

DISSENT: THE REWARDS AND RISKS OF JUDICIAL DISAGREEMENT IN THE HIGH COURT OF AUSTRALIA

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[This article examines the justifications which support the capacity of individual justices to voice their disagreement from a majority through the writing of dissenting opinions. In doing so, it employs extensive comparison with the practice of dissent in other jurisdictions, particularly that of the United States Supreme Court. The author contends that there are political, procedural and developmental benefits provided by the expression of disagreement amongst the bench. However, arguments for judicial restraint are also weighed, especially in respect of the practice of persistent dissent. The effectiveness of stare decisis as a check on disagreement — and the relationship between the two in general — is also considered.]

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I INTRODUCTION

The occurrence of dissent is a phenomenon of judicial work which attracts direct consideration only sporadically. Individual dissenting opinions may often receive attention in cases of interest to the public, but there has been only a limited effort to reflect upon the role of dissent in legal reasoning generally. While the significance of the dissenting opinion has received various forms of tacit acknowledgment over the years — particularly in the United States, where it has long held a peculiar romantic fascination — until recently, serious regard

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had not been given to this important aspect of judge-made law.¹ The purpose of this article is to add to this discussion and to extend it to a consideration of the practice of dissent in the High Court of Australia, which has so far received little direct attention.

It is apparent that, while a dissent may too often be ‘no more than an aberrant view arising out of an individual justice’s prejudices — or ... “cantankerousness”’,² the ability to give voice to disagreement with one’s colleagues is an important facility. First, it has consequences for how a court presents itself as an arm of government to the public which it exists to serve. Second, a court’s work can be qualitatively improved through the acknowledgment — and more proactively, management — of dissension amongst its members. Third, dissent can exercise an influence upon the law itself and drive it in new directions, which may enable the law to keep in step with changing community needs and standards. Part II of this article considers how the possibility of dissent fulfils these interrelated functions.

While there is little to be said in favour of responding to these factors with a case for compulsory unanimity, there remain significant arguments for judicial restraint in the use of dissent. Part III will address the concern that dissent can spawn a multiplicity of conflicting voices which may damage a court’s ability to perform effectively and its standing in the community. The doctrine of precedent is the prime mechanism developed within the common law tradition to curb the negative consequences that can flow from excessive individualism and disagreement on the bench. In a court of last resort, however, precedential value occupies a more precarious position than in lower courts within the hierarchy. How dissent is managed and the degree to which precedent restrains judges in final courts will be considered in Part IV.

II FUNCTIONS OF DISSENT

Broadly speaking, dissent serves three crucial functions. First, the ability to dissent ensures that the judicial arm of government enjoys certain key capabilities associated with a society governed in accordance with democratic principles and values. It operates and, perhaps more importantly, is *seen* to operate, in harmony with the tenets of the political settlement. Second, the process of adjudication may benefit from the possibility of dissenting opinions, which can

¹ Gaffney proclaimed in 1994 that ‘the value of dissenting opinions is now beyond question’: Edward Gaffney Jr, ‘The Importance of Dissent and the Imperative of Judicial Civility’ (1994) 28 *Valparaiso University Law Review* 583, 591. Other commentators, however, disagree and seem only to be warming to the question. In recent years, particularly significant contributions to this debate were made by John Alder, ‘Dissents in Courts of Last Resort: Tragic Choices?’ (2000) 20 *Oxford Journal of Legal Studies* 221; Robert Flanders Jr, ‘The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable’ (1999) 4 *Roger Williams University Law Review* 401; Justice Claire L’Heureux-Dubé, ‘The Dissenting Opinion: Voices of the Future?’ (2000) 38 *Osgoode Hall Law Journal* 495; Rory Little, ‘Reading Justice Brennan: Is There a “Right” to Dissent?’ (1999) 50 *Hastings Law Journal* 683. Additionally, Justice William Brennan’s highly influential 1986 contribution — ‘In Defense of Dissents’ (1986) 37 *Hastings Law Journal* 427 — was reprinted in (1999) 50 *Hastings Law Journal* 671.

² Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court* (1974) 7.

provide a stimulus to clearer judgment writing generally and also serve to clarify majority views by throwing them into sharper relief. Moreover, the presence of dissenting opinions speaks to the integrity of that process and the independence with which the judiciary is allowed to discharge its functions. Third, the law itself may be developed and advanced over time through the use of dissent. In this respect, an ability to dissent enables the law to admit new ideas and adapt old doctrines, exposing them to scrutiny and consideration both inside and outside the court. Thus, dissent facilitates progression and change, and does so in a more open and less abrupt way than might occur in the absence of any ability to deliver such opinions.

These three functions of dissent will be explored more fully below. It should be noted, however, that in many instances similar functions are satisfied by the presence of concurring judgments.³ This part will conclude by considering the degree to which these functions are fulfilled by the seriatim practice of judgment delivery, rather than being exclusively the province of dissenting opinions, and whether their relevance to an examination focused specifically upon dissent is lessened as a result.

A Deliberation, Dissent and Democracy

As evidence of the deliberative decision-making process engaged in by the courts, it may be argued that dissenting judgments inject a readily recognisable democratic tone into an arm of government which is often perceived as remote and unaccountable.

It is well known that Chief Justice John Marshall imposed upon his colleagues the practice of delivering only unanimous opinions in order to secure the fledgling authority of the United States Supreme Court.⁴ President Thomas Jefferson's objections to this development are equally well documented:

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 opinions any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself. Be the opinion therefore ever so impeachable, having been done in the dark it can be proved on no one. As to the 2d guarantee, personal reputation, it is shielded compleatly. The practice is certainly convenient for the lazy, the modest & the incompetent.⁵

³ The distinction between concurring and dissenting judgments is discussed in Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470, 476.

⁴ See almost any of the articles cited in this article dealing with American dissent, but especially John Kelsh, 'The Opinion Delivery Practices of the United States Supreme Court 1790-1945' (1999) 77 *Washington University Law Quarterly* 137, 143-52; Meredith Kolsky, 'Justice William Johnson and the History of Supreme Court Dissent' (1995) 83 *Georgetown Law Journal* 2069; A J Levin, 'Mr Justice William Johnson, Creative Dissenter' (1944) 43 *Michigan Law Review* 497, 520-3; Donald Morgan, 'Mr Justice William Johnson and the Constitution' (1944) 57 *Harvard Law Review* 328, 331-5; Bernard Schwartz, *A History of the Supreme Court* (1993) 39.

⁵ Letter from Thomas Jefferson to William Johnson, 27 October 1822 in Levin, above n 4, 513-15.

Jefferson's appointment of William Johnson as an Associate Justice — and his subsequent stream of advice to him on breaking Marshall CJ's grip on the Court — ensured that the unanimous opinion as a regular practice was soon undermined.⁶ These events are notable for two reasons. First, Marshall CJ's reform, albeit short-lived, is a rare example of a common law court excluding the possibility of dissent. Perhaps a more familiar example to antipodean lawyers is the Judicial Committee of the Privy Council, which until 1966 denied any capacity to dissent and insisted upon unanimous advice being given from the Council to Her Majesty. For most of the time that the Privy Council existed within our court hierarchy, its Australian members in particular rankled against this constraint, largely to no avail.⁷ Second, Jefferson's complaint about the lack of transparency in the Court's decisions goes to the role and relationships of the judicial arm within a democratic society.

This link between an ability to dissent and the democratic ideal which underpins the entire regime has been stressed by a number of subsequent commentators. In 1948, Justice William Douglas was keen to make this connection clear through the use of the dramatic examples readily available to him at the time:

Certainty and unanimity of the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a *sine qua non* to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Führer, with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a communist court dissenting against the decrees of the Kremlin.⁸

Rather than employing comparative illustrations, in his defence of dissents America's Justice William Brennan preferred to show the connection between dissent and democracy through arguments characterising the former as essential to the operations of the 'marketplace of ideas' and the 'judicial town meeting'.⁹ Such phrases are evocative of a coming together of equals with contrary opinions

⁶ Kolsky speculates that 'had Marshall's practice of issuing solo opinions continued unchallenged throughout his entire tenure, this methodology might still be employed today': Kolsky, above n 4, 2069. Indeed, 'Justice Johnson's independence blazed the trail for future dissenters': at 2081. See also letter from Thomas Jefferson to William Johnson, 12 June 1823 in Levin, above n 4, 518; See Hampton Carson, *The History of the Supreme Court of the United States* (1902) vol 1, 229.

⁷ Alder, above n 1, 236. It was Sir Garfield Barwick who finally succeeded in persuading their Lordships to do away with this practice: David Marr, *Barwick* (1980) 219. For an examination of the tradition of the Privy Council's practice and comparison with that of final courts in Commonwealth countries, as well as in the United States, see Edward McWhinney, 'Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals' (1953) 31 *Canadian Bar Review* 595.

⁸ Justice William Douglas, 'The Dissent: A Safeguard of Democracy' (1948) 32 *Journal of the American Judicature Society* 104, 105. Similar sentiments were expressed by Judge Stanley Fuld, 'The Voices of Dissent' (1962) 62 *Columbia Law Review* 923, 926:

I am positive that disagreement among judges is as true to the character of democracy, and as vital, as freedom of speech itself. The affairs of government, no less than the work of the courts, could not be conducted by democratic standards without that right of dissent. Indeed, we may remind ourselves, unanimity in the law is possible only in fascist and communist countries.

⁹ Brennan, above n 1, 430. Unless the context clearly indicates otherwise, all references to Justice Brennan are to the judge of the United States Supreme Court.

for the purposes of exchange and debate — the process exists for ‘individuals and groups representing all viewpoints and perspectives’.¹⁰ Alder has taken such sentiments and built them into his study of dissent as disagreement between incommensurable values:

the practice of dissent helps to offset the democratic deficit in the common law. The judges represent not a constituency of electors but one of competing societal values. These are generated by a series of shifting and provisional settlements made by constantly changing panels of individuals having broad discretion, the application of which is constrained by conventional understandings of what is legally relevant.¹¹

Obviously, the extent to which we can appreciate the judicial arm as a manifestation of democratic governance may be hampered by a hesitance to equate this concept with the familiar feature of electoral representation. But even aside from the absence of any direct connection between the judiciary and the citizens within a society, it is difficult to accept at face value Alder’s claim that judicial officers represent constituencies of ‘competing societal values’. Surely its adequacy in doing so must be open to serious doubt.¹² For this reason, it is preferable to abandon any attempt to incorporate representation into a democratic justification of judicial work. This need not rob the courts of such legitimacy. Rather, scrutiny should be directed towards the judicial method — including the role of dissenting opinions — as a manifestation of democratic ideals through deliberation.

Although many commentators have asserted that dissenting judgments inject a democratic tone into judicial work, Stack was the first to suggest a plausible basis for this view. Stack attempts to consider the impact of dissent upon both an institutional and an interpretative approach to finding a connection between the

¹⁰ Ibid 437.

¹¹ Alder, above n 1, 223 (citations omitted).

¹² See John Gava, ‘The Rise of the Hero Judge’ (2001) 24 *University of New South Wales Law Journal* 747, 754; Justice Michael Kirby, ‘The Constitutional Centenary and the Counting of Blessings’ (1997) 2 *Newcastle Law Review* 1, 9. In his attempt to explain the proper role of community values in legal methodology, Braithwaite said:

Where one wants diversity is in the judicial deliberation itself. First, one should aspire to a court which is itself somewhat diverse, perhaps at least in terms of sex, age, region, religion and ethnicity. Second, one should aspire to a court which is exquisitely open to the diversity of ways of thinking in the community.

John Braithwaite, ‘Community Values and Australian Jurisprudence’ (1995) 17 *Sydney Law Review* 351, 367 (citations omitted). Whilst the degree to which the High Court fulfils the second aspiration may be open to conjecture, it cannot be denied that its personnel are traditionally drawn from a narrow section of the community, which must inhibit their capacity to fulfil the function Alder has identified: see Eddy Neumann, *The High Court of Australia: A Collective Portrait 1903–1972* (2nd ed, 1973) chs 2–4.

In saying this, however, I am not necessarily taking issue with Alder’s main thesis that it is disagreement over values which underpins dissent — a point acknowledged in Ben Palmer, ‘Causes of Dissents: Judicial Self-Restraint or Abdication?’ (1948) 34 *American Bar Association Journal* 761, 765; Roscoe Pound, ‘*Cacoethes Dissentiendi*: The Heated Judicial Dissent’ (1953) 39 *American Bar Association Journal* 794, 796. There may still be sharp division over values amongst the justices, whilst those values remain only narrowly representative of the community. My point here, however, is that a resort to judicial representation of values cannot sustain a democratic defence of judicial power.

United States Supreme Court and the rule of law.¹³ His arguments in respect of institutional efforts to cement the Court with the rule of law have very limited relevance to the Australian context where the High Court's use of seriatim opinions far outstrips the occurrence of unanimity. In any event, Stack concludes that '[t]he presence of a dissenting Justice demonstrates that behind the word "Court" in the "opinion of the Court" sit individual Justices'¹⁴ and this undermines the rule of law's well-known claim that it is not the 'rule of men'. The interpretative method discussed by Stack probably relies too heavily upon a Dworkinian basis of legal determinacy to gain universal acceptance. Yet, within the specific context of his study, Stack fairly recounts Dworkin's own view that dissent is an example of his theory of the judicial process as one of 'fit and justification'.¹⁵ Stack, however, remains sceptical of this argument¹⁶ and cannot escape the conclusion that, in fact, 'dissents cast doubt on the determinacy of the Court's judgments, and thus on the use of law as integrity to provide a principled connection between the Court and the rule of law.'¹⁷

This leads Stack to shift his focus to an examination of political legitimacy and it is here that he adds meaningfully to the general suggestion that dissent is reflective of democracy. The use of a decision-making process which enables dissent demonstrates 'the particular American commitment to a deliberative conception of democracy'.¹⁸ In a passage which mirrors the ideas of Justice Brennan and (to an extent) those advanced by Alder, yet pinpoints how the connection to democracy is made in respect of the judicial arm, Stack explains that:

No less than Congress, the Court is a collegial body in which members of roughly equal rank make authoritative determinations backed by coercive force in the name of our government. With these institutional characteristics, the Court's lack of an electoral connection does not put it outside the commitments of deliberative democracy. Rather, if the Court reaches its judgments through a deliberative process, its power of judicial review will share a basis with the power of representatives in Congress to resist the preferences of citizens — the commitment to making social choices through a deliberative interchange among equals.¹⁹

¹³ Kevin Stack, 'The Practice of Dissent in the Supreme Court' (1996) 105 *Yale Law Journal* 2235.

¹⁴ *Ibid* 2240. Cf L'Heureux-Dubé, above n 1, 503.

¹⁵ Stack, above n 13, 2244.

¹⁶ Stack's dissatisfaction with Dworkin's Hercules model and any light it sheds on dissension was noted in Lynch, above n 3, 486 fn 38.

¹⁷ Stack, above n 13, 2245. Similarly, Shklar argued that dissent betrayed the inconsistencies of legalism: 'The politics of judicial legislation is exposed as such only when there is conflict. As long as there is no opposition to them, decisions seem to be not choices but accepted necessities. ... Without consensus the appearance of neutrality evaporates': Judith Shklar, *Legalism* (1964) 11–13.

¹⁸ Stack, above n 13, 2249.

¹⁹ *Ibid* 2254 (citations omitted). Justice L'Heureux-Dubé also takes the view that 'accepting dissenting opinions injects a certain measure of democracy ... into the judicial decisionmaking process, since every judge has an opportunity to participate fully, even while the majority decision rules the outcome': L'Heureux-Dubé, above n 1, 503. Levin characterises dissent as 'a resort to the particular when the general seeks to subdue the dissenter — hence, it becomes synonymous with individuality, liberty, independence but not anarchy or insensate prejudice. Therefore, dissent is democracy's most valuable instrument': Levin, above n 4, 547.

This passage indicates the significance, as well as the substance, of Stack's argument. In the wider context, dissent may be one of a number of features of the judicial arm which enable an appreciation of its democratic credentials. This may have real importance in addressing concerns about the legitimate scope of judicial review.²⁰ For several decades, many American scholars have grappled with the problem of reconciling a majoritarian image of democracy with judicial review by unaccountable and unrepresentative courts.²¹ Although much of the following draws upon American commentary, this is far from being an issue that is confined to the United States.²² Indeed, as the High Court of Australia more openly espoused its methodology in the 1980s and delivered a number of controversial decisions, criticism of it hinged to a large degree on a perceived lack of democratic standing — and the Court's defenders responded in turn.²³

While a few overcome this dilemma simply by attacking the position of the courts within the constitutional framework,²⁴ others have managed to accommo-

²⁰ Though it should be noted that Stack recoils from engaging in this debate by applying the following caveat: 'my argument is only that deliberative process is a necessary but not sufficient condition of the Court's consistency with democracy (even on the deliberative view) as well as of the Court's legitimacy': Stack, above n 13, 2255.

²¹ Friedman has recently lamented the thrall in which such scholars are held by the counter-majoritarian problem:

There is every reason to believe the counter-majoritarian problem is a less-than-accurate way of characterizing the practice of judicial review. As numerous scholars have observed, both halves of the supposed difficulty are subject to theoretical and empirical challenge. On the one hand, there is every reason to doubt that what we think of as majoritarian politics is designed to, could, should, or does register majoritarian preferences. Thus, judicial review regularly is compared to some imaginary baseline that does not exist. On the other hand, judicial review is a long-established part of our governmental structure. It yields remarkably majoritarian results, and is a process that is different from majoritarian politics but nonetheless responsive to it. In short, whatever judicial review is about, describing its operation requires something *far* more nuanced than the counter-majoritarian explanation provides.

Barry Friedman, 'The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship' (2001) 95 *Northwestern University Law Review* 933, 936 (emphasis in original, citations omitted). See also Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' (1998) 73 *New York University Law Review* 333.

²² The title of Robert Bork's latest book indicates his view of the extent of the problem: *Coercing Virtue: The Worldwide Rule of Judges* (2002).

²³ See, eg, G L Davies, 'The Judiciary — Maintaining the Balance' in P D Finn (ed), *Essays on Law and Government — Volume I: Principles and Values* (1995) 267, 279–82; Chief Justice John Doyle, 'Implications of Judicial Law-Making' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 84, 86; Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 184, 186; Justice Michael Kirby, 'Judicial Activism' (1997) 27 *University of Western Australia Law Review* 1, 15; Justice Michael McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 43. I do not express any view on the opinions advanced by these authors. Rather, my point here is simply to demonstrate that the preoccupations central to the 'counter-majoritarian problem' are not the product of what one of my colleagues described as 'American navel-gazing' but are present, albeit perhaps in a less concentrated form, in Australian legal literature and criticism. Similar concerns have emerged in respect of the English legal system: see Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (2002) 131.

²⁴ Michael Paulsen, 'The Most Dangerous Branch: Executive Power to Say What the Law Is' (1994) 83 *Georgetown Law Journal* 217, 219; Robert Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* (1996) 117, although he has more recently expressed scepticism about the prospect of solving the problems of judicial review through structural realignment: Bork, *Coercing Virtue*, above n 22, 62; Mark Tushnet, *Taking the Constitution Away from the Courts* (1999) 175.

date judicial review by embracing a view of democracy that finds its strength in deliberation.²⁵ On one view, judicial review of legislative action is supported largely on limited procedural grounds, as a means of ensuring that the deliberative processes required by democracy have been satisfied in the creation of the law.²⁶ As such, the legitimate exercise of judicial power demands the employment of a minimalist methodology. Sunstein has taken the view that the adoption of a minimalist approach — by which he means that judges decide cases as narrowly and shallowly as possible, rather than laying down broad rules and offering unnecessary dicta —

grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.²⁷

Thus the courts should defer to the more openly deliberative mechanisms of democracy found in the other two branches of government — what Peters labels a ‘policentric’ view of determining the judicial role.²⁸

The case for judicial minimalism relies heavily upon an assessment of the courts as relatively weak democratic institutions when viewed against a legislative chamber, such as Congress or our own Parliament.²⁹ In fact, there is growing dissatisfaction with this picture.³⁰ The judicial system may, it is argued, provide

²⁵ For recent criticism of this formulation of democracy generally, however, see Edward Rubin, ‘Getting Past Democracy’ (2001) 149 *University of Pennsylvania Law Review* 711, 714.

²⁶ Cass Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 *Stanford Law Review* 29, 58–9; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, 1996 ed) 274–7 [trans of: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des Demokratischen Rechtsstaats*]; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998) 231–3.

²⁷ Cass Sunstein, ‘Foreword: Leaving Things Undecided’ (1996) 110 *Harvard Law Review* 6, 19 (citations omitted). Elsewhere, he expresses essentially the same idea by stating that ‘[f]rom the standpoint of deliberative democracy, however, courts should avoid foreclosing the outcomes of political deliberation if the preconditions for democratic deliberation have been met’: at 37. However, it should be noted that Sunstein admits that ‘[m]inimalism is appropriate only in certain contexts. It is hardly a sensible approach for all officials, or even all judges, all of the time’ (at 28) and that ‘courts should provide spurs and prods when either democracy or deliberation is absent’ (at 37). For a more comprehensive explanation of Sunstein’s arguments for judicial minimalism, see Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

²⁸ Christopher Peters, ‘Assessing the New Judicial Minimalism’ (2000) 100 *Columbia Law Review* 1454, 1457.

²⁹ For a recent important example of this, see Jeremy Waldron, *Law and Disagreement* (1999). Waldron rejects the negative perception which defenders of judicial review have tended to adopt with respect to legislatures and the corresponding ‘naiveté’ with which the workings of the judicial arm have been viewed: at 31–2. It is important to state that very few commentators assert that the judicial arm possesses *no* democratic features. Indeed, Uhr has said that

the role of the deliberative assembly is not to act as the sole or even primary site of political deliberation, which is a responsibility it shares with the two other political institutions of the magistracy and the judiciary. ... The relevant lesson here is that even under regimes of deliberative democracy it makes sense to think of modern legislatures as only one of a number of sites for political deliberation ...

Uhr, above n 26, 31.

³⁰ For example, Dworkin writes:

In some circumstances ... individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the

a more perfect form of deliberative democracy than Sunstein and others have been prepared to concede, in which case the arguments for a minimalist method start to buckle. While Rawls's championing of the United States Supreme Court directly focuses upon his view of it as 'the exemplar of public reason',³¹ rather than the 'social or interactive aspect of deliberation',³² other commentators have recently sought to address this latter issue. In particular, Peters has argued that the policentric bent of minimalist advocates downplays the inherent democratic legitimacy of the adjudicative process.³³ He finds that, even in the absence of electoral checks upon accountability, public participation and the number of issues represented ensures that while it 'may be differently democratic ... it is inaccurate to say that adjudication is *nondemocratic*'.³⁴ In order to overcome lingering reservations about the lack of electoral control of the judiciary, Peters argues that the quality of deliberation in the courts surpasses that of the political realm. Nonetheless, while he discusses the features of the adversarial system — the interchange of reasoned arguments, not dependent upon 'self-interest or force', in a context far removed from the 'glare of the public spotlight' — he does not, strangely, appear to stress the ability to accommodate dissent at the point of adjudication as providing further support for his argument.³⁵

Ironically, that recognition comes from a commentator who certainly does not support Peters's assessment of the judicial arm. In his examination of the 'counter-conversationalism' of the courts (which he equates with their demo-

balance of political influence ... Although the political process that leads to a legislative decision may be of very high quality, it very often is not ... Even when the debate is illuminating, moreover, the majoritarian process encourages compromises that may subordinate important issues of principle. Constitutional legal cases, by contrast, can and do provoke a widespread public discussion that focuses on political morality ... I put the suggestion that judicial review may provide a superior kind of republican deliberation about some issues tentatively, as a possibility, because I do not believe that we have enough information for much confidence either way.

Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) 30–1. Cf Waldron, above n 29, 285–91.

³¹ John Rawls, *Political Liberalism* (1993) 231.

³² John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2000) 15 (emphasis in original).

³³ Peters, 'Assessing the New Judicial Minimalism', above n 28.

³⁴ *Ibid* 1486 (emphasis in original). Though again, on this point, see above n 29.

³⁵ Peters, 'Assessing the New Judicial Minimalism', above n 28, 1496–9. That he would be sympathetic to the arguments advanced by Stack, however, may be discerned through reading some of Peters's more recent work about the use of participatory devices as an enhancement of the legitimacy of majority rule: Christopher Peters, 'Persuasion: A Model of Majoritarianism as Adjudication' (2001) 96 *Northwestern University Law Review* 1, 36–7. Nevertheless, Peters is able to arrive at

a picture of the American judiciary — with the Supreme Court at its apex — as more than just the handmaiden of *deliberative* democracy. The Court is an active and crucial *participant* in the process of deliberative democracy. It is just as deliberative in its own way as the political branches, and often it is more deliberative, especially with respect to individual rights. And it is significantly democratic, too, although not majoritarian. The Court thus can be understood as a coequal institution of deliberative democracy, with the emphasis on the deliberative component.

Peters, 'Assessing the New Judicial Minimalism', above n 28, 1514 (emphasis in original). He then proceeds to discuss the implications of this view for Sunstein's call for judicial minimalism — agreeing ultimately with procedural minimalism but rejecting it substantively.

cratic responsiveness) vis-à-vis the political branches of government,³⁶ Bennett concludes that it is the former's limited conversational abilities which underpin 'the persistent sense of democratic "difficulty"'³⁷ many commentators have with the judicial arm. However, he identifies dissenting opinions, along with the use of *amicus curiae*, as the features which come closest to redeeming this disability:

the robust contemporary tradition of dissenting and concurring opinions is an important conversational phenomenon. A mix of opinions may provide conversational satisfactions to a spectrum of those affected, less broadly appealing, but nonetheless akin to the variegated talk in the political realm.³⁸

In seeing dissent as a vehicle for wider ongoing community discussion, Bennett has made a notable concession to the view that the work of the courts may be suitably deliberative. This point certainly accords with the arguments and impressions offered by Peters, Dworkin and Rawls. Indeed, they would seem more ready to invest it with greater significance than Bennett does in the context of his argument overall. But while this is important, seeing dissents only in this light seems to have taken us away from the *inherently* democratic character of dissenting opinions, as considered at the outset in the words of Justices Brennan and Douglas. Certainly, minority judgments may be fodder for consumption in public debate following a high profile case and in this way the court contributes to wide and popular deliberation. Still, does the ability of its members to dissent render the court itself an appropriately democratic institution?

Pettit suggests that a capacity for dissent confers significant democratic credentials upon a body with restricted membership.³⁹ In describing the ideal of deliberative democracy, Pettit identifies four constraints requiring satisfaction:

- *The inclusive constraint* — all members should be equally entitled to vote on how to resolve certain collective issues, or bundles of issues, with something less than a unanimous vote being sufficient to determine the outcome.
- *The judgmental constraint* — before voting, members should deliberate on the basis of presumptively common concerns about which resolution is to be preferred.

³⁶ Robert Bennett, 'Counter-Conversationalism and the Sense of Difficulty' (2001) 95 *Northwestern University Law Review* 845, 853.

³⁷ *Ibid.* Friedman is dismissive of this conclusion and indeed much of the framework upon which the inquiry is held in the first place: Friedman, 'The Counter-Majoritarian Problem', above n 21, 945–50.

³⁸ Bennett, above n 36, 886. Bennett essentially reiterates these arguments in respect of persistent dissent and concludes that the 'conversational function served by repetition of dissent may in this way provide quite a plausible explanation not only of why repetition of dissent has flourished, but of why any "lawlessness" involved seems largely to escape criticism, or indeed much in the way of notice': at 888.

³⁹ Philip Pettit, 'Deliberative Democracy and the Case for Depoliticising Government' (2001) 24 *University of New South Wales Law Journal* 724. Pettit says (at 725):

Democracy is a decision-making process whereby individuals gain a part to play in the operation of a collective body. Democracy gives the members of an electorate a part to play in the polity, but it also gives individuals a collective role in other, more restrictive contexts; for example, politicians in a party, parliament or cabinet, shareholders or directors in a commercial company, judges in a collegiate court.

- *The dialogical constraint* — members should conduct this deliberation in open and unforced dialogue with one another, whether in a centralised forum or in various decentralised contexts.
- ...
- *The group-rationality constraint* — people should take steps to ensure that where their voting would lead to inconsistent or otherwise irrational policies, this is remedied and group rationality is ensured; if no remedy is feasible, as with a large-scale electorate, then group decisions should not extend to policy matters.⁴⁰

To what extent does the facility for judicial dissent ensure that courts meet this ideal? Clearly, the inclusive constraint is satisfied in respect of most common law courts and those which have had particular significance so far to this discussion, the United States Supreme Court and the High Court of Australia.⁴¹ The second and third constraints are much harder to gauge due to the relatively high degree of secrecy which surrounds the process of adjudication. This may be starkly demonstrated through consideration of Amar's assessment of a recent term of the Supreme Court against this criteria:

The deliberative virtues of Supreme Court doctrine are less clear. ... The current Justices, for example, hold quick oral arguments and spend little time discussing each case in conference. Then they vote. Surprisingly meager meaningful dialogue occurs thereafter. A tentative Court opinion will circulate and often win a majority within days, before a dissent has even had a chance to circulate. The dissent may be far more powerfully reasoned, but no matter. The votes are already in. Rarely does a Justice change his or her vote after conference.⁴²

Amar ascribes virtually no significance at all to the dissenting function — even as an *indication* of deliberation having occurred, let alone as a contribution to an ongoing deliberative process. His rejection of the latter is predicated upon the combination of tactical and cultural adherence to precedent and the difficulties caused by the unpredictability of changes in the Court's composition. With respect, Amar's dismissal of any substantial deliberation seems a trifle hasty. Whilst more is known about the conferencing procedures of the United States Supreme Court than those of the High Court of Australia,⁴³ the former is not so transparent that Amar can actually offer any real support for his assertions.⁴⁴ If

⁴⁰ Ibid 725–8.

⁴¹ In respect of the latter, I am setting to one side the means of resolving deadlock through the use of a casting vote by the Chief Justice as it is certainly an exception rather than the rule.

⁴² Akhil Amar, 'Foreword: The Document and the Doctrine' (2000) 114 *Harvard Law Review* 26, 39–40. Amar was writing in respect of the 1999 term of the Supreme Court.

⁴³ See especially Del Dickson (ed), *The Supreme Court in Conference (1940–1985): The Private Discussions behind Nearly 300 Supreme Court Decisions* (2001).

⁴⁴ He merely builds upon those offered by Dorf in his earlier examination of Socratic deliberation on the Supreme Court. This in turn presents problems: while Dorf is sceptical about how much deliberation occurs, at the same time he admits that ideas are exchanged by a variety of means, including circulation of draft dissents: Michael Dorf, 'Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard Law Review* 4, 40. It seems that Dorf (but not necessarily Amar, whose assertion is completely unqualified) expects deliberation to take a particular form — essentially, face-to-face, Socratic style. I am not convinced that, absent this, it is possible to deduce that the written work of the judges amounts to very little deliberation (see the sources discussed in below n 45). By way of contrast to the speculative nature of these comments on the

anything, there is a wealth of evidence which suggests that judges, at least on that particular Court, have changed their views on numerous occasions in response to the opinions of their colleagues.⁴⁵ This has also been evident in several notable High Court cases in recent years.⁴⁶ In any event, this requirement sets the bar too high. Deliberation does not require, nor is it exclusively evidenced by, consensus — the dissenting and concurring judgments may well indicate that deliberation has occurred even though it did not lead to a change of mind. The mere fact that judgments make reference to each other (which seems to occur with healthy frequency) is adequate evidence of the deliberation spurred on by separate opinion writing. In the absence of any incontrovertible proof to the contrary, the best approach is to accept the claims made by courts that they do employ processes designed to encourage deliberation amongst their members, in addition to noting the high likelihood of this also occurring informally.⁴⁷ Therefore, Pettit's judgmental and dialogical constraints may also be said to be present in judicial work.

The fourth constraint of 'group-rationality' was added by Pettit after considering a number of theoretical examples leading him to conclude that if a group

is to be true to the spirit of deliberative democracy, then it cannot be ruled robotically by majority, issue-by-issue voting. If the group was to give complete control to such majority voting, then, regardless of the rationality of its individual members, it would be likely to support collectively irrational policies.⁴⁸

This constraint has direct relevance to the problems caused by multi-issue litigation and shifting majorities. The lack of any mechanism to avoid inconsistencies arising through the aggregation of judicial votes indicates a flaw in the

United States Supreme Court, see van Dijk's insider view of the deliberations on the European Court of Human Rights. Van Dijk states that '[t]hose who had expressed a view which was provisionally shared by a majority seldom, if ever, allowed themselves to be convinced by a draft dissenting opinion which was brought to their notice': Pieter van Dijk, 'Separate Opinions in the Practice of the European Court of Human Rights during the Martens Era' in W E Haak, G J M Corstens and M I Veldt (eds), *Martens Dissenting: The Separate Opinions of a European Human Rights Judge* (2000) 7, 12.

⁴⁵ In addition to much anecdotal support for this contention, there are the significant volumes produced by Schwartz that demonstrate this admirably: see Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (1985); Bernard Schwartz, *The Unpublished Opinions of the Burger Court* (1990); Bernard Schwartz, *The Unpublished Opinions of the Rehnquist Court* (1996). An illuminating empirical study of the Washington Supreme Court based on surveys of clerks also tends to confirm that circulation of drafts plays a dominant role in the formation of consensus over a number of other factors: Charles Sheldon, 'The Incidence and Structure of Dissensus on a State Supreme Court' in Cornell Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (1999) 115, 125–8.

⁴⁶ See below Part III(A). The evidence is confined mainly to that provided by the justices themselves in the course of their opinions. Certainly, it is difficult to imagine books such as those by Schwartz emerging in respect of the High Court of Australia, if only for the practical problems of finding the material: see Graeme Powell, 'Private Papers' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 558, 558–9.

⁴⁷ See below Part II(B), which considers how dissent reflects upon the operation of a court as an institution.

⁴⁸ Pettit, above n 39, 728. This forms one of the supports for the argument which Pettit goes on to develop — that the popular will of the majority needs to be checked by the ability of depoliticised bodies to make decisions on matters of common interest.

deliberative process as employed by Australian courts.⁴⁹ As Pettit says, ‘the decisions that the group takes should be ones that can be deliberatively defended. Not only should they issue from reasoning, they should themselves satisfy the demands of reason.’⁵⁰

What verdict then may we form of the High Court as a democratic institution on the basis of its quality of deliberation as evinced through its accommodation of dissent? Discounting the possibility of noncompliance with Pettit’s judgmental and dialogical constraints as an occasional matter of practice, the most serious failing lies in the difficulty of reconciling the destructiveness which dissenting and concurring opinions may wreak upon institutional coherence with the demand for deliberation to produce group-rationality. The frequent inability of judgment delivery *in seriatim* to conform with this fourth constraint clearly inhibits the capacity of courts employing this method to attain the ideal of deliberative democracy as a matter of practice. However, we should not lose sight of the fact that it is the dissenting opinion which enables compliance with the first three of Pettit’s constraints. To the extent that courts even *approach* the requisite level of deliberation to secure their democratic credentials under this model, it is the long tradition of dissent which gets them there. This is the context in which the remarks of earlier commentators asserting a link between judicial dissent and the democratic standing of the courts should be taken.

Pettit acknowledged that ‘[d]eliberative democrats differ on which forums should be democratised in the deliberative way’,⁵¹ and doubtless there is much room for debate as to whether a court of last resort is amongst those institutions which may properly be characterised in this way. Certainly, there is ample evidence of deliberation in such bodies, but does this provide sufficient democratic legitimacy absent an element of representation? Although answering this question is clearly beyond the scope of this inquiry, it is enough to stress the role of dissenting judgments in even enabling such a question to be asked at all in respect of the courts. If we accept all that is argued by Peters and others in respect of the participatory link between the courts and the public, an acknowledgment of the *institutional* deliberative value of dissenting opinions to which Stack has referred (and to which arguments such as those of Amar pose no serious challenge) must surely enhance the claim to democratic legitimacy of the judicial arm. Whether this is so to such an extent that it ultimately secures that legitimacy to the point of assuaging the concerns of those perplexed by the counter-majoritarian difficulty and advocating judicial minimalism, need not be

⁴⁹ It is important to note here that these problems of incoherency are ones to which a practice of *in seriatim* judgment delivery is especially prone: Lynch, above n 3, 493. Thus, the United States Supreme Court, for example, which has traditionally employed a different method of judgment delivery, may well satisfy the group-rationality constraint since it largely avoids these difficulties. However, the advent in 1990 of ‘doubleheaders or twins’ — that is, ‘two cases in which there were two opinions announcing different (and somewhat contradictory) parts of the Court’s ruling for two different majorities in each case’ (David O’Brien, ‘Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions’ in Cornell Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (1999) 91, 111) — means that the Court is no longer completely immune from group irrationality.

⁵⁰ Pettit, above n 39, 728.

⁵¹ *Ibid* 725.

determined here.⁵² It is sufficient for these purposes to recognise the contribution that a capacity for dissent can make towards that end and, conversely, the additional objections to which judicial review would be exposed if it were exercised by a court governed by compulsory unanimity.

B *Dissent and Judicial Process*

Dissent provides three notable benefits to the judicial process. First, it enables members of the judiciary to be individually free in expressing their views. Second, there is much to suggest that the presence of dissent has a positive impact upon the manner in which the majority opinions are drafted so that they are both more precise in what is laid down and more comprehensive in what they address. Third, hearing an opposing view can very often provide clarification of the majority position for those attempting to understand what it signifies. These aspects of how dissent affects the process of judging and opinion writing are the focus of this part of the article.

The independence that dissent affords the judicial arm is not institutional in the sense that it cossets the judiciary from the demands of the legislature or execu-

⁵² In leaving the field at this point, I am conscious of emulating Stack's prudence: see above n 20. Yet, what of those many courts which are not allowed a dissenting facility? In discussing the 'increasing tendency towards publishing dissents' in numerous European courts, but particularly in Germany, Alder states that 'debates about dissent have tracked the emergence of democracy': Alder, above n 1, 237. Alder is not necessarily doubting the staunchness of democracy to be found in numerous civil law jurisdictions which possess a traditional aversion to judicial dissent. Rather, while acknowledging that the possibility of judicial dissent reflects and reinforces the value of freedom of speech and the democratic nature of a political settlement, its absence does not, of itself, stand as an indelible stain upon those polities in question. It does, however, pose an obvious impediment to the applicability of those justifications of judicial review which rely upon the democratic, deliberative qualities of courts to other adjudicative bodies where dissent is forbidden or discouraged. Placing the final courts of civil law countries to one side, the position of international courts such as the Judicial Committee of the Privy Council and the European Court of Justice should be recognised as being subject to rather different considerations. There are political sensitivities at stake in such multi-nation tribunals. As Alder says: 'Arguments against dissent have been raised most strongly in settings where confidence in the political settlement or in the judicial process has been relatively low or uncertain': at 244. It must be added that international courts are less obviously connected to any one particular political outlook, but are designed to fulfil overarching purposes. The capacity to dissent in such courts may well depend in part upon the content of those purposes. The absence of opportunity to dissent in the Privy Council until 1966 demonstrates this point. Prior to that time the Privy Council was a powerful tool for control of the varied components of the British Empire. By 1966, the hierarchical days of the Empire had been superseded by the more cooperative notion of the Commonwealth. The rationale for quelling dissent had faded to be replaced by political reasons for its acknowledgment. This situation may be compared with the purposes surrounding the establishment of the International Court of Justice. Hussain asserts that one of the primary reasons for allowing dissent in this body was that:

If universality of international law is the main objective, then it is necessary that the main forms of civilization and major legal systems other than the Anglo-Saxon and the Continental do not lose their voice in the majority opinion, especially on important aspects of international law.

Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (1984) 3. See also Alder, above n 1, 234. By way of another example, consider the contrast in forbidding dissent in the Court of Justice of the European Communities and allowing it in the European Court of Human Rights: see Henry Schermers, 'Separate Opinions' in W E Haak, G J M Corstens and M I Veldt (eds), *Martens Dissenting: The Separate Opinions of a European Human Rights Judge* (2000) 1, 2-4. The different goals of uniformity and universality go some way towards explaining the acceptability of dissent in these international courts.

tive. Rather, dissent enables judges to fulfil their role without the pressure of having to submit themselves to a process designed to produce an artificial unanimity. In short, it ensures their independence from their colleagues.⁵³ Some of the most revealing comments on the deficiencies of enforced unanimity were those collected by Paterson in his interviews with Law Lords in the early 1980s.⁵⁴ Based on their experience in the Privy Council, their Lordships raised two converse objections to a process which demanded the production of a single judgment to which all of those presiding put their names. The first was that a weak ‘compromise judgment’ would result from a need to reflect the lowest common denominator of consensus.⁵⁵ The second criticism of such an approach was that if the judgment was not an insipid settlement between diverse points of view, then it was just as likely to be the result of one justice’s work rather than that of the entire bench.⁵⁶ It will be recalled that this second point was Jefferson’s great fear for the practice which Marshall CJ attempted to establish in the United States Supreme Court — an opinion ‘having been done in the dark it can be proved on no one.’⁵⁷

Both these objections to a denial of dissent readily appear valid. It is not at all inconceivable that unanimity may be impossible to achieve in practice.⁵⁸ In the absence of real consensus, the first scenario must surely be the only way in which a unanimous opinion can result. But while the court is spared the potential of immediate loss of public confidence ensuing from a divided bench, it is ironically weakened in its ability to state decisively and develop the law of the jurisdiction. Over time, the public’s faith in the court is likely to diminish anyway due to the lack of transparency in how its decisions are reached:

⁵³ It is interesting that one of the arguments raised against dissenting opinions in the Permanent Court at the Hague was that enforced unanimity would be more effective in freeing the judges from the pressure to be seen to cast their vote for their home country: Hussain, above n 52, 19. The considerations governing the procedures in international courts are frequently quite different from those in respect of national courts. This particular argument is inapplicable to the High Court of Australia because judges are not appointed to it upon a representative basis. However, this point is of much more force in respect of, for example, the Supreme Court of Canada which does indeed aim at some degree of regional representation: see Bora Laskin, ‘The Supreme Court of Canada: A Final Court of and for Canadians’ (1951) 29 *Canadian Bar Review* 1038, 1041–2.

⁵⁴ Alan Paterson, *The Law Lords* (1982) 98–9.

⁵⁵ Lord Pearce, quoted in *ibid* 99. See L’Heureux-Dubé, above n 1, 514:

In fact, in my view, one creates a false dichotomy by equating unanimous opinions with clarity and authority, while associating dissenting opinions with incoherence. Where there is profound disagreement among judges, the law itself is the greatest beneficiary of dissenting opinions: instead of sacrificing lucidity to an overriding need to accommodate diverging views, judges may focus their efforts on the logical and persuasive justification of their own understanding of the law, whether it be a minority or majority of one.

Most commentary is in this vein. For a generally sceptical perspective on the benefits of dissent to the quality of judgments, see Theo ten Kate, ‘Dissenting Opinion: A Brief Background Sketch’ in W E Haak, G J M Corstens and M I Veldt (eds), *Martens Dissenting: The Separate Opinions of a European Human Rights Judge* (2000) 13, 14–15.

⁵⁶ Paterson, above n 54, 99.

⁵⁷ Letter from Thomas Jefferson to William Johnson, 12 June 1823 in Levin, above n 4, 518.

⁵⁸ ‘Disagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time’: Justice Ruth Bader Ginsburg, ‘Remarks on Writing Separately’ (1990) 65 *Washington Law Review* 133, 136. See also Sheldon, above n 45, 116–17.

what must ultimately sustain the court in public confidence is the character and independence of the judges. ... while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity could be secured through its sacrifice.⁵⁹

On the other hand, where a base level of agreement *does* exist it may be all too tempting for one justice to take the reins of writing the opinion and thus exercise undue individual influence on the shape of the law.

Justice L'Heureux-Dubé has declared that a denial of individual judicial expression 'creates a situation entirely antithetical to the Canadian conception of the role of the impartial and openminded judge.'⁶⁰ The same must hold true in respect of Australian judges.⁶¹ The ability to dissent relieves their Honours of the pressure to conform to views they do not actually hold and ensures that they can fulfil the promises contained within their judicial oath.⁶² This level of individual independence might be perceived as placing a strain on the collegiality of the court — and may thus be harmful to its overall operations. Justice Brennan admitted that '[v]ery real tensions sometimes emerge when one confronts a colleague with a dissent. After all, collegiality *is* important; unanimity *does* have value; feelings *must* be respected.'⁶³ Yet arguments have been advanced by others that admitting the different viewpoints within a court provides a safety valve for the much greater strains which would otherwise develop. Despite the occasional snideness which is to be found amongst separate judgments delivered in a case, less animosity is said to accrue from majoritarian decision-making than from enforced unanimity.⁶⁴ Flanders warns against using dissents 'as some type of crude barometer to measure the lack of collegiality on an appellate court.'⁶⁵ The extent to which the judicial process is affected by sour personal relations⁶⁶ between justices can only marginally be attributed to an ability to dissent.⁶⁷ A

⁵⁹ Charles Hughes, *The Supreme Court of the United States — Its Foundation, Methods and Achievements: An Interpretation* (1928) 67–8. See also Fuld, above n 8, 927.

⁶⁰ L'Heureux-Dubé, above n 1, 513.

⁶¹ See *Commissioner of Taxation of the Commonwealth v St Helens Farm (ACT) Pty Ltd* (1980) 146 CLR 336, 387 (Murphy J).

⁶² On the significance of the judicial oath to High Court judges, see Justice John Toohey, "'Without Fear or Favour, Affection or Ill-Will": The Role of Courts in the Community' (1999) 28 *University of Western Australia Law Review* 1, 2.

⁶³ Brennan, above n 1, 429 (emphasis in original). On the dysfunction caused by rampant individualism on the High Court during the early years of Latham CJ's tenure, see Clem Lloyd, 'Not Peace but a Sword! — The High Court under J G Latham' (1987) 11 *Adelaide Law Review* 175, 178–87.

⁶⁴ Alder, above n 1, 240; L'Heureux-Dubé, above n 1, 513.

⁶⁵ Flanders, above n 1, 403.

⁶⁶ See Amelia Simpson and Troy Simpson, 'Personal Relations' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 528, 528–31.

⁶⁷ Sir Anthony Mason has expressed the view that, in his experience, tensions on the High Court were most pronounced over disagreements as to the use of precedent in matters of constitutional interpretation and this was frequently evidenced in 'strongly expressed judgments', often dissenting in nature: Sir Anthony Mason, 'Personal Relations: A Personal Reflection' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 531, 532. However, the ability to dissent is incidental, rather than central, to an actual disagreement as to the value of any particular precedent. The relationship between precedent and dissent will be considered in below Part IV.

dissenting judgment is merely the public manifestation of an existing disagreement. Disharmony in the court is not avoided by a ban on expressing dissent — if anything, that simply raises the stakes and increases the pressure within.

As well as assisting to free the judicial process from constraints upon its independence, the ability to dissent also results in clear benefits to the method of opinion writing. To some extent these two overlap, as evidenced by the effect of enforced unanimity upon Privy Council judgments. However, while the stultifying impact upon the quality of judgments caused by a lack of judicial independence has been addressed, the positive consequences of allowing dissent must still be considered. In simple terms, a dissent offers a competing viewpoint and competition is conducive to greater efficiency or, in this context, better quality.⁶⁸ The laziness and lack of accountability which Jefferson feared in the United States Supreme Court are threatened when the cloak of unanimity is cast aside. Allegations along those lines may still be levelled against judges when delivery of seriatim opinions is the norm (no matter how unfairly).⁶⁹ But, at least for those outside the inner sanctum, the dynamics between their Honours will be easier to gauge for these features.

If the judges in consensus are faced not with assembling an enforced tepid agreement with their colleagues, but instead with a challenge to their position by a published dissenting opinion, then it is clear that the processes of the court are dramatically altered. The focus is not upon writing a judgment to which everyone can offer base approval, but rather upon producing an opinion which withstands the criticisms made of it, expressly or by implication, by a dissent. As Flanders points out:

because the reasoning of the majority and any dissents will inevitably be compared and judgments will be rendered concerning which is the better-reasoned or the best solution to the problem posed by the case, the filing of a dissent also means that the intellectual stakes of the case, as well as its potential media interest, have also increased for all concerned.⁷⁰

In such circumstances, the authors of all opinions will be striving to make theirs the most compelling.⁷¹

⁶⁸ As Sir Hersch Lauterpacht said, dissent is ‘a powerful stimulus to the maximum effort of which a tribunal is capable’: Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958) 66–7. See also Alder, above n 1, 240; Brennan, above n 1, 435; Fuld, above n 8, 927; Hussain, above n 52, 3; L’Heureux-Dubé, above n 1, 515; R Moorhead, ‘Concurring and Dissenting Opinions’ (1952) 38 *American Bar Association Journal* 821, 823; Justice Antonin Scalia, ‘The Dissenting Opinion’ (1994) *Journal of Supreme Court History* 33, 41; Edward Voss, ‘Dissent: Sign of a Healthy Court’ (1992) 24 *Arizona State Law Journal* 643, 655–7. In many respects, the ensuing discussion deals with issues addressed earlier in the article concerned with the quality of deliberation in the judicial process.

⁶⁹ Starke J dubbed Evatt and McTiernan JJ ‘the parrots’ on account of his perception that they always followed the lead of Dixon J: Lloyd, above n 63, 181. In his turn, Dixon J took the view that Williams and Webb JJ were ‘passengers’: Simpson and Simpson, above n 66, 530.

⁷⁰ Flanders, above n 1, 403. Kadzielski and Kunda agree with Flanders but state that ‘[w]hile this may be one of the effects of a dissent it can hardly be considered a motive for dissenting. A judge is not going to dissent in order to strengthen the authority of a decision with which he disagrees’: Mark Kadzielski and Robert Kunda, ‘The Unmaking of Judicial Consensus in the 1930s: An Historical Analysis’ (1983) 15 *University of West Los Angeles Law Review* 43, 54–5.

⁷¹ Such is the effectiveness of dissenting judgments as a means of exposing weaknesses in majority opinions, that the former Attorney-General has cited them as one factor justifying his disinclina-

Thinking of dissents as providing a competitive impetus to the judgment writing process is one side of the matter. Different judgments do not just react to each other: at the immediate stage of writing, they can interact *with* each other. The drafting of dissents for circulation amongst the court creates a dialogue which can lead to the incorporation of some of the ideas of a dissident in the opinion of the majority.⁷² Interestingly, Paterson suggests that the author may withdraw the draft dissent once this process is completed and there is no further influence to be exerted upon the majority.⁷³ Certainly, this would seem to depend upon how strongly the individual justice feels about the correctness of his or her views and how important he or she perceives the issue to be. Nonetheless, the suggestion is not highly surprising given the arguments in favour of the exercise of judicial self-restraint, canvassed in Part III of this article. The extent to which this occurs in the High Court of Australia must, of course, be largely a matter of speculation, although there have been instances where a dissenting view is published and then recanted from in subsequent cases to provide concurrence — a curious example of judicial restraint.⁷⁴

It must be admitted that the value of dissent at this stage is largely dependent upon the institutional processes, if any, that exist for the court in question to manage its work. In the United States Supreme Court, the practice of delivering an opinion ‘for the Court’ necessitates early identification of a Justice’s stance on the problem at hand. The formal conferencing procedure adopted by that body also provides a forum in which this information will be declared.⁷⁵ However, in courts delivering judgments *in seriatim* and without any institutionalised process of communication, dissents will have less impact upon opinion writing. In such courts, the justices are not engaged in drafting majority and minority opinions as part of a dialogue — they are simply writing their own opinions and dispatching these into the ether without much thought for their ultimate status.⁷⁶ As extrapolated elsewhere, dissent is a relational concept and no judgment is inherently dissenting.⁷⁷ Nonetheless, it should be recognised that the eventual status of a

tion to defend the judiciary from external attack: ‘It is very difficult to see what defending the court would mean when some of its most articulate critics are amongst its members’: Daryl Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252, 260.

⁷² Chief Justice Rehnquist has written that

not only those who agree with a position that is ably expounded benefit from the exposition; so do those who end up disagreeing with the position. By this process of elucidation through criticism and disagreement, the first draft of a prevailing opinion may be refined and revised by the input of others to make a better product than any solo writing would have been.

Chief Justice William Rehnquist, ‘Foreword’ in E Rosenkranz and Bernard Schwartz (eds), *Reason and Passion: Justice Brennan’s Enduring Influence* (1997) 11, 11. Cf Amar, above n 42, 40.

⁷³ Paterson, above n 54, 100–1.

⁷⁴ See below Part III(A).

⁷⁵ Indeed, the present Chief Justice of that Court views this as the ‘true purpose’ of the practice: Chief Justice William Rehnquist, *The Supreme Court: How It Was, How It Is* (1987) 294–5.

⁷⁶ Stephen J is attributed as saying, ‘its [sic] not a matter of great zeal and enthusiasm that my view should prevail. [If it] doesn’t happen to be the majority view, so be it’: Michael Coper, *Encounters with the Australian Constitution* (1987) 152.

⁷⁷ Lynch, above n 3. In attempting to understand this less formal system, an American commentator suggested:

judgment can become apparent earlier or later depending upon the procedures followed by the justices of the court. If the dissenting judgment comes too late to make a difference to the drafting of the majority opinions then this particular function of dissent is not exploited.

The conferencing procedures of courts other than the United States Supreme Court may be less established or at least less appreciated by observers, but they do exist in some form. Paterson's examination of the House of Lords 20 years ago meticulously detailed the extent of both formal and informal interaction among the Law Lords.⁷⁸ The High Court has had a chequered history in this respect.⁷⁹ In 1997, Justice Kirby expressed regret that the High Court did not 'have anything like' the system of conferencing and case assignment employed in the United States Supreme Court.⁸⁰ His hope that 'something like that will come in time'⁸¹ was fulfilled soon after when, 'upon the initiative of Chief Justice Gleeson, a new series of regular meetings of the Justices ... commenced.'⁸² Justice Callinan has recently confirmed that these conferencing techniques have been maintained.⁸³ Similar efforts to achieve such interaction in the past met with less success. Barwick CJ's attempt to institute formal conferences collapsed in the face of opposition from his individualistic colleagues. However, although the Court's disunity during this period has been highlighted and analysed by commentators,⁸⁴ its members were at least still communicating with each other, if not actively seeking to build upon consensus.⁸⁵ The personal animosity infecting the Latham Court, on the other hand, meant that for substan-

'The dissent' was unnecessary in English courts, in which opinions were presented *seriatim*. Each law lord would orally express his individual opinion. There was no need to 'dissent' because each jurist, in turn, expressed his own opinion in the case. Any disagreement was manifest; it did not need to be called a 'dissent'.

Voss, above n 68, 644–5 (citations omitted).

⁷⁸ Paterson, above n 54, 89–98.

⁷⁹ Troy Simpson, 'Conferences' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 130, 130–3.

⁸⁰ Justice Michael Kirby, 'What Is It Really Like to Be a Justice of the High Court of Australia? A Conversation between Law Students and Justice Kirby' (1997) 19 *Sydney Law Review* 514, 517.

⁸¹ *Ibid.*

⁸² See High Court of Australia, *Annual Report: 1998–99* (1999) 5. The report states (at 5):

In the past, there has always been informal discussion on such matters. The new series of meetings has formalized the arrangements to a greater extent and provided the occasion for the review of current thinking of the Justices concerning the cases reserved for decision. ... The discussions will not always secure agreement between the Justices and this is not their purpose. Even where important differences exist, discussion can help to clarify and refine opinions and reasoning.

⁸³ The Court engages in both 'a short conference after an appeal has been heard' and a subsequent 'more formal judgments meeting': Justice Ian Callinan, 'Law and Literature' (2001) 21 *Australian Bar Review* 265, 266.

⁸⁴ See Marr, above n 7, 233; G P J McGinley, 'The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts' (1987) 11 *Adelaide Law Review* 203, 207–9; Michael Sexton, *Uncertain Justice: Inside Australia's Legal System* (2000) 15.

⁸⁵ As Marr reports:

Consultation between the judges at this stage of the process depended on friendship, speciality and geography. ... Each decision went to Barwick. The Chief Justice's staff photocopied the judgments, entered them in the schedule of judgments in hand, and circulated a copy to each of the judges sitting on the case.

Marr, above n 7, 222.

tial periods of time even this was not occurring. This is a good example of a court so dysfunctional that the use of dissent as a means of improving the quality of written judgments was lost. Starke J 'refused to have any consultation with Evatt, to exchange reasons for judgments and draft judgments with him, or even to supply him with final judgments.'⁸⁶ Starke J's uncooperative behaviour was not always exclusively applied in respect of Evatt J and, not surprisingly, Evatt J applied reciprocal sanctions against Starke J. Nonetheless, the Latham Court must be seen as an extreme example, where not even informal opportunities to liaise were utilised.⁸⁷ On the whole, it seems reasonable to presume that some basic level of discussion takes place in a collective decision-making body, in which case draft dissenting judgments may be able to improve the quality of majority opinions.

The concept of a dialogue between judgments leads us to the final function which dissents may perform in the enhancement of a court's work. It has been suggested that the knowledge that some justices are intending to dissent should ideally stimulate greater care and attention in the drafting of opinions. Even so, the reasoning of the majority camp may be difficult to grasp. This may be for a variety of reasons, but two spring readily to mind: the majority opinion may be poorly constructed and justified; or the majority view may be a composite of different opinions whose combined effect is to cloud the clarity of the decision as a whole. In either situation, a better appreciation of the import of the majority view may be achieved after considering a dissent — making it clear what the majority does *not* stand for by providing a useful contrast.⁸⁸ In his exhortations to Johnson J, Thomas Jefferson was keen to highlight the benefits of seriatim opinions beyond their democratic function. In praising the method of the English judiciary, he was quick to note 'the light which their separate arguments threw on the subject, and the instruction communicated by their several modes of reasoning'.⁸⁹ By contrast, the lone voice of unanimity can often simply provoke further questions which, in the absence of an illuminating dissent, require clarification in later decisions.⁹⁰

⁸⁶ Lloyd, above n 63, 182.

⁸⁷ 'The refusal by a Justice to contribute to the deliberations of his colleagues was an extraordinary and exceptional step. ... With this exception, friction between members of the Court does not appear to have significantly affected the Court's work': Mason, 'Personal Relations', above n 67, 532.

⁸⁸ Matthew Bergman, 'Dissent in the Judicial Process: Discord in Service of Harmony' (1991) 68 *Denver University Law Review* 79, 85–6. See also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) vol 1, 1–2.

⁸⁹ Letter from Thomas Jefferson to William Johnson, 27 October 1822 in Levin above n 4, 513.

⁹⁰ A recent example of this in the High Court of Australia was the unanimous decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, which sought to resolve much uncertainty in respect of the constitutionally implied freedom of speech by subsuming or explaining 'the various formulations offered by different members of the Court in earlier judgments. However, for that very reason, there may be room for disagreement as to precisely how the *Lange* test is to be applied': Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary & Materials* (3rd ed, 2002) 1192.

C *Dissent and the Law's Development*

Having considered the political significance of dissent and its potential to contribute to the process of judgment writing, the final broad function to be addressed looks to the future — how does dissent assist in the development of legal principle? In addressing this issue, one cannot avoid quoting Hughes, whose distinctive lyricism has never quite been surpassed by subsequent commentators and has been echoed by the High Court of Australia:

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.⁹¹

Its ubiquity aside, Hughes's portrayal of dissent remains striking for the romanticism with which it imbues American discussions of dissent. It is in this vein that the notion of dissent as prophecy has taken hold.⁹² It seems rather odd that the idea of a dissenting judge as a 'prophet with honor' should gain currency in a legal culture which provided fertile ground for the growth of the realist, critical legal studies and jurimetrics movements. But the danger of adopting this sobriquet is that it obscures the dynamic role which dissent can play in achieving change in the law. Lively's description of dissents may be short on soaring expression, but it displays a keener awareness of their function: 'dissents facilitate the law's development while providing a linkage that establishes a source of continuity.'⁹³ To describe dissents as 'foreshadowing'⁹⁴ or 'prescient'⁹⁵ speaks more to a judge being ahead of his or her time than talk of prophecy, which tends to overly mystify the judicial process and adopt a degree of fatalism towards movement in the law.⁹⁶ In any case, these labels may only be applied

⁹¹ Hughes, above n 59. See also *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, where Mason CJ, Wilson, Dawson and Toohey JJ said that '[a] dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom': at 314.

⁹² Alan Barth may not have been the initiator of the catchphrase 'prophet with honour' but he can fairly take credit for its widespread use in American legal circles: see Barth, above n 2. Two earlier instances employing prophecy as a descriptor can be cited. Jackson stated that the dissenter 'may be the prophet whose heresy of today becomes the dogma of tomorrow': Percival Jackson, *Dissent in the Supreme Court: A Chronology* (1969) 3. Felix Frankfurter said that Holmes J's dissents 'record prophecy and shape history': Felix Frankfurter, 'Mr Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court' (1927) 41 *Harvard Law Review* 121, 162.

⁹³ Donald Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* (1992) xi.

⁹⁴ *Ibid.*

⁹⁵ Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997).

⁹⁶ It is curious to see some commentators marry the prophetic and active roles of dissent in respect of change in the law. This is done in the quote from Frankfurter, above n 92. More recently Justice L'Heureux-Dubé has said that 'dissenting opinions are not only prophetic, but they are also an invitation for dialogue about the law's development in these areas': L'Heureux-Dubé, above n 1, 508. These quotes reveal the difficulty in using prophecy to describe something which may actually be trying to achieve change — unless one is content with the notion of a self-fulfilling prophecy.

with the benefit of hindsight after such time as the dissent has itself been a factor in stimulating legal change.

Dissent as enabling dialogue was discussed earlier in respect of the interaction between the justices sitting on a particular case. The concept of dialogue is again useful here in exploring the way in which dissent promotes evolution of the law, though in this instance the discourse occurs over time and may involve parties external to the court.⁹⁷ The ‘brooding spirit of the law’ is to be found in the minds of commentators, legislatures and later manifestations of the court. It is clear, for the various reasons considered in the previous section, that evaluating the court’s work is made easier in cases where there are dissenting opinions. Obviously, commentators, academic or otherwise, do not directly develop the law, but they can certainly seek to influence it. This occurs not infrequently through championing of a dissent. Parliamentary reaction to a decision which it regards as unsatisfactory may have two uses for a dissenting view given voice in the case. First, a division in the bench may be said to provide a degree of political justification for legislative interference with the court’s settlement of the law. Second, dissenting opinions may provide Parliament with material that guides the form of its response to the decision reached by the court.⁹⁸

It is perhaps to future sittings of the court, however, that dissent has most relevance in shaping the law — certainly this must be true in respect of constitu-

⁹⁷ Blackshield states that

patterns of High Court growth and change involve complex interaction among all seven members of the Court: and while some of this interaction involves informal discussion or exchange of draft judgments, its main channel is the public dialogue conducted in the published judgments themselves.

Tony Blackshield, ‘Introduction’ in Tony Blackshield et al (eds), *The Judgments of Justice Lionel Murphy* (1986) xiii, xviii.

⁹⁸ For discussion of an early example of this, see generally George Brown, ‘A Dissenting Opinion of Mr Justice Story Enacted as Law within Thirty-Six Days’ (1940) 26 *Virginia Law Review* 759. This phenomenon — that of a ‘dialogue’ between the two arms of government — has recently drawn a good deal of commentary in Canada: see generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001). For example, the dissenting view of L’Heureux-Dubé J in *R v O’Connor* [1995] 4 SCR 411 was subsequently enshrined in the Canadian *Criminal Code*, RSC 1985, c 46 through legislative amendment and then approved by the Court in the case of *R v Mills* [1999] 3 SCR 668. But in rejecting the dialogue model of the relationship between the judiciary and legislature stimulated by the *Canadian Charter of Rights and Freedoms*, pt 1 of the *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11, Manfredi and Kelly say of these cases that ‘the response by the Parliament of Canada can only be considered as legislative compliance that borders on *Charter* ventriloquism’: Christopher Manfredi and James Kelly, ‘Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures’ (2001) 64 *Saskatchewan Law Review* 323, 345. While the suggestion of these authors of an impaired equality underlying the dialogue between the courts and Parliament may have some credence, this episode should not lose its broader significance for the purposes of this article — the potential impact of dissents outside the court so as to assist change. However, this potential is clearly limited in the area of constitutional law.

An Australian example of dialogue between the High Court and Parliament where dissenting opinions seem to have been influential is the legislative amendments made to the *Telecommunications (Interception) Act 1979* (Cth) in the wake of the 3:2 split in *Hilton v Wells* (1985) 157 CLR 57 over the validity of judges issuing warrants for telephone tapping. The amendments appeared to be passed with the aim of addressing the concerns of the dissenters in that case, Mason CJ and Deane J. By the time the issue rose again for consideration in *Grollo v Palmer* (1995) 184 CLR 348, Mason CJ had retired but Deane J was seemingly satisfied with the change in the law.

tional law.⁹⁹ The consolation for the judge whose views have not triumphed on the day is the hope that they may be later revived and vindicated. This is most likely what Hughes had in mind when he spoke of ‘the brooding spirit of the law’. Again though, we find that Thomas Jefferson appreciated this aspect of dissent well before others did: ‘It sometimes happened too that when there were three opinions against one, the reasoning of the one was so much the most cogent as to become afterwards the law of the land.’¹⁰⁰

The ability of dissent to foster change in the law has been recognised almost universally,¹⁰¹ although some commentators place different emphasis upon negative side-effects which may accrue as a result of the practice.¹⁰² It is surprising, therefore, to find a lone voice of doubt on this score. Kadzielski and Kunda in their examination of ballooning dissent rates in several American courts during the 1930s make the following statement:

Some decisions are overruled a short time after they emerge; occasionally a court will reverse itself on rehearing. Whether any of these is the result of a dissenter’s convincing his colleagues that they are wrong through his dissent is doubtful. That a dissent would be written for such an unlikely event seems even more unlikely. ... Conservative judges as well as liberal ones realize that a decision can be overruled. The liberal judges as well as conservative ones realize that it is unlikely to happen unless greatly changed conditions or wisdom emerge. Both groups cast dissenting votes. It does not seem that either group uses dissents in order to promote changes in the law.¹⁰³

This is a fairly startling claim, which the authors seek to justify by citing two examples — the best known being that of the dissenting judgment of Harlan J in *Plessy v Ferguson*.¹⁰⁴ Kadzielski and Kunda argue first that the tone of a dissent rarely looks forward, but instead is defeatist:

⁹⁹ Though in respect of the High Court of Australia this is yet to be the subject of in-depth study.

¹⁰⁰ Letter from Thomas Jefferson to William Johnson, 27 October 1822 in Levin, above n 4, 513–15.

¹⁰¹ Alder, above n 1, 241; Bader Ginsburg, above n 58, 143–5; Bergman, above n 88, 82–5; Brennan, above n 1, 430–1; Toni Ellington, ‘Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero’ (1998) 20 *University of Hawaii Law Review* 797, 820–1, 824–32; Flanders, above n 1, 410–14; Fuld, above n 8, 928; Gaffney, above n 1, 590; Hussain, above n 52, 7, 24; Ken Kimura, ‘A Legitimacy Model for the Interpretation of Plurality Decisions’ (1992) 77 *Cornell Law Review* 1593; Kirby, above n 23, 17; Anita Krishnakumar, ‘On the Evolution of the Canonical Dissent’ (2000) 52 *Rutgers Law Review* 781, 788–805; Jacob Lashly and Paul Rava, ‘The Supreme Court Dissents’ (1943) 28 *Washington University Law Quarterly* 191, 191–2; L’Heureux-Dubé, above n 1, 504–9; Little, above n 1, 687; Mimi Liu, ‘A “Prophet with Honour”: An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada’ (2000) 25 *Queen’s Law Journal* 417, 475–8; Nadelmann, above n 68, 430–2; Richard Primus, ‘Canon, Anti-Canon, and Judicial Dissent’ (1998) 48 *Duke Law Journal* 243; Schermers, above n 52, 2, 5; Thomas Shea, ‘The Great Dissenters: Parallel Currents in Holmes and Scalia’ (1997) 67 *Mississippi Law Journal* 397; Sheldon, above n 45, 116; Voss, above n 68, 657–9; *Fisher v Minister of Public Safety and Immigration* [1998] AC 673, 686 (Lord Steyn).

¹⁰² See below Part III.

¹⁰³ Kadzielski and Kunda, above n 70, 53, 55. The only hint of support I can find in other literature for this view is Justice Scalia’s acknowledgment that dissenting opinions can ‘help to change the law’ — he concludes that this is ‘most common in the decisions of intermediate appellate tribunals’ and is rare in the Supreme Court: Scalia, above n 68, 36–7.

¹⁰⁴ 163 US 537 (1896) (*Plessy*). This case involved a challenge to one of the so-called ‘Jim Crow’ laws of the South — a Louisiana statute which required railway companies to provide ‘equal but

He [Harlan J] was definitely accepting the finality of the decision with which he disagreed under the circumstances of the times. The dissent could hardly have been intended to persuade the Court to change its mind in the immediate future; if change was to be forthcoming, there would be no need to atone.¹⁰⁵

This seems an odd observation to make because it denies that a number of functions are fulfilled in all opinion writing. While resolution of the matter before the court is the paramount task, it is understandable, especially in courts of last resort, that judgments are assembled with an eye on the future. Regret for the immediate result need not obliterate the hope, even unexpressed, that subsequent like cases will meet with a different reception.

The second argument used to support this contention goes even more to the question of a developmental function of dissent. Essentially, Kadzielski and Kunda take the view that courts, when overruling majority decisions, seldom seem to place reliance upon dissents in order to do so. In relation to *Plessy*, they say:

Although the precise holding about segregation on railroad cars to which Justice Harlan objected has since been overruled, the language of what is probably the most famous dissenting opinion ever written has not become accepted law.¹⁰⁶

While this is certainly true and the Supreme Court in *Brown v Board of Education of Topeka*¹⁰⁷ did not make reference to Harlan J's opinion, one should be careful in dismissing its impact. The persuasive pull of particular judgments (and for that matter, external commentary) may be an extraordinarily subtle force. Barth's appreciation of the often abstruse influence of dissents is demonstrated by his view of the same material:

It can hardly be said that the vision and fire of Harlan's dissenting opinion turned the Court round, as though in 1954 that dissent was suddenly read with understanding for the first time. Yet it can hardly be said, either, that his vision and fire were altogether without effect upon succeeding judges. Every time members of the Supreme Court were called upon to decide a case entailing racial segregation, they were obliged to reread the fatuous words of Justice Brown and to be reminded by Justice Harlan's stinging refutation that the decision was juridically — and ethically — wrong.¹⁰⁸

Attempts to verify or quantify the impact of dissenting opinions upon subsequent development of the law should be wary of the overly simple analysis which Kadzielski and Kunda have applied in their consideration of Harlan J's

separate accommodations' for white and coloured passengers. A majority of the United States Supreme Court found that the segregationist law was consistent with the Fourteenth Amendment. Such laws eventually met their end at the hands of a unanimous Supreme Court decision delivered almost 60 years later: *Brown v Board of Education of Topeka*, 347 US 483 (1954).

¹⁰⁵ Kadzielski and Kunda, above n 70, 56. Contrast this with Bergman's description of Harlan J's dissent as 'an eloquent appeal to future generations': Bergman, above n 88, 83.

¹⁰⁶ Kadzielski and Kunda, above n 70, 56.

¹⁰⁷ 347 US 483 (1954).

¹⁰⁸ Barth, above n 2, 52–3.

judgment in *Plessy*.¹⁰⁹ The formal recognition and vindication of an earlier dissent by a court alone will not present the extent to which such judgments have effect. For a pertinent local example, Justice Kirby has expressed the view that several innovative approaches employed by Murphy J during his 11 years on the High Court of Australia have gained greater acceptance, albeit without due acknowledgment, in the years since his death.¹¹⁰ Only by a substantive examination of the developing jurisprudence of a court can an accurate assessment of the impact of the past be reached.¹¹¹

Before concluding this section, it should be made clear that the message of a dissenter to his or her court need not necessarily advocate progression of the law. Dissent can just as effectively be used to contain the impact of new principles. As Lord Radcliffe told Paterson, dissent 'does enable you to try to limit what you regard as an unsatisfactory line by some reasoned and carefully worked out contribution of your own.'¹¹² The idea of dissent as a subtly conservative influence on a progressive court is not how we tend to think dissenters are typically regarded, though it may be far more the norm.¹¹³ Once again, a propensity to talk of prophets and 'Great Dissenters' can lead to a blinkered view of the pervasive and diverse nature of dissent in practice.¹¹⁴

¹⁰⁹ The reader may be asking, so what significance *do* Kadzielski and Kunda, above n 70, ascribe to Harlan J's dissent? The answer is (at 57):

Justice Harlan was right in doing what is often said it is nearly impossible to do, that is, writing history as the events occur rather than writing from a perspective of time. This is the primary motivation for such a dissent: it can forever stand as a monument to what the dissenting judge felt at the time to be right, which may be illuminated later by the light of history, or which at least can stand as a symbol to some greater power of right and wrong than the law of the land.

Kadzielski and Kunda, it would seem, are strongly advocating a prophetic role for the dissenting judgment, but unlike those authors cited above at nn 92 and 96, they do not see this function as combined with a capacity to contribute actively to change, certainly not within the court itself. As is clear from that earlier footnote, I am sceptical of something being simultaneously characterised as prophetic and dynamic. Unlike Kadzielski and Kunda, I see the 'dissent as prophecy' paradigm unhelpful and dispensable.

¹¹⁰ Justice Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 253, 254. The degree of subsequent influence of Murphy J's judgments is the central inquiry in Coper and Williams, *Justice Lionel Murphy*, above n 95.

¹¹¹ In respect of the impact of Murphy J, Blackshield stressed that 'even to assess *his* contribution, we would need to trace it through patterns of accommodation and rejection extending over a series of cases, and indeed over decades to come': Blackshield, above n 97, xviii (emphasis in original).

¹¹² Paterson, above n 54, 101.

¹¹³ An example of this in the High Court is the influence of the dissentients (notably Dawson and McHugh JJ) in the freedom of speech cases of the 1990s. It is always difficult to measure the extent of such influence, but it seems safe to say that if the majority in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*') had not been weighed down by more cautious voices, the more moderate resolution for the basis of the freedom agreed upon in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 might not have been reached.

¹¹⁴ The best example I have found of this is Wald's assertion that:

The typical tone of a dissent is troubled, outraged, sorrowful, puzzled. It is most apt to turn away from the technicalities of the majority holding and play to higher levels of aspirations and values that it sees desecrated by the majority's insistence on a relentless imposition of precedent regardless of the consequences. ... The strategy of personalization in dissent is to separate the dissenter from the cold, impersonal, authoritarian judges of the majority, who impliedly do not take the human condition into account when they mercilessly impose 'the law'.

D *Concurring Judgments Compared — The Acceptable Face of Disagreement and Change?*

Having considered the various ends which are served by a capacity for judicial disagreement to manifest itself as a dissenting opinion, it is relevant to consider the position of concurring judgments and, specifically, the extent to which they also share these functions. Do concurring judgments achieve much the same thing but with less threat to stability?

First, we must be aware that the American tendency to lump concurrences and dissents together under the banner of ‘separate judgments’ reflects the practice employed by the United States Supreme Court of a majority opinion being delivered ‘for the Court’ from which the remaining justices may distance themselves by varying degrees.¹¹⁵ Concurring judgments delivered in the High Court of Australia are not strictly ‘separate’ from anything. In the absence of an opinion ‘for the Court’, all those in the majority are in concurrence simply with each other. Obviously in many cases, one or two judges of the majority may deliver fuller opinions with which others merely indicate agreement, enabling identification of the ‘leading’ judgments, but it need not be this way. It has certainly not been uncommon for all seven members of the Court to deliver their own individual opinions in full. In such instances it is, to an extent, quite meaningless to regard concurrences and dissents as being of the same ilk — judgments which together stand ‘separate’ from a clearly identified and concerted majority. Rather the collection of concurrences amounts to a majority and it is the dissents alone which are on the outer.

Even so, it is clear that the ability (for which the seriatim practice provides) of each judge to deliver his or her opinion individually serves many of the beneficial functions identified in relation to the delivery of dissents. ‘Writing separately’ may mean quite different things in the practice of the High Court and the United States Supreme Court, and is traditionally much rarer in the latter forum, but the essentially individualistic nature of the act itself remains.

Justice Bader Ginsburg’s examination of separate judgments remains the most lucid examination of the similarities underlying concurrences and dissents by reason of their capacity to promote individual expression.¹¹⁶ For this reason, concurring judgments fulfil a democratic function in accord with what has been outlined above. Although concurring opinions express support for the court’s

Patricia Wald, ‘The Rhetoric of Results and the Results of Rhetoric: Judicial Writings’ (1995) 62 *University of Chicago Law Review* 1371, 1412–13.

Even allowing for the numerous differences between the United States Supreme Court and the High Court of Australia, not the least among them being matters of judicial style, it is dangerous to generalise about the dissents of any court in the manner Wald has adopted here. Although examples of the type of judgment she describes undoubtedly do exist — Australian classics of the genre include the opinions of Evatt J in *Waverley City Council v Chester* (1939) 62 CLR 1 and, more recently, Kirby J in *Re Wakim* (1999) 198 CLR 511 — it would indeed be surprising if they were the norm. Wald’s error is that her conception of dissent denies its primarily relational, rather than substantive, nature.

¹¹⁵ See Bader Ginsburg, above n 58, 134; Flanders, above n 1, 401. Wald’s claim that ‘[m]ost judges dissent more than concur’ (Wald, above n 114, 1413) reflects how very different the notion of concurrence is made by the United States Supreme Court’s practice of delivering a core majority opinion.

¹¹⁶ Bader Ginsburg, above n 58, 136

resolution of the ultimate issues in a case, they are just as potent as outright dissent at indicating the deliberations of that body. In so far as the judicial strain of deliberative democracy is sustained by freedom of expression, it should not be forgotten that even within a concurrence a level of disagreement may still be given voice.¹¹⁷

As contributions to a judicial dialogue, concurrences may play a part in promoting more thorough opinion writing in the same way as dissents. On the whole, however, concurrences are seen as problematic in their contribution to the clarity of judicial work. Whereas a dissent may be said to provide a useful contrast to the majority judgments, a majority result which is assembled through concurrences can be contradictory and confusing. While an ability to agree with the orders of the court but for reasons distinct from those adopted by others on the bench is undoubtedly valuable, the suspicion has been voiced that separate concurring judgments have often been delivered when consensus building would have been both possible and appropriate.¹¹⁸

A profusion of substantially similar concurring opinions serves less purpose than a clear statement of dissent and is more harmful to the coherence of the law that the court lays down. It seems that this is a concern in jurisdictions beyond our own,¹¹⁹ indicating inadequate conferencing processes adopted by the

¹¹⁷ This is true even if the disagreement extends only to matters of written expression.

¹¹⁸ Coper, *Encounters with the Australian Constitution*, above n 76, 151; Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 50–1. This complaint was raised by the former Attorney-General at the swearing in of Gleeson CJ: Bernard Lane, 'Gleeson Calls for Reorder in the Court', *The Weekend Australian* (Sydney), 23–4 May 1998, 4. Perhaps the most impolite criticism along these lines comes from the Canadian McWhinney who writes:

it may be less a matter of one single opinion versus multiple opinions than of the nature and content of the opinions when actually written. The five dreary, repetitive, Gothic, opinions written by the judges of the High Court of Australia in the *Bank Nationalisation* case [*Commonwealth v Bank of New South Wales* (1948) 76 CLR 1] gain, it is suggested, little by comparison with the Privy Council's single opinion in the same case.

McWhinney, above n 7, 623.

¹¹⁹ In respect of the difficulties caused by concurrence in the Supreme Court of Canada, see Laskin, above n 53, 1047–8. Almost 50 years later, Justice L'Heureux-Dubé expressed similar concerns about concurrences but reported that the 'phenomenon is increasingly rare': L'Heureux-Dubé, above n 1, 514. Justice Bader Ginsburg has also stated that in the United States Supreme Court '[m]ore unsettling than the high incidence of dissent is the proliferation of separate opinions with no single opinion commanding a clear majority': Bader Ginsburg, above n 58, 148.

court,¹²⁰ difficult personal relations amongst its members¹²¹ and also (ironically) the impact of improvements in staffing and technology.¹²²

So far as developmental functions are concerned, there is no reason to presume that obiter dicta expressed in concurring opinions has less potential in this respect than dissents. Indeed, the converse is true. Beyond their contribution to the ratio decidendi of the decision, the precedential value of statements found in the concurring opinions of the majority is likely to be more persuasive than those contained in dissents.¹²³ The use of opinions expressed in concurring judgments is undoubtedly the way in which much subtle and incremental change occurs in the law. We would expect the frequency with which dissent assists the development of legal principle to be less — however, the actual extent of change which a dissent may assist to bring about is likely to be much more pronounced.

Concurrences and dissents share a number of features. They both fulfil democratic and developmental functions, though admittedly concurrences do so in a less noticeable manner than dissents. This is not just a result of their status as representing a fundamental degree of consensus, but must also be attributable to their implicit place within the practice of delivering opinions *in seriatim*. Unlike their position in America, concurring judgments are simply the usual method by which judges in the English tradition express agreement with each other, despite occasional instances of welcome unanimity. Unfortunately, this strong sense of individualism over institutionalism presents problems of clarity which can obscure the actual decision. It is ironic that, in this sense, the formal expression of judicial disagreement in a dissent is less harmful to the certainty of the law.

III ARGUMENTS FOR RESTRAINT — THE HAZARDS OF DISSENT

The previous part considered three broad functions which an ability to dissent may be said to serve. While there are unquestionably benefits associated with

¹²⁰ Laskin, above n 53; Sawyer, above n 118, 49–50. There is some degree of overlap between this topic and assessments of the effectiveness of the leadership qualities of the presiding Chief Justice: see Sue Davis, ‘The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court’ in Cornell Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (1999) 135, 144–6; O’Brien, above n 49, 97–9, 109–11.

¹²¹ Lloyd, above n 63, 179; Marr, above n 7, 233; Mason, ‘Personal Relations’, above n 67, 532; Simpson and Simpson, above n 66. To gain a sense as to how problems of collegiality have affected the United States Supreme Court, see Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* (1998); Melvin Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953* (1997); Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (first published 1979, 1981 ed).

¹²² Justice Bader Ginsburg cites the ‘multiplication of law clerks’ and ‘more efficient means to retrieve and process words’ as reducing the need for judges to work as cooperatively with their colleagues as in the past: above n 58, 148–9. See also O’Brien, above n 49, 103, 110.

¹²³ MacAdam and Pyke say that ‘it is an entirely proper part of the judicial process for authoritative propositions of law to be extracted out of a combination of majority and minority judgments as long as such propositions are not in conflict with the majority ratio and/or the result in the case’: Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) 210. While it is apparent that this qualification does not restrict the use of dissents, it does indicate that concurring opinions are probably going to be more helpful — unless, of course, one is advocating the overruling of the earlier decision.

dissent, it is far from the case that dissents are routinely well received.¹²⁴ Aside from the substance of any particular dissenting opinion, the practice itself can, in certain circumstances, evoke ambiguous feelings. For while we can identify the benefits of dissent, these can be difficult to reconcile with law's preference for order, clarity and conformity. This part of the article will examine the arguments for judicial restraint in dissenting.

A Certainty and Coherence

Although Justice Kirby has described the judiciary as 'the last empire of governmental individualism',¹²⁵ there are numerous examples of Australian judges refraining from an insistence upon their personal views so as to enable the court to settle a question of importance with sufficient clarity. Perhaps the most infamous of these are the opinions delivered by Gibbs and Stephen JJ in *Queensland v Commonwealth*,¹²⁶ in which their Honours resisted the temptation to maintain the views they had expressed in an earlier case¹²⁷ and refused to form a majority with the persistent Barwick CJ and the newly arrived Aickin J to invalidate the representation of the territories in the Senate. In following the majority decision from which they had earlier dissented, Gibbs and Stephens JJ made it very clear that — although they were still of the view that the majority approach was incorrect — they saw more value in avoiding an overruling within such a short space of time that was made possible only through a change in the composition of the Court.¹²⁸ Perhaps Stewart J of the United States Supreme Court best expressed the source of such reluctance when he said:

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.¹²⁹

On the high importance of consistency, Gibbs J had this to say:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were

¹²⁴ Michael Coper, 'The Path of the Law' (2002) 76 *Australian Law Journal* 716, 719.

¹²⁵ Kirby, above n 23, 16.

¹²⁶ (1977) 139 CLR 585 ('*Second Territory Senators Case*').

¹²⁷ *Western Australia v Commonwealth* (1975) 134 CLR 201 ('*First Territory Senators Case*').

¹²⁸ Aickin J had been appointed to replace McTiernan J, a member of the majority in the original case. Coper clearly suggests this as a significant factor in explaining Gibbs and Stephen JJ's conduct: Coper, *Encounters with the Australian Constitution*, above n 76, 153.

¹²⁹ *Mitchell v W T Grant Co*, 416 US 600, 636 (1974) ('*Mitchell*'). Stewart J's discomfort at exploiting a change in the composition of the Court to gain ascendancy for views he had expressed previously in dissent is well documented by Woodward and Armstrong, most memorably in a scene recounting an exchange between Stewart and White JJ where the latter described Stewart J's stance as 'kind of a chickenshit position': Woodward and Armstrong, above n 121, 483. For an earlier American statement along the lines of Stewart J's comments in *Mitchell*, see the dissenting judgment of White J in *Pollock v Farmers' Loan & Trust Co*, 157 US 429, 651 (1895).

blank, or as though the authority of a decision did not survive beyond the rising of the Court.¹³⁰

For both Justices, the duty to follow the earlier decision was determined by a number of factors, but avoidance of the confusion and disappointed expectations of the peoples of the territories caused by a reversal was of great significance.¹³¹ In dissent, Barwick CJ and Aickin J made it clear that, to their minds, such a consideration held little sway against a judge's individual conviction of being right.¹³² Their view was, to paraphrase Kelman, that if dissent is an appeal to the intelligence of a future day, the dissenter should not falter because that day arrives sooner than expected.¹³³

The example of the *Second Territory Senators Case* is interesting because it displays remarkable self-sacrifice by Gibbs and Stephen JJ. Justice L'Heureux-Dubé has said that 'even the most ardent defender of dissenting opinions will be compelled to admit that in most cases, it is the majority opinion which blazes the law's trail.'¹³⁴ This was decidedly not such a case — far from any compulsion, the two Justices had in fact a clear ability to claim ascendancy for a previous dissenting view which they still believed to be correct. That they refrained from such action illustrates that in some circumstances (or, at least, with some judges) the value of institutional consistency is far from a hollow ideal but has real power in curbing instability in the law.

Of course, it is less dramatic when a potential dissenter recants from views which stand next to no real chance of attracting majority support. Nevertheless, such occasions are significant evidence as to the importance of coherency in judicial method. A classic example is provided by the judgment of Dawson J in *Richardson v Forestry Commission*,¹³⁵ in which his Honour repeated his objections to the expansive interpretation of the external affairs power arrived at by the majority in *Tasmania v Commonwealth*.¹³⁶ Having done so, his Honour proceeded to explain why he would, despite retaining those views, accept the authority of the earlier decision from now on:

Precedent must, however, have a part to play, even in the interpretation of a constitution. Considerations of practicality make it necessary that the law should, as far as possible, take a consistent course. The constant re-examination of concluded questions is incompatible with that aim.¹³⁷

¹³⁰ *Second Territory Senators Case* (1977) 139 CLR 585, 599. This sentiment was recently echoed by Gummow J in *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75: 'The state of the law of the Constitution at any given time is to be perceived by study of both the constitutional text and of the *Commonwealth Law Reports*'.

¹³¹ *Second Territory Senators Case* (1977) 139 CLR 585, 600 (Gibbs J), 603–4 (Stephen J).

¹³² *Ibid* 594 (Barwick CJ), 630–1 (Aickin J). Indeed, and remarkably, Aickin J 'formed the view that this is not a case where it can be said that the previous decision has been "acted upon" ... notwithstanding that elections have been held and persons so elected have sat in each House and acted as members thereof': at 630–1.

¹³³ Maurice Kelman, 'The Forked Path of Dissent' [1985] *Supreme Court Review* 227, 284 fn 222.

¹³⁴ L'Heureux-Dubé, above n 1, 498.

¹³⁵ (1988) 164 CLR 261.

¹³⁶ (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

¹³⁷ *Richardson v Forestry Commission* (1988) 164 CLR 261, 322. Dawson J went on to adopt a similar approach in subsequent cases: *Queensland v Commonwealth* (1989) 167 CLR 232, 247

Similar motivations are present in instances where members of the court explicitly tailor their judgments so as to make a clear majority view possible. This practice differs from the cases just considered because it involves no reference to an earlier dissent, but rather prevents a dissenting opinion from coming into existence. Two recent striking examples of this spring to mind. First, Deane J's winding back of the more extreme aspects of his approach to the consequences of the implied freedom of political speech found in *Theophanous* so that he could form a majority on the facts with Mason CJ, Toohey and Gaudron JJ.¹³⁸ Similarly, Kirby J, after setting down his ideal approach to questions of dishonesty in instructing the jury in a trial for conspiracy to defraud, abandoned it in order that a useful majority be formed in *Peters v The Queen*.¹³⁹ The other four judges in that case were evenly divided over the matter. Kirby J acknowledged that no immediate value would be gained from his deciding the matter in accordance with his own preferred view — and (presumably) that any prospective impact was unlikely. Thus, his Honour decided to use his vote pragmatically and effectively aborted a potential dissent:

As this Court is evenly divided on the applicable legal test, as there is a clear majority for dismissing the appeal which my opinion cannot affect and as it is essential that the Court should provide clear instruction to those who have the responsibility of conducting criminal trials, whilst preferring my own opinions I withdraw them. For the purposes of procuring a holding on the issues argued in this appeal, I concur in the opinions expressed by Toohey and Gaudron JJ on the point of difference between them and McHugh J and Gummow J.¹⁴⁰

All the judgments discussed in this section demonstrate an aversion to the costs incurred by disagreement. The dissenting judge may often be seen as '[adding] to the confusion of [the law], for he turns the spot-light away from the issues in the case and keeps it focused upon himself; he tells the world that the law is indefinite, except as expounded by him.'¹⁴¹ Clearly, however, complete personal satisfaction with the result in a case is often sacrificed to the higher

(*'Tropical Rainforests Case'*); *Victoria v Commonwealth* (1996) 187 CLR 416, 565–72 (*'Industrial Relations Act Case'*).

¹³⁸ (1994) 182 CLR 104, 187–8. Deane J published this as an addendum to his formal judgment, saying, *inter alia* (at 188):

majority support for the operation of the implication in a case such as the present exists for, but is limited to, that attributed to it by Mason CJ, Toohey and Gaudron JJ. In these circumstances, the appropriate course for me to follow is to lend my support for the answers which their Honours give to the questions reserved by the stated case.

The effect of this compromise upon the precedential value of *Theophanous* was made clear by comments of the Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554–6 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹³⁹ (1997) 192 CLR 493.

¹⁴⁰ *Ibid* 556. There are, of course, other examples of this kind of strategic voting: the comments of Murphy J in *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 309 come to mind: 'while adhering to my own view of s 92, I would, as an alternative, support that which seems to be the nearest to mine in order to obtain or increase the vote for that view and to reject a more extreme alternative.' Just what influences a judge to such transparency when others must presumably resolve such choices before writing their judgment and see little point in extrapolating upon them is difficult to discern.

¹⁴¹ William Hirt, 'In the Matter of Dissents *Inter Judices de Jure*' (1960) 31 *Pennsylvania Bar Association Quarterly* 256, 259.

ideal of legal certainty — as Brandeis J famously declared, ‘[i]t is usually more important that a rule of law be settled, than that it be settled right’.¹⁴² That statement now invites more rigorous scrutiny given the developments in legal theory since the early decades of the 20th century. In a legal milieu where it has long been conjectured that there is no such thing which may simply be identified as the ‘right’ answer,¹⁴³ conscious decisions by an individual judge to strengthen an acceptable and justifiable alternative view so as to achieve institutional coherence should not be surprising. Some of the examples given above are more illustrative of this point than others. The judgments of Gibbs and Dawson JJ, on the one hand, are not so clearly in this vein since they forcefully maintain the correctness of their own approach, despite supporting the contrary, established view on precedential grounds. Thus, these opinions perhaps more perfectly reflect the aphorism of Brandeis J. On the other hand, Deane and Kirby JJ make it clear that, whilst they have one solution in mind, they are prepared to concede the merits of another. Interestingly, Stephen J, writing at a time when it was much rarer to see such express admissions of the indeterminacy of the law emanating from the Australian bench, seems to adopt a similar approach in the *Second Territory Senators Case*.¹⁴⁴ In referring to the earlier decision which he is now following, his Honour says that ‘[t]he case was very much one upon which different minds might reach different conclusions, no one view being inherently entitled to any pre-eminence as conforming better than others to principle or to precedent.’¹⁴⁵

However, one must be cautious of taking this analysis too far. From the tenor of the observations made above, the idea that law is regarded as more indeterminate and that the process of adjudication is more supple than previous generations admitted would seem to lead naturally to a greater incidence of subsuming individual opinion to the benefits of institutional consensus. Yet dissent seems just as prevalent now as in past eras, if not more so. This is undoubtedly due to a range of diverse factors,¹⁴⁶ but it seems reasonable to suggest that one of them is, in fact, the dismantling of the formalist, declaratory tradition itself. So, whilst the acknowledgment that a number of alternative solutions are legally and logically

¹⁴² *Di Santo v Pennsylvania*, 273 US 34, 42 (1927). It should, however, be acknowledged that in the same paragraph Brandeis J went on to suggest that ‘[i]n the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken.’

¹⁴³ See the references to Alder and Pound in above n 12. Even a Dworkinian analysis concedes some room for disagreement between justices about final answers, though this does not rob them of being ‘right’ in the sense with which he uses that term: Ronald Dworkin, *Law’s Empire* (1986) 264.

¹⁴⁴ (1977) 139 CLR 585.

¹⁴⁵ *Ibid* 603. For an even earlier example, consider the words of Dixon J in *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 in refusing to depart from ‘a recent and well considered decision upon what is evidently a highly disputable question’: at 214 (emphasis added).

¹⁴⁶ Almost all of these are touched upon over the course of this article and to catalogue them here would prove cumbersome. As succinct a list of factors (no fewer than 26) giving rise to dissent as it is possible to compile is found in Ben Palmer, ‘Present Dissents: Causes of the Justices’ Disagreements’ (1949) 35 *American Bar Association Journal* 189. The most original and comprehensive attempt to explain the sociological factors stimulating the growth of dissenting opinions in American courts from the 1930s is the study of Kadzielski and Kunda, above n 70. I am unaware of an equivalent Australian study.

possible may be seen, at least in some cases, to provide a sound justification for judges to abandon their own view in order to support that which is advocated by their colleagues, it appears that admitting the scope of choice has only made consensus less likely overall.¹⁴⁷

Coherence definitely exercises a strong pull upon judicial officers and this idea will be further examined below in the specific context of the rules of precedent. The benefits of consistency and certainty in the law are so obvious as not to require lengthy discussion. Yet the fact that greater recognition of the malleable state of the law has not resulted in higher rates of agreement, but rather the converse, must say something about the process or, more likely, its participants.

B *Individualism and the Authority of the Court*

It is appropriate at this juncture to consider some of the more severe criticism reserved for dissenters. While the last section was concerned with the destabilising effect which dissent may have upon the state of the law, an additional dimension is the damage which a lack of consensus may inflict upon the court itself. To quote the words of Judge Learned Hand, dissent ‘cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.’¹⁴⁸

This remains an elusive concept to observe in practice despite its natural extension from the desire to maintain coherence and consistency in the law and despite the degree to which it has been discussed by commentators in the past. This is because it is not actually dissent per se which is frowned upon, but rather the broader malady of individualism of which it is perhaps the most obvious symptom. It seems a strangely neutral objection in that the relative merits of the majority and minority views do not seem to matter. The very existence of the dissent is resented as an irritation and as a challenge to the security of the majority. Any orthodoxy of method, let alone developmental potential, which the dissent may possess is dismissed. This is compounded by the simple truth that the days of judicial unanimity are long gone, if they were not gone already when Judge Learned Hand wrote in 1958.¹⁴⁹

¹⁴⁷ O’Brien, writing of the United States Supreme Court, puts it thus:

In sum, agreement on an institutional opinion for the Court’s decisions was once deemed central to the Court’s prestige and legitimacy, and to preserving the myth that law is not merely a reflection of politics. The forces of American Legal Realism and liberal legalism brought to the Court by the New Deal justices transformed that norm into one of individual expression.

O’Brien, above n 49, 111. He ascribes the maintenance of individual expression over subsequent decades to judicial socialisation: at 104–5. Palmer, above n 146, pithily echoes this with his 20th reason for dissent (at 190): ‘Relativism, skepticism, cynicism, distrust of reason and of logic, despair of attempts to arrive at objective standards of value, denial of absolute truths’.

¹⁴⁸ Judge Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958* (1958) 72. See also Schermers, above n 52, 1: ‘A divided oracle could not have the authority that is crucial to indisputable interpretation.’

¹⁴⁹ Just one year after Judge Learned Hand’s speech, ZoBell considered that ‘[e]ven if a jural reincarnation of the Great Chief Justice [Marshall] were to preside, the idea of imposing judicial silence upon his Associates by external means — whether by positive law or by the fiat of the Chief Justice — would be intolerable to today’s lawyers and judges’: Karl ZoBell, ‘Division of Opinion in the Supreme Court: A History of Judicial Disintegration’ (1959) 44 *Cornell Law Quarterly* 186, 209–10 (citations omitted).

Nevertheless, the perceived connection between dissenting opinions and harmful individualism remains strong. In his evaluation of the High Court under Chief Justices Mason and Brennan, Patapan warns of the danger of law students being seduced by the easy appeal of a judicial method which is prepared to displace law in order to achieve what is perceived as just.¹⁵⁰ The source of this activist influence is identified (somewhat surprisingly) as the ‘example and ambitions of the “Great Dissenter” on the Bench’.¹⁵¹ This comment reflects Judge Learned Hand’s automatic disdain for dissent, rather than a more principled denunciation of an unacceptable methodology leading to poor judging per se — something which, by way of contrast, Gava attacks without discrimination as to whether the opinion is dissenting or not.¹⁵² It is clear, then, that Gava’s ‘hero-judges’ need not be dissenters — as clear as Chief Justice Gleeson’s converse insistence that dissenters are not heroes.¹⁵³

Of course, there are a few cases where a split in a court clearly did not reflect well on the authority of either the decision reached or the institution itself. The most dramatic example which comes to mind is the United States Supreme Court’s 5:4 split in *Bush v Gore*.¹⁵⁴ That the case had such momentous consequences and involved the Court in what might be seen as an abject failure of the democratic process, presents it as one where an aura of ‘monolithic solidarity’ would have been more desirable than not.¹⁵⁵ An Australian example on a par with that case is hard to produce, though arguably the controversy that resulted from *Wik Peoples v Queensland*¹⁵⁶ was aggravated in no small way by the fact that it was a knife-edge decision.

However, satisfying as unanimity might be, there is no denying that it remains a false comfort. Judge Learned Hand’s desire is fundamentally unattainable. As Sir Anthony Mason has said:

The High Court is not a monolithic institution. It is at any time a group of seven justices who are obliged to hear and determine, according to their individual judgment, particular cases. The justices may have conflicting views on the role of the Court as well as on the principles of law which should govern the case in hand. It would therefore be a serious mistake to assume that, in deciding a case, the Court as an institution embarks upon any general policy with a view to

¹⁵⁰ Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) 192.

¹⁵¹ *Ibid.* I have identified elsewhere the incongruity of this assertion from Patapan given his criticism of some of the majority judgments from the High Court across this period: see Andrew Lynch, ‘The High Court — Legitimacy and Change: Haig Patapan, Judging Democracy — The New Politics of the High Court of Australia’ (2001) 29 *Federal Law Review* 295, 313.

¹⁵² Gava, above n 12, 747.

¹⁵³ ‘Only someone given to mock heroics, or lacking a sense of the ridiculous, could characterise differences of judicial opinion in terms of bravery’: Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (Speech delivered at the Australian Bar Association Conference, New York, 2 July 2000).

¹⁵⁴ 531 US 98 (2000). In that case, Stevens J stated that ‘[o]ne thing ... is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law. I respectfully dissent’: at 128–9.

¹⁵⁵ Certainly, this conclusion is affirmed when one considers the strength unanimity lent decisions such as *Brown v Board of Education of Topeka*, 347 US 483 (1954); *Cooper v Aaron*, 358 US 1 (1958); *United States v Nixon*, 418 US 683 (1974).

¹⁵⁶ (1996) 187 CLR 1.

achieving a particular goal, political or otherwise, external to the disposition of that case.¹⁵⁷

From this statement, it seems that any solidarity which may be achieved is purely an accidental convergence of views. Indeed, we might well be suspicious of unanimity — especially in high-profile controversial cases. As Judge Evans argued, dissents ‘must be, to the thoughtful reader, as well as to the litigants, proof conclusive that the questions presented were thoroughly and seriously considered and this conviction should go far to develop respect.’¹⁵⁸ If unanimity is to be seen as largely serendipitous, then dissent, while it may often be regretted, would seem impervious to admonishments of the sort extended by Judge Learned Hand and others in the same vein.

A final word needs to be added, however, in respect of the phenomenon of persistent dissent. This will be more fully considered in Part IV of this article, but the particularly strategic characteristic of this practice means that it can be seen as amounting to a deliberate challenge to the authority of the court and as thus warranting the severest reproach. Chief Justice Taft of the United States Supreme Court took the view that judges who refused to conform were ‘constitutional lawbreakers’.¹⁵⁹ Judge Evans took the view that dissenters actually encouraged lawlessness among the populace.¹⁶⁰ Writing on Deane and Gaudron JJ’s repeated dissents in some High Court cases in the early 1990s, Justice Keith Mason similarly reflected:

No one expects a judge to give assent to that which he or she believes to be wrong. But is there not a duty on an individual judge to follow ‘the law’ as declared by the court? Surely it is not overstating it to say, with Thurgood Marshall J that ‘obviously, respect for the rule of law must start with those who are responsible for pronouncing the law’? Why is a dissenting judge who declines to follow the majority view declared in an earlier case any different to the journalist who out of conscience defies the law in refusing to reveal a source?¹⁶¹

The maintenance of a view in repeated defiance of the Court’s earlier holdings clearly overlays the general issue of dissent with a sharper degree of complexity. The hostile interaction between the delivery of such opinions and the pervasive influence of precedent may be seen, in those circumstances, to invest calls for restraint and solidarity with a greater claim for judicial obedience. However, as shall be seen, the problem of persistent dissent raises the spectre of other duties beside mere fealty to the status quo. It is at this juncture that dissent presents

¹⁵⁷ Sir Anthony Mason, ‘Foreword’ in Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) viii, viii–ix.

¹⁵⁸ Judge Evan Evans, ‘The Dissenting Opinion — Its Use and Abuse’ (1938) 3 *Missouri Law Review* 120, 129. See also Scalia, above n 68, 35.

¹⁵⁹ See Voss, above n 68, 650 (citations omitted). Cf Kelman, above n 133, 255 (citations omitted): ‘A dissenting justice who exercises that prerogative can be accused of stubbornness, lack of collegiality, or undue pride of opinion, but none of that makes him a “constitutional law-breaker”’.

¹⁶⁰ Evans, above n 158, 125. See also Learned Hand, above n 148, 72.

¹⁶¹ Justice Keith Mason, ‘The Rule of Law’ in P D Finn (ed), *Essays on Law and Government — Volume 1: Principles and Values* (1995) 114, 138 (citations omitted). I am grateful to his Honour for bringing this material to my attention.

itself at its most challenging for judicial method and the values inherent in the law.

IV THE RELATIONSHIP BETWEEN DISSSENT AND PRECEDENT

In the main, dissenting judgments are not diametrically opposed to the concept of *stare decisis*, as observers may be tempted to assume.¹⁶² This is due to the largely neutral nature of what is classed as a minority opinion. The point has been made earlier that dissent is a relational concept rather than one of substance or form.¹⁶³ As such, it is entirely possible for a dissenting view to be in staunch defence of the authority of past precedents and the principle at large.¹⁶⁴ Such incidents lend support to the assessment that precedent is itself, ironically, one of the more profound sources of disagreement amongst judges.¹⁶⁵

Nevertheless, it is important to discuss the doctrine of precedent in any examination of dissent for two reasons in particular. First, the presence of dissent in a decision may constitute a handicap to its authoritative value and render it vulnerable to subsequent overruling. Second — and to return to the problem identified at the close of the preceding section — the practice of persistently rejecting the view of a majority of a court does actually imbue the ability to dissent with a character which renders it hostile to the values of *stare decisis*. Before considering these intersections between dissent and precedent, a word is needed on the applicability of the latter concept generally in courts of last resort.

A Precedent as a Means of Resolving Disagreement in Law versus Judicial Choice in Courts of Last Resort

While the constraining influence of precedent is central to its origins and purpose, the development of the modern doctrine depended very much on its use within a clearly structured hierarchy of courts.¹⁶⁶ Consequently, the rigidity normally associated with the ‘rules’ of precedent did not actually take hold until towards the end of the 19th century. It was at this time, with a distinctly tiered court system, and in the context of other changes to the profession,¹⁶⁷ the House

¹⁶² For instance, in the first of his controversial series of articles on the United States Supreme Court of the day, Palmer opened with an overt link between the two, saying: ‘The prestige of the Court is threatened, if it has not already been seriously impaired, by recent divisions of opinion within the Court and its reversal of precedents that had come to be regarded as enduring landmarks of the law’: Ben Palmer, ‘Dissents and Overrulings: A Study of Developments in the Supreme Court’ (1948) 34 *American Bar Association Journal* 554, 554.

¹⁶³ See above nn 77 and 114 and accompanying text.

¹⁶⁴ For two examples, see the judgments of the minorities in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 129–31 (Brennan J) and *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 448 (Kirby J).

¹⁶⁵ See Mason, ‘Personal Relations’, above n 67, 532. See also Ben Palmer, ‘Dissension in the Court: *Stare Decisis* or “Flexible Logic”?’ (1948) 34 *American Bar Association Journal* 887.

¹⁶⁶ Sir William Holdsworth, *A History of English Law* (1938) vol 12, 146; Theodore Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 350.

¹⁶⁷ Chief amongst these were an improvement in the reliability of court reporting and also the enhanced respectability of the House of Lords as a judicial body after the exclusion of its lay members from participating in legal decisions: see Plucknett, above n 166; Holdsworth,

of Lords laid down restrictions upon its ability to depart from even its own decisions.¹⁶⁸ Though this practice was abandoned by the mid-20th century, it demonstrates the earnestness with which precedent was treated by those courts most influential upon the Australian legal system at the time of Federation.

While, as a consequence, the High Court of Australia developed a corresponding deference to the decisions of English courts in respect of the common law, it never followed the practice of considering itself bound by its own decisions.¹⁶⁹ The well-known statement of Isaacs J in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* made this very clear early on:

The oath of a Justice of this Court is 'to do right to all manner of people *according to law*.' Our sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.

Whatever else may be said with respect to the reconsideration of former decisions — and it is unnecessary here to consider the principles upon which the Court should act in particular cases — so much at least emerges as is undoubtedly beyond challenge, that where a former decision is clearly wrong, and there are no circumstances countervailing the primary duty of giving effect to the law as the Court finds it, the real opinion of the Court should be expressed.

In my opinion, where the prior decision is manifestly wrong, then, irrespective of consequences, it is the paramount and sworn duty of this Court to declare the law truly.¹⁷⁰

This should not be taken to mean that the High Court has played fast and loose with its past decisions. On the contrary, the connection between the institution and the English legal system was sufficiently tangible for much of the 20th century as to result in a sharing by the former of the latter's core values, even if it chose not to take the ultimate step of enshrining them in a formal rule. Thus, the High Court operated in a milieu where precedent was accorded great respect — not least because in many matters it regarded itself bound by the decisions of other courts — yet simultaneously it had uninhibited freedom to control the development of its own jurisprudence, particularly with respect to constitutional matters. Of course, now that the High Court is the apex of our legal system, it does not defer to the decisions of any other court and is left entirely to its own devices in weighing competing authorities.

above n 166, 146–58; Patrick Parkinson, *Tradition and Change in Australian Law* (2nd ed, 2001) 70–1.

¹⁶⁸ *London Street Tramways Co, Ltd v London City Council* [1898] AC 375. The Court of Appeal took this step in respect of its own decisions much later in *Young v Bristol Aeroplane Company Ltd* [1944] KB 718. This decision still determines practice in that Court: *Davis v Johnson* [1979] AC 264.

¹⁶⁹ *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576, 582 (Lord Diplock) (Privy Council); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554.

¹⁷⁰ (1913) 17 CLR 261, 278–9 (emphasis in original).

Additionally, the nature of the cases which make their way to final courts present their own problems for the adherents of a strict application of the doctrine of precedent. They tend to be 'hard cases' to which no pre-existing authority is readily applicable. In such instances, the scope of judicial choice is substantially increased in the process of trying to reason a solution by means of analogy.¹⁷¹ That these choices are far from simple, hinging as they often do upon extrinsic values, only further explains why the justices are likely to divide over the best approach.¹⁷² Even when a relevant precedent does exist, these factors may lend truth to the aphorism that 'hard cases make bad law' and the judges deciding at present may find irreconcilable the values which are evident in the court's previous work.

The point is that the doctrine of precedent has been accorded a chequered application in the High Court and is weakened in the context of final courts generally. The perceived result may be that the doctrine only exists as a constraint to be ignored or observed at the discretion of the individual judge: in short, as no constraint at all. But while this has been a significant criticism levelled by the realists and critical legal studies movements, the fact remains that some cases, decried as unpalatable or even wrong, are nevertheless followed.¹⁷³ This is the surest indicator that precedent *does* matter.¹⁷⁴ While it is perhaps tempting to swallow a chaos theory of legal method, Bennett's reasons for insisting upon the importance of precedent seem to have direct relevance for the High Court:

There is evidence that precedent does matter a great deal, even in the United States Supreme Court. First, a number of the justices say it does. Second, anyone who has ever argued before the Supreme Court knows that an enormous

¹⁷¹ McHugh, above n 23, 44–8; Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) ch 5.

¹⁷² Alder, above n 1, 226; Ben Palmer, 'Background for Dissensions: Pragmatism and Its Effects on the Law' (1948) 34 *American Bar Association Journal* 1092; Roscoe Pound, 'The Theory of Judicial Decision' (1923) 36 *Harvard Law Review* 641, 654; Pound, '*Cacoethes Dissentiendi*', above n 12, 795. With the arrival of the *Human Rights Act 1998* (UK) c 42, the role of values has been decisively accommodated into the mainstream of the English legal tradition with Lord Browne-Wilkinson saying:

The features of current judicial reasoning are therefore as follows. First, the actual decision is primarily based on moral, not legal, factors. Second, those moral reasons are not normally articulated in the judgment. Third, the morality applied in any given case is the morality of the individual judge ...

Lord Nicolas Browne-Wilkinson, 'The Impact on Judicial Reasoning' in Basil Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (1998) 21, 22. It is precisely statements of this sort which fuel opponents of enhanced judicial review under a Bill of Rights: see Waldron, above n 29, 180–7.

¹⁷³ The examples considered in above Part III are strong illustrations of the pull which precedent will exert upon even the most reluctant of justices.

¹⁷⁴ As Bennett has said, 'if *stare decisis* means anything interesting at all, it must mean that a precedent has a claim on our obedience even though we disagree with its substance': Robert Bennett, 'A Dissent on Dissent' (1991) 74 *Judicature* 255, 256. See also Harold Spaeth and Jeffrey Segal, *Majority Rule or Minority Will: Adherence to Precedent on the US Supreme Court* (1999) 3. So far as evaluating judicial performance through precedent, Goldsworthy asserts: 'It is what judges do in [a] minority of cases, when the law dictates a result which they believe is unjust or contrary to the public interest, which most clearly indicates whether or not they are extreme legal realists': Jeffrey Goldsworthy, 'Commentary' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997) 259, 260.

amount of time and energy is devoted to dealing with precedent, to relying on it, distinguishing it, urging its overruling. That behaviour is quite irrational if in fact precedent does not matter at all. ... From the earliest days of legal education, precedent becomes something like a vocabulary of the law, providing a framework in which discourse is made possible. That vocabulary does not answer the question posed, but it is both a tool for doing so and a decided influence on the shape of the answers given.¹⁷⁵

So, we are left with courts of last resort that have scope for choice in adjudication but yet deal routinely in the ‘vocabulary’ of previous authority. The safest ground does indeed seem to be that, rather than being hidebound by precedent or rampantly creative, these courts tread a middle road. The advantage of an extreme position, however, is that it enables definition. In discarding its absolutist stance towards precedent in 1966, the House of Lords proclaimed its intention to ‘depart from a previous decision when it appears right to do so.’¹⁷⁶ As subsequent experience was to show, the simplicity of that language is only matched by the supreme confidence that it might actually mean something in substance.¹⁷⁷ The House of Lords should have known from an examination of other final courts, such as those of Australia and the United States, that to declare a flexible approach to precedent is one thing, but that effectively striking the balance is quite another.

B *Factors in Favour of Overruling and the Likelihood of Dissent*

Those scrutinising the decisions of courts of last resort would be hard pressed to discern any clearly consistent approach to departing from past authority.¹⁷⁸ This is despite the efforts of members of such courts to articulate guidelines governing the overruling of past decisions. The High Court of Australia has indicated a general willingness to consider such a course in the following context:

the Court will re-examine a decision if it involves a question of ‘vital constitutional importance’ and is ‘manifestly wrong’. Errors in constitutional interpretation are not remediable by the legislature, and the Court’s approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes.¹⁷⁹

¹⁷⁵ Bennett, above n 174, 257 (citations omitted). Stone would agree with Bennett on the use of precedent — while certainly not determinative of anything, it provides the ‘vocabulary’ through which judicial choice is made: see Stone, *Precedent and Law*, above n 171, 83.

¹⁷⁶ ‘Note’ in [1966] 3 All ER 77, 77 (Lord Gardiner LC).

¹⁷⁷ Julius Stone, ‘The Lords at the Crossroads — When to “Depart” and How!’ (1972) 46 *Australian Law Journal* 483, 484. See also Julius Stone, ‘1966 and All That! Loosing the Chains of Precedent’ (1969) 69 *Columbia Law Review* 1162, 1201–2.

¹⁷⁸ Henry Monaghan, ‘*Stare Decisis* and Constitutional Adjudication’ (1988) 88 *Columbia Law Review* 723, 753.

¹⁷⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554. This is not to suggest that the Court excludes the possibility of departing from precedent in non-constitutional matters (see *John v Commissioner of Taxation of the Commonwealth* (1989) 166 CLR 417, 438–40 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ)), but rather that the possibility of legislative intervention makes it less inclined to do so.

However, as Sir Anthony Mason wrote: 'The perennial problem is, of course, to arrive at the conviction that the old decision is wrong. Many legal questions are so finely balanced that the balance in favour of one answer rather than another is marginal.'¹⁸⁰

Given this difficulty, judges have tended to require the consideration of factors additional to a belief that the previous decision is incorrect. This is evident even in Isaacs J's insistence that the decision be 'manifestly' wrong,¹⁸¹ although this qualification adds very little.¹⁸² Thus Horrigan has identified a two-stage process where substantive wrongness is simply a precondition for overruling, which is in turn determined by a number of factors or tests which illuminate the precedential 'propriety of maintaining a prior decision'.¹⁸³ These precedential criteria include, but are by no means limited to, the age of the decision, its place within a line of authority, differences of opinion within its majority and the degree to which the decision has been relied upon by the community.¹⁸⁴

Dissent is relevant to this issue in two distinct and rather contradictory ways. First, given the range of factors which may determine the weight to be accorded to *stare decisis*, the fact that an earlier decision was reached over protestations from a minority of the court might assist to weaken it as an authority.¹⁸⁵ Admittedly, however, judicial pronouncements have tended to focus upon a lack of common reasons within the majority¹⁸⁶ or a split amongst a bench not fully

¹⁸⁰ Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111.

¹⁸¹ On this point, Harris has effectively called Isaacs J's bluff by asking: 'Why should not "mere" wrongness be enough to warrant departing from an earlier decision? ... If there is such a knowable entity as the organic law of the constitution, should not loyalty to it be overriding every time? If there is no such entity, is "loyalty" talk plain moonshine?': J W Harris, 'Overruling Constitutional Interpretations' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 231, 232.

¹⁸² *Second Territory Senators Case* (1977) 139 CLR 585, 621 (Aickin J). See also Monaghan, above n 178, 762 (emphasis in original): 'Whether a precedent is seen as clearly wrong is often a function of the judge's self-confidence more than of any objective fact.' Note, however, Nelson's reinvigoration of this debate by arguing that a precedent should be overruled when it can be shown to be 'demonstrably erroneous', by which he means not just that today's court would have reached a different result, 'but also that the prior court went beyond the range of indeterminacy created by the relevant source of law': Caleb Nelson, 'Stare Decisis and Demonstrably Erroneous Precedents' (2001) 87 *Virginia Law Review* 1, 8.

¹⁸³ Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199, 209. See also Larry Alexander, 'Constrained by Precedent' (1989) 63 *Southern California Law Review* 1, 59; Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167, 187, 192.

¹⁸⁴ Horrigan identifies 10 broad categories of precedential criteria which he groups under three general headings: (i) the nature of the decision in question; (ii) the nature of the subject matter; and (iii) the consequences of overruling: Horrigan, above n 183, 210–11. Boeddu and Haigh have recently considered the effects of individual rights, governmental reliance and public inconvenience and perception in the overruling of constitutional cases: Boeddu and Haigh, above n 183, 171–86. See generally R C Springall, 'Stare Decisis as Applied by the High Court to Its Previous Decisions' (1978) 9 *Federal Law Review* 483; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 433–44. For a list of factors derived from consideration of English, as well as Australian, cases, see Lyndel Prott, 'When Will a Superior Court Overrule Its Own Decision?' (1978) 52 *Australian Law Journal* 304, 314–15.

¹⁸⁵ See *Cain v Malone* (1942) 66 CLR 10, 15 (Latham CJ); *Cullen v Trappell* (1980) 146 CLR 1, 10–11 (Gibbs J); Mason, 'The Use and Abuse of Precedent', above n 180, 101.

¹⁸⁶ See *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 35 (Gaudron J). Cf *McHugh J* at 37–8.

constituted¹⁸⁷ rather than the presence of dissent per se. The reason for this would be the danger of simple disagreement and subsequent overruling due only to a change in the composition of the bench — something which judges are usually adamant should not be a factor inducing change in the law.¹⁸⁸ The United States Supreme Court has not been quite so careful in resisting the temptation to use the presence of dissent as an Achilles heel, leading Voss to conclude of that body that ‘dissents are not only a blaring difference of opinion by a justice, but are now a speeding vehicle for reconsideration of precedent.’¹⁸⁹ From the foregoing Australian authorities, such an assessment is not readily applicable to the dissenting opinions of the High Court. Indeed, dissents may be of as little importance in undermining a precedent as unanimity is in protecting one.¹⁹⁰

This ambiguity about the relevance of dissent as a factor in overruling reflects the frustrating fluidity of all the precedential considerations generally.¹⁹¹ Dixon J’s statement that the ‘Court has adopted no very definite rule as to the circumstances in which it will reconsider an earlier decision’¹⁹² is as true today as it was over 50 years ago. It is in this regard that we come to the second important way in which this topic relates to dissent. The inherently unstable application of *stare decisis* in a final court manifests the differing emphases which judges ascribe to the incommensurable values of consistency, certainty, flexibility and change.¹⁹³ Thus, questions of precedent go straight to the heart of judicial choice, while sharp divisions among the judges, who necessarily pursue individualistic balancing of those values, must be expected.¹⁹⁴

¹⁸⁷ *Baker v Campbell* (1983) 153 CLR 52, 103 (Brennan J). Though not even this was enough in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493, 496 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ). The even split in the six member bench presiding in *Gould v Brown* (1998) 193 CLR 346 caused debate over its precedential value very shortly thereafter in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, with that divide being best observed by comparing the comments of Gummow and Hayne JJ (at 570–2) with those of Kirby J in lone dissent (at 598).

¹⁸⁸ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd [No 1]* (1914) 18 CLR 54, 69 (Barton J) (*‘Tramways Case’*); *Second Territory Senators Case* (1977) 139 CLR 585, 600 (Gibbs J). See also Lord Wilberforce’s clarification of the Practice Statement of 1966 (*‘Note’* in [1966] 3 All ER 77) in this respect in *Fitzleed Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, 999. Cf *Second Territory Senators Case* (1977) 139 CLR 585, 594 (Barwick CJ); Transcript of Proceedings, *Levy v Victoria* (High Court of Australia, Dawson J, 6 August 1996). The tension between this ideal and the reality that new members of a court will legitimately bring a new perspective to bear on the law is perhaps best captured in a succinct paragraph of Kirby J’s opinion in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 597–8.

¹⁸⁹ Voss, above n 68, 660. The example cited by Voss is the comments of Rehnquist CJ in *Payne v Tennessee*, 501 US 808, 829 (1991).

¹⁹⁰ Note, by way of example, the willingness of three members of the majority (Gaudron, Gummow and Kirby JJ) in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 to dispatch *Teori Tau v Commonwealth* (1969) 119 CLR 564 to the annals of legal history.

¹⁹¹ Indeed, in light of this, Keyzer postulates that ‘[c]hanges in the composition of the bench may well be the most reliable indicator that constitutional change is likely’: Patrick Keyzer, ‘When Is an Issue of “Vital Constitutional Importance”? Principles Which Guide the Reconsideration of Constitutional Decisions in the High Court of Australia’ (1999) 2 *Constitutional Law and Policy Review* 13, 18.

¹⁹² *A-G (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237, 243–4.

¹⁹³ Mason, ‘The Use and Abuse of Precedent’, above n 180, 111; Zines, above n 184, 443–4.

¹⁹⁴ Alder’s analysis of the causes of dissent lying in the clash of incommensurable values is directly relevant to this point: Alder, above n 1, 227–33. Cf Horrigan, above n 183: Horrigan’s stance

C Sustained Defiance of Precedent — The Practice of Persistent Dissent

Nowhere is the discord over values so blatant as in the refusal by a minority of judges to adhere to a precedent arrived at or maintained by their colleagues. The practice of persistent dissent evinces a clear favouring of the values of change and reform over those of predictability and stability, as well as a stubborn belief that the dissenter's view is correct. Isaacs J's declaration that 'sworn loyalty' to the law demands that it be given effect despite 'conflict with what we or any of our predecessors erroneously thought it to be' makes plain the way in which he ranks the values under discussion.¹⁹⁵ His continued dissent over the legitimacy of the implied reserved state powers and intergovernmental immunities doctrines demonstrated the consequences of this conviction — a court repeatedly fractured over the same issue and, arguably, a weakened strain of authority vulnerable to overthrow under changed conditions.¹⁹⁶

Despite the earlier comments about the scope for judicial choice, it appears that there are some issues where judges are convinced that 'the question on analysis is capable of but one answer.'¹⁹⁷ In addition to the example of Isaacs and Higgins JJ in the cases leading to *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,¹⁹⁸ consider again the judgments of Barwick CJ and Aickin J in the *Second Territory Senators Case*.¹⁹⁹ Another prominent pattern of persistent dissent was set by Deane and Gaudron JJ in the early 1990s.²⁰⁰ Focusing upon the legal values of the individual judges themselves would seem to be just as important as identifying the substantive issues which may give rise to a refusal to follow past authority. A belief that the present law is not as it ought to be is one thing and a view commonly encountered — but what drives the persistent dissenters, and differentiates them from their colleagues, is the refusal to be swayed by any of the precedential criteria as a basis for upholding that law.²⁰¹ Between the 'organic law' and the precedents there can be no contest: the individual's sense of duty as a judge outstrips any gains from

seems to reject this as insufficient and to demand that there be devised a 'measure commensurating these competing demands of flexibility and certainty' (at 214) in order to establish 'determinate guidelines for High Court overruling and other precedential issues' (at 216). Boeddu and Haigh suggest that 'while no exact guidelines can be formulated, it behoves the Court to be direct and avoid reasoning by the use of easy, but unhelpful, terminology': Boeddu and Haigh, above n 183, 194.

¹⁹⁵ *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278.

¹⁹⁶ See generally John Goldring, 'The Path to *Engineers*' in Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (1997) 1; Zelman Cowen, *Isaac Isaacs* (1993) 153–62.

¹⁹⁷ *Babataris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 14 (Mason J).

¹⁹⁸ (1920) 28 CLR 129 ('*Engineers Case*').

¹⁹⁹ (1977) 139 CLR 585.

²⁰⁰ These justices advanced a view of s 118 of the *Constitution* in *Breavington v Godleman* (1988) 169 CLR 41 which they maintained in the face of contrary majority opinion in *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463. Deane and Gaudron JJ showed similar persistence in another line of cases concerned with the jurisdiction of military tribunals: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 (in the latter case, cf McHugh J).

²⁰¹ See Zines, above n 184, 444.

institutional consistency. This disparity in judicial outlook is understandably a source of frustration to those following the Court's work:

What makes it difficult, and very unsatisfactory, is that not all of our appellate judges play by the same rules. With the current High Court, it is often impossible to predict whether individual justices will accept the ruling of the majority in an earlier case as representing the law unless and until it is reconsidered by the High Court itself.²⁰²

Persistent dissenters are motivated by two concerns. First, they are unable to sign off on a view they find unacceptable. Examples abound of course, but the most striking demonstration of absolute rejection (and indeed repulsion) of a majority view are the repeated dissents of Brennan and Marshall JJ of the United States Supreme Court against the constitutionality of the death penalty.²⁰³ The second reason is more purposive: 'By acting on the basis of his own counter-doctrine, the dissident may imagine that he is preventing the official position from settling into a marmoreal hardness that will defy future displacement.'²⁰⁴

Through repeated assertion of his or her views, the dissenting judge indicates more than a hopefulness that their position will 'appeal ... to the intelligence of a future day'.²⁰⁵ This is a deliberate strategy to ensure that the majority view is not further entrenched by unanimity and that the door remains open for an about-face in the law at some later juncture. In this way, persistent dissent would seem particularly driven by the considerations of development in the law which were canvassed in Part II.

Bennett, however, argues that the initial filing of a dissent capitalises upon those advantages and that, in most cases, subsequent protestations add very little. At the same time, he argues that they inflict damage upon the courts and the law itself through the consequent instability and unpredictability.²⁰⁶ Kelman responds:

The idea of keeping the issue alive is perfectly legitimate. Whatever its actual effectiveness, it is not an act of institutional treachery on the part of the dissenter. There is no ethical imperative that confines a dissenter to a single, not-to-be-repeated statement of disagreement.²⁰⁷

What is striking in both these conflicting assessments is that neither Bennett nor Kelman can actually state as a matter of fact what the impact of persistent dissent has been upon the jurisprudence of the United States Supreme Court. In fact, both commentators seem to think the impression left by repetition is minimal.²⁰⁸ Bennett's position is therefore easier to appreciate than Kelman's,

²⁰² Mason, above n 161, 137 (citations omitted).

²⁰³ Michael Mello, 'Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment' (1995) 22 *Florida State University Law Review* 591; Michael Mello, *Against the Death Penalty — The Relentless Dissents of Justices Brennan and Marshall* (1996).

²⁰⁴ Kelman, above n 133, 254.

²⁰⁵ Hughes, above n 59, 68.

²⁰⁶ Bennett, above n 174, 260.

²⁰⁷ Kelman, above n 133, 254.

²⁰⁸ *Ibid* 255.

the latter waiving the institutional costs, while simultaneously admitting that the profits of the practice may be slim. But the fact that a minority of the United States Supreme Court has recently reaffirmed the ‘need for continued dissent’ from majority rulings on issues of state immunity from federal law²⁰⁹ indicates that, at least from a judicial perspective, there is real value to be gained from taking such a course. This would seem to warrant a proper assessment of the consequences of persistent dissent in order to conduct a well-rounded debate on these issues.

The experience of the High Court of Australia also invites greater scrutiny of this phenomenon. To return to an example given above, it is interesting to speculate whether the Court in the *Engineers Case* would have rejected the implied federal doctrines had there not been a string of dissents from Isaacs and Higgins JJ drawing attention to their inadequacies. Even accepting the influence of other factors,²¹⁰ the instability of the area which was achieved by the dissents of those two Justices must have assisted the Knox Court in its resolve to reject the doctrines. More generally, a persistent pattern of disagreement in other areas of the law (say, the interpretation of ss 90 and 92 of the *Constitution*, to take two troublesome examples) has prevented the locking in of any majority view for a substantial period of time. The willingness of recent judges to adopt a line of persistent dissent²¹¹ indicates that there must be something in the practice. In order to understand why some judges more than others are drawn to employ it, let alone to pass comment upon its effects in respect of the standing and procedures of the institution of the Court itself, some research must be performed which demonstrates the consequences of persistent dissent for the development of the law.²¹²

V CONCLUSION

The tradition of individual expression found in Australian courts has been an unquestioned and largely unexamined part of our inheritance from the English legal system. Wherever the common law has taken root, so too has the ability of

²⁰⁹ *Federal Maritime Commission v South Carolina State Ports Authority*, 535 US 743, 788 (2002) (Breyer J; Stevens, Souter and Bader Ginsburg JJ agreeing).

²¹⁰ Beyond the inherent weaknesses of the doctrines themselves are the considerations raised by Windeyer J in *Victoria v Commonwealth* (1971) 122 CLR 353, 395–7 (*‘Payroll Tax Case’*).

²¹¹ See above n 200 and accompanying text.

²¹² Kelman has argued that the dissenting judge faces not two, but three options in subsequent cases. The choice is not so stark as to be between acceptance of the unpalatable precedent or its continued rejection through repeated dissent. Instead, the judge may temporarily acquiesce in the authority of the earlier decision, ‘counting on time and tide to bring about a reconsideration of the precedent, reserv[ing] the right to join, indeed to rally, his colleagues to an express reversal when the moment is opportune’: Kelman, above n 133, 259. There are several problems with the existence of a general path of ‘temporary acquiescence’ open to past dissenters, however. The issue of identification aside, the theoretical difficulty with the ‘third way’ is its ambivalence with respect to precedent. Much more so than persistent dissent, temporary acquiescence demonstrates a particularly cynical stance towards the values of *stare decisis*. Kelman’s theory of temporary acquiescence will be difficult to observe — and may indeed be problematic as a theory explaining judicial action. That latter judgment cannot be conclusively made until an attempt to chart the existence of temporary acquiescence is seriously undertaken. Until such time as that work is performed in respect of the High Court of Australia, any further comment remains merely speculative.

judges to give independent voice. Even in the United States Supreme Court, despite Marshall CJ's efforts, Johnson J kept alive the ability to dissent and, increasingly, the 'middle way'²¹³ of judgment delivery resembles the seriatim practice.

The High Court of Australia has, on the whole, had few qualms about this mode of opinion delivery. Indeed, for much of its first 100 years, the Court has been blithely indifferent to the replication of effort which manifold concurring judgments involves. This has, as discussed, been the source of a deal of criticism in recent decades and the present Court assures us that it is aware of the problem and is taking steps to alleviate it, though its success in doing so is open to question.²¹⁴ As part of this individualism, dissents have generally attracted little attention. When they have, it has most often been in respect of particular justices. Even then, though, the dissenting itself is in many ways seen simply as a by-product of the novel judicial approach being employed. The substance of disagreement has tended to obscure examination of the act of disagreement itself. However, to reiterate, any attempt to understand dissent on its own terms requires acknowledgment of its chiefly relational, rather than substantive, nature. It is a disinclination to separate the two which presumably explains the absence of an Australian study of dissent itself.

In attempting to fill this gap, this article has necessarily drawn on comparative materials fairly extensively. With the content of disagreement to one side, the role, functions and liabilities of dissent are germane to discussions of judicial method generally. The American literature has trod much of this ground already, albeit in the much more politically-charged atmosphere of the Supreme Court. To extend those principles and propositions to the High Court has simultaneously demonstrated their universality and shed light on a little appreciated, yet powerful, feature of the Court's work.

Dissent in Australia's highest court presents largely the same advantages and activates the same concerns as it does elsewhere. To recap those arguments, disagreement through individual expression offers significant assistance in legitimising judicial review through its demonstrated commitment to principles of deliberative democracy; it provides a competitive stimulus to the production of judgments resulting in better reasoned opinions and even, in some cases, the securing of consensus; and importantly, it allows room for innovation so that the law can change and develop in a transparent and coherent way. Of course, there is a fine line between this last function and a profusion of individual opinions weakening both the state of the law and the authority of the court from which it emanates. For these reasons, instances of judges holding back from their preferred view of a matter are not so difficult to find.

While there are numerous benefits in allowing disagreement to be aired by individuals, there remains a sense of harm that may be done to the institution as a consequence. This is especially so in the case of a strain of persistent dissent over a particular issue — a phenomenon from which the High Court has not been

²¹³ Bader Ginsburg, above n 58, 134.

²¹⁴ Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26 *University of New South Wales Law Journal* 32, 49, 61–2.

immune. As was seen, the values of *stare decisis* are often to be found at the heart of a divided court. Although the doctrine of precedent aims to ensure consistency and stability in the law, its correct application in any given case cannot help being a fault-line over which the judges may disagree, particularly in a final court.

It should be apparent from preceding sections of this article that dissent and minority concurring judgments are an inevitable feature of common law courts. To that extent, delivery of some ultimate verdict in favour or against the filing of separate judgments is futile. A capacity for individual expression is bound to be employed. Although there is sense behind calls for fewer needless concurrences, minority judgments will continue to be filed regardless of generalised pleas for restraint. The frequency of such minority judgments will vary — despite all pronouncements to the contrary — on the composition of the bench more than any other factor. A strong institutional voice is to be expected when the individuals of which the court is comprised share a very similar outlook — not just to the problems they face, but also to the values inherent in questions of precedent and change. Apart from that seeming an unlikely trick to pull off given the vagaries of the appointment process, it is not hard to imagine that such smug certainty across the court's judges might be a less than desirable thing. Dissent occurs over matters of substance, but in doing so it conveys a sense of the differences which exist between the legitimate methods of the justices themselves. It affirms that a degree of diversity is contained within the institution, which is often glossed over by stereotyping its members.²¹⁵

It is human nature that opposition to the voicing of dissent is generally stirred only when the commentator believes the minority's view of a case to be wrong: were the positions reversed, she or he would likely be thankful that the flaws of the majority are so effectively exposed by the dissident. That is probably the key to a true appreciation of individual judgments voicing disagreement — they may cancel the 'monolithic solidarity' of the court but in doing so they allow engagement by a wider audience with its decisions. The myths of infallibility and omnipotence are worth sacrificing in order to show that the capacity for deliberation in the wider community is matched by that found within the court.

²¹⁵ This is not to say that I find the present Court sufficiently diverse, but simply that dissent indicates the presence of different perspectives.