could have continued the early Court's practice of deciding cases by either per curiam or seriatim opinions.[262] Justice

255. *See supra* notes 159-71 and accompanying text.
256. *See supra* notes 159-71 and accompanying text.
257. *See supra* notes 175-201 and accompanying text.
258. *See supra* notes 202-30 and accompanying text.
259. It is also true that had these changes not occurred, Stone probably would not have had the attitude he had upon becoming Chief Justice.
260. *See supra* notes 36-80 and accompanying text.
261. *See supra* notes 202-30 and accompanying text.
262. *See supra* notes 16-21 and accompanying text.

Wash U Law Repository

Johnson could have decided to follow the lead of his brethren and never write separately.[263] The Justices might never have abandoned the belief that dissent is appropriate only in a narrow category of cases.[264] Had any of this taken place, the Court would undoubtedly today be a very different place.

---

263. *See supra* notes 67-80 and accompanying text.
264. *See supra* notes 82-90 and accompanying text.