THE CORRECTIVE CAREERS OF CONCURRENCES AND DISSENTS

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"A judiciary that publishes dissents and concurrences serves as the exemplar of justice."[1]

Justice Ruth Bader Ginsburg stated in 2015 that the liberal wing of the United States Supreme Court ("the Court") deliberately voted together as a block.[2] "We agreed," she said, that "when we are in that situation again," referring to the Court's per curiam opinion in *Bush v. Gore*, 531 U.S. 98 (2000), and the four dissents that criticized it, "let's be in one opinion."[3] She apparently would have preferred one unified dissent to four separate dissents. "If you want to make sure you're read," she added, "you do it together, and you do it short."[4] This strategy might explain why she, Justice Stephen Breyer, Justice Sonia Sotomayor, and Justice Elena Kagan joined Justice Anthony Kennedy's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), even though, in Justice Antonin Scalia's words, that opinion "lack[ed] even a thin veneer of law,"[5] consisted of "mummeries and straining-to-be-memorable passages,"[6] and diminished the "Court's reputation for clear thinking and sober analysis."[7]

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[1] Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. AND LEE L. REV. 1607, 1635–36 (2005).

[2] *See* Nina Totenberg, *Ginsburg: Liberal Justices Make a Point to Speak With One Voice*, NPR (July, 10, 2015, 2:40 PM), http://www.npr.org/sections/itsallpolitics/2015/07/10/421811833/ginsburg-liberal-justices-make-a-point-to-speak-with-one-voice.

[3] *Id.*

[4] *Id.*

[5] Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting).

[6] *Id.*

[7] *Id.* at 2630.

Equally significant in *Obergefell* is the fact that the conservative wing of the Court authored four separate dissents rather than one unified dissent. Justice Scalia and Justice Clarence Thomas joined Chief Justice John Roberts's dissent. Justice Thomas joined Justice Scalia's dissent. Justice Scalia joined Justice Thomas's dissent. And Justice Scalia and Justice Thomas joined Justice Samuel Alito's dissent. The conservative wing of the Court, having lost the votes needed to achieve a majority, seemed less interested in voting as a block and more interested in registering their personal views for posterity. They apparently could not achieve the consensus necessary to produce one united dissent of four justices, at least not without sacrificing the rhetorical intensity and originality that characterized each dissent.

Why might it matter that each dissenter authored his own dissent in *Obergefell*? What would compel these dissenters to add their losing arguments to the vast deposit of rejected legal propositions? This essay seeks to answer such questions about concurring and dissenting opinions, which consist of nonbinding statements, rationales, and explanations by judges and justices in a particular case. I will not focus on *Obergefell* but more generally on the practice of authoring non-binding opinions from the bench. I will argue that such opinions, although lacking in compulsory application and effect, contribute to our fund of knowledge, diversify our perspectives, and shape the trajectory of the law as it is embedded in a textual network of cases.

Judges are dialogic, discursive actors who, by framing and molding legal precedents, participate in the transmission of cultural postulates and practical solutions to future generations with unforeseen conflicts. Judges are in this sense the conduits through which pass selectively retained principles and gradual modifications in the rules that govern society. This essay does not question whether judges fully comprehend their individual role in this aggregate process of adjustment and trial-and-error. One suspects that judges have studied enough cases to comprehend the possibility that their writings may one day be vindicated or revisited if a future court adopts their views.

Understanding why judges author concurring or dissenting opinions that do not obtain as law requires some historical mapping; thus, I begin by supplying a brief account of the opinion practices of the Court. I focus on the Court and not on state courts or inferior federal courts because the Court provides widely recognizable examples of concurring and dissenting opinions. I then discuss why nonbinding opinions such as concurrences or dissents are constructive. By calling certain writings constructive, I am not passing judgment on their merits but merely suggesting that their arguments have enjoyed successful careers in that later courts found those arguments to be compelling. The success of these writings, some of which have been vindicated over time, owes to their ability to shape the character and facilitate the development of American constitutional law. I conclude by discussing how such opinions reflect and enact the common-law theories on which the American legal system has flourished, and finally by celebrating concurring and dissenting opinions as an intricate and important form of judicial service to the legal profession.

I. A BRIEF HISTORY OF THE OPINION FORM IN THE UNITED STATES

Sir Matthew Hale and Sir William Blackstone explained that judicial opinions in England traditionally were a source of unwritten law, or *lex non scripta*, derived from custom and read from the bench but not transcribed in official reports or indexed in a formal corpus.[8] Judicial opinions began as an oral medium, not a written record. They were considered evidence of what the law was, but not the law itself.[9]

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[8] SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 3 (John Clive ed., Univ. of Chi. Press 1971) (1713); 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 63 (George Sharswood, Ed., J.B Lippincott Co. 1893). *See also* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1187–88, 1190–91 (2007).

[9] *See* Blackstone, *supra* note 8, at 71; Tiersma, *supra* note 8, at 1192.

From the thirteenth to the fifteenth century, opinions were often written down, in French, and compiled in Year Books.[10] Lawyers began citing opinions—some written, some unwritten—in their arguments before the courts, although there was no systematized mode of citation.[11] As early as the fifteenth century, lawyers produced abridgements, or digests, to review the state of the law across England.[12] These sketchy compilations summarized and classified opinions and could be referenced in the courtroom as authority for particular propositions.[13] During the fifteenth and sixteenth centuries, a comprehensive scheme of methodical and widespread adherence to written precedent emerged gradually by slow degrees.[14] However, not until the sixteenth and seventeenth centuries did judges and litigants treat opinions as authoritative and binding in a manner that resembled the modern sense of precedent.[15] The publication of Sir Edward Coke's *Institutes of the Lawes of England* over the course of nearly two decades during the early seventeenth century provided direction for both jurists and attorneys who wished to substantiate their arguments with concrete holdings.[16] Still there were no certified court reporters or verbatim transcriptions; the enterprise of publishing reports or digests was often personal and selective, insofar as reporters often chose to record only cases they liked and to disregard cases they disliked.[17]

From approximately 1600 to 1800, the British House of Lords enjoyed supreme appellate jurisdiction over cases in common-law and equity courts.[18] During that time, the House of Lords did not publish reports of its decisions, seriatim or

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[10] *See* Tiersma, *supra* note 8, at 1193.
[11] *See id.* at 1195.
[12] *See id.* at 1196.
[13] *See id.*
[14] *See* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory in Dissent*, 2007 SUP. CT. REV. 283, 293 (2007); Tiersma, *supra* note 8, at 1196.
[15] Henderson, *supra* note 14, at 293; Tiersma, *supra* note 8, at 1199.
[16] Tiersma, *supra* note 8, at 1199–200.
[17] *Id.* at 1200–01.
[18] Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 189 (1959).

otherwise.[19] Most cases were ultimately determined by intermediate appellate courts, including the Exchequer Chamber, the Court of Common Pleas, and the King's Bench, which regularly issued seriatim opinions that were transcribed by reporters.[20] Prior to American independence from Great Britain, appeals from colonial courts went before the Privy Council in England. The Privy Council reached decisions by majority vote but issued those decisions as unified pronouncements, regardless of dissenting views.[21] Because all decisions of the Privy Council were subject to the King's review, and the King, the site and symbol of the law or body politic,[22] could not articulate simultaneous, contradictory positions, the appearance of unanimity within the Privy Council was paramount.[23]

In its early years, after the adoption of the Judiciary Act of 1789, the Court, following the practice of English common-law courts—specifically the King's Bench—typically rendered

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[19] ZoBell, *supra* note 18, at 189–90. The "seriatim" convention refers to multiple opinions authored separately by each judge sitting in a single case. *Id.* at 190.

[20] *Id.*

[21] *Id.* at 187–88.

[22] SERGIO BERTELLI, AND TRANSLATED BY R. BURR LITCHFIELD, THE KING'S BODY 10, 35–36, 38–40 (The Penn State Univ. Press, 2001); PAUL KLÉBER MONOD, THE POWER OF KINGS: MONARCHY AND RELIGION IN EUROPE, 1589–1715, 74 (Yale Univ. Press, 1999); Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L. J. 1639 (1989). Paul Raffield, *The Ancient Constitution, Common Law and the Idyll of Albion: Law and Lawyers in Henry IV, Parts 1 and 2*, 22 LAW AND LITERATURE 18, 37–41 (2010). I own that my loose use of the phrase "site and symbol of the law or body politic" raises questions, but space does not permit me to fully explain myself here. Regarding an earlier manifestation of this semiotic phenomenon in England, *see generally* ALLEN P. MENDENHALL, LITERATURE AND LIBERTY: ESSAYS IN LIBERTARIAN LITERARY CRITICISM 85–100 (2014).

[23] ZoBell, *supra* note 18, at 188; Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 135 (1990).

decisions in the form of per curiam and seriatim opinions.[24] The near obligatory practice of rendering written opinions was an American innovation and a departure from the English custom of residual orality.[25] The fact that the United States Constitution was written perhaps necessitated the textual documentation of judicial opinions in books, digests, and reports.

During the tenure of Chief Justice Oliver Ellsworth (1796–1800), the third Chief Justice of the Court, seriatim opinions became less common and were abandoned during the tenure of Chief Justice John Marshall (1801–1835), who orchestrated consolidated opinions among the justices, much to the chagrin of

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[24] MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 41 (Pantheon Books, 2015; Joshua M. Austin, *The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?*, 31 N. ILL U. L. REV. 19, 20, 26–27 (2010); Harvard Law Review, Note, *From Consensus to Collegiality: The Origins of the 'Respectful' Dissent*, 124 HARV. L. REV. 1305, 1306–07 (2011); Henderson, *supra* note 14, at 304; Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation In Historical Perspective*, 4 WASH. U. J. L. & POL'Y 261, 263 (2000); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court, 1790–1945*, 77 WASH. U. L.Q. 137, 138, 141 (1999); Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2085–86 (1995) (note); Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2072–73 (1995); Linas E. Ledebur, Note, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 901 (2009); James Markham, *Against Individually Signed Judicial Opinions*, 36 Duke L.J. 923, 928 (2006) (note); Tiersma, *supra* note 8, at 1223, 1229–30; Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1958–59 (2006); Natalie Wexler, *In The Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1412 (2006); G. Edward White, *Toward a Historical Understanding of Supreme Court Decision-Making*, 91 DENV. U. L. REV. ONLINE 201, 205 (2014) [hereinafter White, *Historical*]; ZoBell, *supra* note 18, at 191–92, 194.

[25] Tiersma, *supra* note 8, at 1209–14, 1226; Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 945 (2013).

Thomas Jefferson.[26] Justices who concurred with the prevailing rationale no longer authored a separate opinion to express their agreement.[27] Justice William Johnson, a Jeffersonian Republican, was the notable exception, authoring nearly half of the dissents that were produced by members of the Court during his tenure on the bench.[28] Chief Justice Marshall, for his part, authored most of the Court's majority opinions, which were issued with the phrase "opinion of the Court" to lend the impression that the justices spoke with one voice.[29] Collegiality and consensus-building must have been a high priority because, after work hours, the justices resided and dined together in a small boardinghouse on Capitol Hill, away from their families, where court conflicts could have incited personal quarrels.[30] Abandoning the seriatim mode and dissenting opinions also quickened the publication process; over a quarter of the cases decided by opinion between 1815 and 1835 were published in no more than five days.[31]

The period late in Chief Justice Marshall's tenure to approximately 1905 involved the rise of dissenting justices.[32]

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[26] Urofksy, *supra* note 24, at 47–49; Austin, *supra* note 24, at 20, 27; Ginsburg, *supra* note 23, at 138; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1189 (1992); Harvard Law Review, *supra* note 24, at 1306–07; Henderson, *supra* note 14, at 283, 304–07, 311–16; Hochschild, *supra* note 24, at 267, 284; Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1621 (2005); Kelsh, *supra* note 24, at 138, 144–45; Kirman, *supra* note 24, at 2085–86; Kolsky, *supra* note 24, at 2069, 2095–97; Ledebur, *supra* note 24, at 902; Kirman, *supra* note 24, at 2085–86; Marceau, *supra* note 25, at 945–46; Markham, *supra* note 24, at 929; Tiersma, *supra* note 8, at 1230, 1234; West, *supra* note 24, at 1959; White, *Historical, supra* note 24, at 205–06; ZoBell, *supra* note 18, at 193.

[27] White, *Historical*, *supra* note 24, at 206.

[28] ZoBell, *supra* note 18, at 197; *see generally* Henderson, *supra* note 14, at 283; Kolsky, supra note 24, at 2070, 2076–81.

[29] Harvard Law Review, *supra* note 24, at 1307; Henderson, *supra* note 14, at 292; Hochschild, *supra* note 24, at 283–84; Kelsh, *supra* note 24, at 141, 143; Marceau, *supra* note 25, at 946; White, *supra* note 24, at 206; G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 31, 42 (1984) [hereinafter White, *Marshall*]; ZoBell, *supra* note 18, at 193.

[30] White, *Marshall*, *supra* note 29, at 1, 5, 34.

[31] *Id.* at 30–31.

[32] Kelsh, *supra* note 24, at 143, 147; Kirman, *supra* note 24, at 2087; Tiersma, *supra* note 8, at 1231; ZoBell, *supra* note 18, at 196.

Chief Justice Marshall himself began to author dissents[33] as the Court increasingly decided cases through majority rather than unanimous opinions.[34] Dissents proliferated during the mid-nineteenth century and into the twentieth century.[35] Justice John McLean and Justice Benjamin Curtis authored memorable dissents in *Dred Scott v. Sandford*.[36] Forty-eight years later, Justice Oliver Wendell Holmes Jr.'s three-paragraph dissent in *Lochner v. New York*[37] became one of the most influential legal writings in American history.[38] Blackstone's conviction that opinions were evidence of law but not actually law continued to some extent throughout the nineteenth century, yet it had been diminishing since the mid-eighteenth century.[39] The notion of "caselaw," or the idea that judicial opinions constituted law, did not gain currency until the twentieth century.[40] Today it is mostly accepted without question or qualification.[41]

The twentieth century ushered in the era of the "Great Dissenter," a label that has been conferred on Justice Holmes[42] and Justice John Marshall Harlan.[43] By the 1940s, most cases involved separate opinions.[44] Dissents and separate writings are now

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[33] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1189 (1992); Kelsh, *supra* note 24, at 147; ZoBell, *supra* note 18, at 196.
[34] Tiersma, *supra* note 8, at 1231.
[35] Kelsh, *supra* note 24, at 170–74; Kirman, *supra* note 24, at 2087; Ledebur, *supra* note 24, at 900.
[36] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 529 (1857), *superseded by constitutional amendment,* U.S. CONST. AMEND. XIV (McLean, J., dissenting); *id.* at ,564 (Curtis, J., dissenting).
[37] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
[38] JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 25 (Little, Brown & Co. 2011) (calling Holmes's *Lochner* dissent "the most influential dissenting opinion in the Court's history).
[39] Tiersma, *supra* note 8, at 1232, 1234.
[40] *Id.* at 1233.
[41] *Id.* at 1247–48.
[42] PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 3 (Univ. of Okla. Press 1969); ALLEN MENDENHALL, OLIVER WENDELL HOLMES JR., PRAGMATISM, AND THE JURISPRUDENCE OF AGON xvi, xix, 8, 13, 29 (Bucknell Univ. Press, 2017).
[43] FRANK B. LATHAM, THE GREAT DISSENTER: JOHN MARSHALL HARLAN, 1833–1911 (Cowles Book Company, Inc. 1970); TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (Oxford Univ. Press, 1992).
[44] Henderson, *supra* note 14, at 325; UROFSKY, *supra* note 24, at 7.

common.[45] A jurist's reasoning and argument typically enjoy precedential effect, but historically, under the English tradition of the common law, the judgment of the opinion was authoritative, and later courts could disregard the analysis from which that judgment followed.[46] The results of an opinion, in other words, took priority over its reasoning. Given the binding operation of reasoning *and* rules, rather than of *just* rules, jurists today may dissent to "alert Court stakeholders about the 'errors' of a decision,"[47] "weaken the precedent and thus encourage judicial or political responses,"[48] embolden lower-court judges to rule in a particular manner,[49] narrow majority opinions,[50] or supply arguments for future jurists.[51] Authoring dissents "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[52]

II. CONCURRENCES AND DISSENTS ARE CONSTRUCTIVE

A unanimous opinion admits little doubt about its authority. Yet a dissent, especially when it is joined by another justice, deprives a majority opinion of its full import, calling into question the soundness and quality of the reasoning that prevailed in the case. Future judges may, after all, reclaim from obscurity the rationale of a dissent, thereby abrogating the majority opinion against which the dissent was situated. Concurrences and dissents notify future readers of alternative grounds of argument.[53] Concurrences may complicate the interpretation of the leading or

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[45] *See* Henderson, *supra* note 14, at 334–35.
[46] *See* Hochschild, *supra* note 24, at 278; Tiersma, *supra* note 8, at 1247.
[47] Henderson, *supra* note 14, at 335.
[48] *Id.*
[49] *See id.*
[50] *See id.*
[51] *Id. See also,* Allen Mendenhall, *Dissent as a Site of Aesthetic Adaptation in the Work of Oliver Wendell Holmes Jr.*, 1 BR. J. AM. LEG. STUDIES 517, 541–42, 546–47 (2012); Allen Mendenhall, *Holmes and Dissent*, THE JOURNAL JURISPRUDENCE 689–97 (2011).
[52] William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L. J. 427, 430 (1986).
[53] *See* Ginsburg, *supra* note 23, at 143–44.

majority opinion,[54] but the fact that they signal the need for closer scrutiny and inspection is, in my view, advantageous.

Each case in a common-law system represents a ratified principle or principles[55] nested within a chain of other cases. Patterns of precedent gain increasing authority the longer and more widely they are followed. Dissents add to the population of principles within the total system of rules that govern society, but they chart a path away from the settled course if they attract adherents and gradually disturb consensus about what the operative rule should be.

A decision in a single case may seem inconsequential because it is plugged into a vast network of cases. Yet each case is important in the aggregate because it contributes to the wide distribution of choices by purposeful actors (voters who elect legislators, legislators who enact statutes, lawyers who contextualize statutes and produce lines of argument, judges who interpret statutes and formalize lines of argument, and litigants who initiate cases that either adopt or challenge prevailing rules). Each case thus contributes to the filtering processes by which sketchy correspondences develop between past and present holdings. Principles become clearer as associative links between cases grow more noticeable and as like cases combine into a cumulative force that demands attention. Each case is necessary as a practical test for some principle to win judicial recognition. A judge considers the law of the case synchronically, as if the operative rule were fixed, because he or she is bound by statute or precedent or some other source of positive law at that moment. But concurrences and dissents, when they challenge the operative

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[54] *See* West, *supra* note 24, at 1956.

[55] I use the terms "law," "principle," "rule," or their variants throughout this essay and thus wish to clarify my meaning in a footnote because the terms are not interchangeable. A law is a "rule of conduct" or "body of rules" that is enforced. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1544 (Lesley Brown, ed.) (1993). Thus, the term "law" is broader than and encompasses "rules." A rule, for the purposes of this essay, is a "regulation" or "maxim" that governs "individual conduct." 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2646 (Lesley Brown, ed.) (1993). A principle is the source of both laws and rules. It is a "fundamental truth or proposition on which others depend," or "a general statement or tenet forming the basis of a chain of reasoning." *Id.* at 2356.

rule, force future judges to consider the law diachronically, as if it were subject to change and perhaps derived from some other source of law (e.g., when a judge dissents even though a statute or constitutional provision leads seemingly inexorably to the conclusion reached by the majority).[56]

There are millions of published cases from both federal and state courts across the United States; the relation between principles and rationale in each of these cases cannot possibly be based on factual resemblances alone. Only slight factual affinities, for instance, may lead judges to label an activity "theft" or "murder" in one case but not in another.[57] Cases do not consist merely of facts that require naming and classification according to a fixed legal lexicon. The facts of a case may square with a legal principle that can be named, but the precise application of the principle remains unknown until a judge articulates it in an opinion. The judge differentiates between principles in light of facts that are specific to each case. The principles represent, in this sense, theoretical concepts abstracted from facts in specific cases. When several cases hitch up to announce similar principles derived from comparable facts, the principles accrue authority. Textual patterns signal how judges will rule in like cases; they thus ensure the predictability of rules.

The heritability of principles through cases enables judges to construct genealogies for principles to reveal a common

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[56] *See, e.g.,* some of the dissents of Chief Justice Roy Moore in cases involving a termination of parental rights: *Ex parte* J.W. and M.W., 140 So. 3d 457 (Ala. 2013) (Moore, C.J., dissenting); *Ex parte* J.M.P., 144 So. 3d 287 (Ala. 2013) (Moore, C.J., dissenting); *Ex parte* T.M., 160 So. 3d 10 (Ala. 2014) (Moore, C.J., dissenting); *Ex parte* S.L.J.F., 165 So. 3d 614 (Ala. 2014) (Moore, C.J., dissenting); *Ex parte* B.M., 187 So. 3d 697 (Ala. 2015) (Moore, C.J., dissenting); *Ex parte* S.C., 188 So. 3d 648 (Ala. 2015) (Moore, C.J., dissenting).

[57] Regarding "theft," *see, e.g., Ex Parte* Newman, 143 So. 3d 746, 747 (Ala. 2013) (Moore, C.J., dissenting) (arguing that the lower appellate court misconstrued the robbery and theft statutes to uphold the conviction of a defendant who might instead have been convicted of the lesser crime of theft of services). Regarding "murder," *see, e.g.,* Phillips v. State, CR-12-0197, 2015 WL 9263812, (Ala. Civ. App. Dec. 18, 2015) (holding that an "unborn child" is a "person" within the meaning of a statute that designates as a capital offense the murder of "two or more persons").

ancestry.[58] An opinion represents one operative resolution among a heterogeneous mass of decisions. An opinion in isolation derives its clarity and meaning by linking its rationale to associated concepts in prior cases. Only by linking itself to like antecedents can an opinion establish its authority as the apparent sum of a limited number of legal options. Case precedent is thus a social and discursive institution, embedding principles within a system or network of citation and imitation. Each opinion unites certain principles with facts until eventually several opinions merge to form a cumulative family of similar cases. Each opinion thereby serves as a resource for future judges who need to find and assemble principles that will situate the facts of a case within a settled pattern of decision-making.

Dissents are corrective mechanisms[59] that guide future judges and justices away from problematic precedents.[60] They also facilitate and instantiate the values of free expression, as well as competition among ideas, that the First Amendment enshrines.[61] Justice William Brennan suggested that dissents involve "the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side."[62] He echoed Justice Holmes by invoking "the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas," and to this end he referred to opinions figuratively as "the product of a judicial town meeting."[63] Melvin Urofsky argues that dissents facilitate a "constitutional dialogue," a phrase that "includes not just debates justices on the high court have with one another in specific cases or over particular jurisprudential ideas but also discussions between and among jurists, members of Congress, the executive branch,

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[58] *See, e.g.*, Justice Scalia's historicizing in District of Columbia v. Heller, 554 U.S. 570 (2008), and Chief Justice Roy Moore's in *Ex parte* First Exchange Bank, 150 So. 3d 1010, 1014–22 (Ala. 2013).
[59] *See* Kolsky, *supra* note 24, at 2083–85.
[60] *Id.* at 2085–86.
[61] *Id.* at 2086–87.
[62] Brennan, *supra* note 52, at 430.
[63] *Id.* at 430.

administrative agencies, state and lower federal courts, the legal academy, and last, but certainly not least, the public."[64]

Dissents can narrow the import of majority holdings that otherwise might result in broad interpretations.[65] They signal to litigants and judges in lower courts different suasive permutations and even, in some instances, supply theories about rules that fall outside the purview of the present case.[66] For example, a federal court may provide its own theory about the meaning of a state constitution that state jurists may later incorporate as state judicial precedent.[67] The mere draft of a dissent "may win over sufficient votes to become the majority view."[68] Some dissents become so important that they seem "prophetic" or "canonical" in that they "influence the constitutional dialogue."[69] We should not be entirely surprised that a concurrence or dissent may generate sweeping changes in the law when we have an entire body of constitutional jurisprudence emanating from a single footnote in a single case.[70]

The constructiveness of concurrences and dissents is evident from those which later courts have vindicated. Examples include Justice Brandeis's concurrence in *Whitney v. California* (1927)[71] and his dissent in *Olmstead v. U.S.* (1928),[72] Justice John Marshall Harlan's dissents in the *Civil Rights Cases* (1883)[73] and

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[64] UROFSKY, *supra* note 24, at 4.
[65] Brennan, *supra* note 52, at 430.
[66] *Id.*
[67] *Id.*
[68] *E.g.*, UROFSKY, *supra* note 24, at xii. *See id.* at 17.
[69] *Id.* at 7.
[70] This, of course, is the famous "footnote four" in United States v. Carolene Products Co., 304 U.S. 144 (1938).
[71] 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). Justice Brandeis's concurring opinion was partly vindicated in Brandenburg v. Ohio, 395 U.S. 444 (1969).
[72] 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Justice Brandeis's dissent was partly vindicated in Berger v. State of N.Y., 388 U.S. 41 (1967), and Katz v. U.S., 389 U.S. 347 (1967).
[73] 109 U.S. 3 (1883) (Harlan, J., dissenting). Consider this revealing quotation: "[I]t was Harlan's dissenting opinions in civil rights cases that were vindicated by cases like *Brown v. Board of Education* in the 1950s and 1960s." Eric Goldwarg, *What Makes an Influential Justice? Jeffrey Rosen on the Supreme Court in History*, 36-SPG Vt. B.J. 43, 44 (2010).

Plessy v. Ferguson (1896),[74] Justice Wiley Rutledge's dissent in *In re Yamashita* (1946),[75] and Justice Hugo Black's dissent in *Betts v. Brady* (1942).[76] Recently the Supreme Court of Alabama released *Ex parte Christopher* (2013),[77] a case that overruled a quarter-century-old precedent established in *Ex parte Bayliss* (1989).[78] Chief Justice Roy Moore, who authored the majority opinion in *Christopher*, had urged the overruling of *Bayliss* in a special writing he authored in *Ex parte Tabor* (2002).[79] Reanimating his *Tabor* writing in *Christopher*, the Chief Justice and a majority of the Court demonstrated the mode in which non-binding dissents may express reasoning that courts later adopt, in effect turning dead-letter into living authority.

Counterintuitively, a dissent may itself represent the plurality opinion. In *Ex parte Harper* (2015), for example, Chief Justice Moore authored an opinion that drew only one concurrence as to the rationale.[80] Three other justices concurred in the result of the opinion but rejected the opinion's rationale. One justice recused from the case. Justice Lyn Stuart authored a dissent that two other justices joined. Thus, the dissent, with a block of three justices, had more support as to the rationale than did Chief Justice Moore's rationale with which only one justice agreed. Technically, then, the dissent carried more precedential weight than the opinion that disposed of the case.

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[74] 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). On the vindication of this dissent, *see* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412–17 (2011); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 800–02 (2000); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L. J. 243, 245–47, 256–57, 262, 279–81, 292–93 (1998). *See also* Allen Mendenhall, *The Power of Dissent*, 77 ALA. LAW. 170, 171 (2016) ("Without Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* . . . we probably would not have the landmark decision in *Brown v. Board of Education* (1954).").

[75] *See* 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting). On vindication, *see generally* UROFSKY, *supra* note 24, at 257–74.

[76] *See* 316 U.S. 455, 474 (1942) (Black, J., dissenting). Justice Black's dissent was partly vindicated in Gideon v. Wainwright, 372 U.S. 335 (1963).

[77] *See* 145 So. 3d 60 (2013).

[78] *See* 550 So. 2d 986 (1989).

[79] *See* 840 So. 2d 115, 123–30 (2002) (Moore, C.J., concurring in part and dissenting in part).

[80] *See Ex parte* Harper, 189 So. 3d 1 (Ala. 2015).

The ideal of freedom of speech and expression is an inadvertent byproduct of the practice of dissenting, the primary function of which is to ascertain the proper legal argument, rationale, rule, or standard of review for a particular case. A competition among values and ideas emerges inductively from the free play of clashing judicial opinions. A variety or diversity of ideas embedded in case precedent enables a constructive flexibility in the rules that govern human activity. By multiplying the options available to future judges, dissents ensure that courts have wider latitude to reach the right result in complex cases. Dissents preserve in the textual record arguments that may in the long run seem more plausible, seemly, and correct. They make it possible for future jurists to say, "This other argument is better and should be dispositive in the case before me."

III. CONCURRENCES AND DISSENTS ENACT THE MELIORATIVE PROCESSES OF THE COMMON-LAW SYSTEM

It has been said that the "common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time."[81] A better understanding of the common law holds, not that the law lacks an authoritative source, but rather that spontaneous order inheres in the common-law system despite or because of the absence of a central body that plans or designs the rules that govern decisions in individual cases.[82]

James R. Stoner submits that "the paradigm of the common law is the community's traditional sense of right and wrong" and that the "[c]ommon law emphasizes assent rather than domination,

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[81] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

[82] *See* F. A. HAYEK, THE CONSTITUTION OF LIBERTY 115 (Univ. of Chi. Press, 2011) (1960); MICHAEL POLANYI, THE LOGIC OF LIBERTY 198–200 (Liberty Fund, 1998) (1951); Todd J. Zywicki, *Spontaneous order and the common law: Gordon Tullock's critique*, 135 Public Choice 35, 35–37 (2008) [hereinafter Zywicki, *Spontaneous order*]; Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE WESTERN L. REV. 961, 992 (1996) [hereinafter Zywicki, *Unanimity*].

the community rather than the state, [and] moral authority rather than physical power."[83] The common law, accordingly, is bottom-up, not top-down, "borne directly on the raw facts of daily life" and reflecting "the character of the social order."[84] It is an emergent order with small and local beginnings that varies in complexity as it grows. The larger it grows, the greater the need becomes for its systems of grouping and classification to direct the uncoordinated activities of the rational actors who are subject to it. Cases that share constituent elements may be grouped together under headings such as "contracts" or "property," or more particularly, within those fields, restitutionary disgorgement or trespass, quantum meruit or easement, anticipatory repudiation or usufruct. Todd Zywicki describes this process of naming and classification this way: "The classical common law . . . results from many judges resolving particular disputes involving particular individuals in concrete fact situations, from which emerge abstract and generalizable legal concepts as the byproduct."[85]

The basis of the common law is competition involving particular disputes and questions of moral import. At its most fundamental level, the common-law system is adversarial, premised as it is on disputes between competing litigants before impartial jurists as well as juries of peers who in theory mirror the backgrounds and perspectives of the litigants.[86] Murray Rothbard suggests that "the justly celebrated common law . . . was developed over the centuries by competing judges applying time-honored principles rather than the shifting decrees of the State."[87] Common-law courts were themselves in jurisdictional competition with other courts insofar as litigants could opt to bring their cases before county or church courts, baronial overlords, courts of the

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[83] JAMES R. STONER, COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 5 (Univ. Press of Kan., 2003).
[84] ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 3 (Liberty Fund, 1986) (1966).
[85] Zywicki, *Spontaneous order*, *supra* note 82, at 37.
[86] *See id.* at 38.
[87] Murray Rothbard, *Police, Law, and the Courts*, in ANARCHY AND THE LAW: THE POLITICAL ECONOMY OF CHOICE 29 (Edward P. Stringham, ed.) (Transaction Publishers and the Independent Institute, 2007).

borough, and other tribunals with overlapping or coextensive jurisdiction.[88] Thus, the common law represents an agonistic system,[89] marked by contest and competition, and "[l]awyers in common law jurisdictions [may] expect legal rules to be the site of ongoing conflict between clashing visions of justice."[90]

Richard Posner popularized the theory that the inherently competitive characteristics of the common law induce economic efficiency and lower transaction costs.[91] Because of its basis in competition, the common law is also flexible and fluctuating.[92] The malleability of rules in a common-law system is evidenced by the fact that "[t]he development of the common law in the thirteen colonies followed different paths that were not only distinct from the original English common law, but also between the colonies themselves."[93] In fact, Nuno Garoupa and Carlos Gómez Ligüerre have demonstrated that "the common law adjusts to local determinants that vary across the world, therefore producing different doctrines and legal outcomes."[94] Rules within common-law systems vary from time to time and place to place because different common-law jurisdictions contain their own unique cultural values and incentives that shape the types of litigation initiated and the manner in which judges evaluate their cases.

The variability of rules and principles embedded in common-law cases enables the law to adapt without resort to arbitrary or capricious alternatives that may include legislative or executive commands. By increasing the possible selections for future judges, concurrences and dissents ensure regularity, consistency, and uniformity, as well as malleability and flexibility within precedents. While they challenge the permanence or fixedness of particular rules, they also reveal that the methods and

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[88] HOGUE, *supra* note 84, at 5. *See generally* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV 1179, 1181–82, 1185–87 (2007).
[89] Jacobson, *supra* note 1, at 1630–31.
[90] *Id.* at 1630.
[91] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 315–20 (8th ed. 2011).
[92] HAYEK, *supra* note 82, at 198.
[93] Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. OF INT'L. & COMP. L. 307, 311 (2012).
[94] *Id.* at 314.

processes by which those rules are determined are secure and organized. Rights and norms remain unchanged even if the juridical manner in which they are protected changes.

The common law provides a stable system within which rules may be altered and amended. This system contemplates the possibility of internal reform and modification. Changes in rules may be improvements or degenerations, but determining their success requires the passage of time and their gradual testing within the field of human relations, i.e., in actual cases involving felt disputes between real people. Today's rule may prove erroneous tomorrow. What seemed to be a solution to a recurring problem may only compound the problem.[95] Such temporary setbacks are part of a net gain in human knowledge because they supply new data about the workability of ideas or practices.

Imagining a stationary state of the common law is useful for extrapolative and speculative purposes. For instance, actor *A* may wonder whether he will find himself in trouble if, say, he files his taxes in one manner as opposed to another, or if he decides to open a business under a name that is substantially similar to one that is already in use. Yet the fact that rules and the enforcement of norms can be predictable—that an actor can calculate his legal options with a high degree of probability before he undertakes a given course of action—suggests that stability and uniformity do inhere within an evolutionary common-law system.

The historic understanding of the common-law judge is that he did not make law but instead responded to the rules, customs,

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[95] Although the merit or soundness of these switches is subject to debate, an example might be the manner in which the Alabama Supreme Court has alternated between the American and British rules for evaluating whether an activity constitutes "gambling." *See, e.g.*, Opinion of the Justices No. 373, 795 So. 2d 630 (Ala. 2001); Opinion of the Justices No. 358, 692 So. 2d 107 (Ala. 1997); Opinion of the Justices No. 83, 31 So. 2d 753 (Ala. 1947).

and norms prescribed by the community.[96] Rothbard echoes this traditional understanding of the common law by which "the judge did not make law" because his "task" and "expertise" was instead "in finding the law in accepted common law principles, and then applying that law to specific cases or to new technological and institutional conditions."[97] The function of the judge in the current American legal system differs so much from the historical function of the judge in the common-law system that John Hasnas questions whether the present model continues to represent the common-law tradition: "The Anglo-American legal system is often referred to as a common law legal system. This is unfortunate, given the anachronistic contemporary understanding of the term 'common law.' Currently, common law is associated with 'judge-made' law. For most of the formative period of the common law, however, judges did not make the law, but merely presided over proceedings where disputes were resolved according to the accepted principles of customary law."[98]

If the pronouncements of judges are not law, but estimations or evidence of law, then judicial statements about what constitutes the law are never completely final because the judicial

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[96] Zywicki, *Unanimity*, *supra* note 82, at 994–95. James R. Stoner describes the understanding of the common-law judge as follows: "It was settled in the rhetoric of common law, and held to be fixed in the character of a common-law judge, that in deciding cases, it was the judge's duty to discover, not invent, what law governed the case at hand. If a case seemed genuinely novel, the judge was to proceed by analogy to the appropriate precedent. As statutes were made, they were assimilated to common law, for the common law had rules by which statutes were to be interpreted. Although it was a maxim of common law that a rule of statute law supersedes a contrary, unwritten common-law rule, it first had to be determined whether the statute in question modified the common law or simply declared it in writing." STONER, *supra* note 83, at 11.

[97] ROTHBARD, *supra* note 87, at 29.

[98] John Hasnas, *The Obviousness of Anarchy*, *in* ANARCHISM/MINARCHISM: IS A GOVERNMENT PART OF A FREE COUNTRY? 111, 113 (Roderick T. Long & Tibor R. Machan eds., 2008). Hasnas adds this statement: "It is true that, beginning in the late twelfth century, the common law developed in the royal courts, but this does not imply that either the king or his judges made the law. On the contrary, for most of its history, the common law was entirely procedural in nature. Almost all of the issues of concern to the lawyers and judges of the king's courts related to matters of jurisdiction or pleading; that is, whether the matter was properly before the court, and if it was, whether the issues to be submitted to the jury were properly specified." *Id.* at 114–15.

conversation is always potentially fluid and pragmatic; the cases containing those statements are modes of connection, bringing together an incalculable number of decisions from a sprawling network of legal theories into one coherent decision in one concrete case. The linkages between multiple cases form a chain of communication and enable an open and potentially unlimited exchange of opinion to unfold within the parameters established by fact patterns and binding precedents. Each case in a common-law system consists of recognizable bundles of distinguishing qualities formed out of contests and alliances between and among prior decisions. A judge's failure or refusal to register a dissenting view thus deprives the textual record of an alternative perspective or different calculus for settling disputes. In the words of Arthur J. Jacobson:

> If common law is just the record of what courts have done and why they have done it, suppressing a portion of that record creates a divergence between the law in the books and the law on the ground. Common law at its most rigorous holds that any adjudication may from the perspective of some future adjudication be understood to have made law, however insignificant. Unpublication breaks the link that common law establishes between law-making and adjudication.[99]

In light of the interactive, communicative, and discursive nature of the common-law system, the lack of dissenting or minority views in cases may cause an erroneous or misguided majority view to ossify as precedent.[100] Dissents loosen up precedent, ensuring the possibility of an ongoing conversation about the proper application of rules in comparable circumstances. They are propellants, inducing and provoking responses by

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[99] Jacobson, *supra* note 1, at 1607.

[100] *Id.* at 1619 ("The hardening of the doctrine of precedent, which seems to cut off the possibility that dissent can become the rule, is inevitably challenged by the pressures of political and social transformation, and precedent must always be ready to give way.").

litigants and judges in subsequent cases. Dissents also suggest that courts are not passive recipients of the rules that govern cases but rather active participants in a dynamic, continual process of transmission and discovery.

Cases in a common-law system entail the restless rhetorical pursuit of right ideas for specified contexts; the rules and principles expressed in cases relate to one another in contiguity. The ongoing dialogue between jurists and litigants not only evolves organically but also invites feedback and participation, making judges responsive to the concerns and needs of the people within their jurisdiction. Jacobson describes this democratic element of the common law as follows:

> [C]ommon law judges are participants with citizens in an ongoing struggle over plural visions of justice. Rather than ersatz legislators issuing rules from out of a potpourri of competing principles and policies, judges more nearly resemble co-adjutants in the resolution of disputes among antagonists unable to ravel them without assistance. Common law makes disputation on the bench continuous with the disputes that occasion it; it invites ordinary citizens to see themselves as part of the process of disputation. It thus reduces the gulf between judge and lawyer, between judge and citizen.[101]

Dissents may capture a minority view that is worthy of consideration; they may present cogent alternative arguments against which majority claims to reason and authority may be checked. A corollary of this idea is that any majority position that is susceptible to refutation should be challenged for the greater benefit of the community, there being a constant need for value pluralism and democratic insight in free societies.[102] The common law represents the concept of fallibilism writ large, inasmuch as it contemplates the free exchange of ideas as the best means of

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[101] *Id.* at 1632.
[102] *See generally* HAYEK, *supra* note 82, at 166–83.

arriving at peaceful and cooperative solutions to perplexing struggles. Such exchange cannot properly or efficiently take place if dissenting voices are silenced.

IV. JUDGES SHOULD AUTHOR CONCURRENCES AND DISSENTS, WHENEVER POSSIBLE, AS A SERVICE TO THE PROFESSION

Creative jurists who author dissents can make surprisingly strong claims on their successors' attention. These jurists capture their readers' notice with profound registers of sound and syntax, or with metaphors, figurative language, cadences, and rhythms that ripple through the text. Writing with panache is not alone sufficient to vindicate dissents. Analysis of the rule of law and sound rationale are of course necessary. Yet "dissents that soar with passion and ring with rhetoric" and "straddle the worlds of literature and law," as Justice Brennan intoned, command the attention of future audiences.[103] Rather than exhausting or retiring an argument, dissents can magnify it or give it new life. They can enrich and multiply ideas about how best to resolve conflict.

I do not advocate a return to mandatory seriatim opinions. The cumbersome practice of writing seriatim opinions not only increases the workload of judges and justices but also complicates any determination of which rationale among the fragmented writings in a case operates as binding, dispositive, and precedential. When, as a matter of course, each judge or justice writes an opinion in every case, the resultant proliferation of words and arguments muddles the distinction between *obiter dicta* and *ratio decidendi*. The task of synthesizing a common rule among fractured texts thus becomes difficult and confusing. I also see no need for redundancy among opinions when multiple judges agree as to the rationale and the judgment in a case.

Nevertheless, I believe concurrences and dissents provide a constructive variety in our stock of cases, multiply the options available to future jurists and litigants, and diversify perspectives on issues of often grave importance to the bench and bar. Concurrences and dissents are investments in the future state of the

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[103] Brennan, *supra* note 52, at 431.

law. They hold in reserve important principles for later use; as deposits, their value lies in prospective benefit or return. Dissents that are creatively and memorably written, that stand out for their literary qualities, press into the future and ring in the ears of later jurists. In the words of Justice Benjamin Cardozo, "The voice of the majority may be that of force triumphant, content with the plaudits of the hour and recking little of the morrow. The dissenter speaks of the future, and his voice is pitched to a key that will carry through the years."[104]

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[104] BENJAMIN N. CARDOZO, *Law and Literature*, *in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 3, 36 (1931).