# Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion

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*A dissenting opinion . . . has nothing more than individual authority. By the suppression of dissenting opinions and statements of dissent space will be economized in our reports; and the dignity and influence of our judicial decisions will be greatly enhanced.*[1]

Around the turn of the last century, many American lawyers wanted to ban dissenting opinions in all courts of last resort. They derided dissenting opinions as a pernicious waste of time, one that caused uncertainty in the law, shook the public's faith in the courts and was fundamentally inconsistent with the nature of judicial authority. A dissenting opinion, they claimed, was no more than a statement by a judge as individual, but such statements should not be published in law reports. Though the idea never got very far—only one state prohibited the publication of dissenting opinions in official reports—the debate over whether to publish dissent engaged the energies of leading legal periodicals, bar associations, judges and lawyers for a considerable span of years.

The turn-of-the-century controversy over the publication of dissenting opinions has escaped contemporary academic attention. To the extent that the criticism of dissenting opinions has appeared in scholarship at all, it has been understood as an example of "classical legal thought."[2] As one account puts it, because classical legal thought strove to portray "law [as] neutral, objective and prepolitical," it was embarrassed by and adamantly opposed to the public expression of judicial disagreement.[3] In an article on the opinion-writing practices of the Taft Supreme Court, Robert Post quotes some of the lawyers from this earlier era who inveighed against the

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1. *Current Topics*, 10 ALB. L.J. 324, 325 (1874).

2. *See, e.g.*, WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953, at 16 (2006).

3. *Id.*

publication of dissent.[4] He too uses turn-of-the-century articles opposed to the publication of judicial dissent as examples of "a jurisprudential understanding of the nature of law [as] a grid of fixed and certain principles designed for the settlement of disputes,"[5] an understanding which he argues the members of the Taft Court gradually abandoned.

Their authors' sights set elsewhere, such accounts tell only part of the story. They do not observe that articles criticizing dissenting opinions were not isolated polemics but were instead part of a roughly thirty-year debate within the Bar on the propriety of published judicial dissent. Further, though classical "jurisprudential understanding[s] of the nature of law"[6] may have motivated or undergirded the desire to abolish dissent, many of those who argued about dissenting opinions in the nineteenth century reasoned about their disagreement in terms of different understandings of the nature of courts as institutions and the nature of the judicial office. Dissent's would-be abolishers promoted a vision of courts as composite institutions into which judges' individuality should be merged, while defenders of dissent reasoned from the notion that courts should speak as collections of individual judges. Dissent's opponents argued that judges should maintain a stricter separation between their private views and their official pronouncements of the law in law reports, while those enamored of dissent celebrated dissenting opinions as expressions of judges' authentic personality and virtuous character.

As anyone familiar with contemporary American courts could say, dissents' would-be abolishers failed spectacularly. They failed on an institutional level in that the publication of dissenting opinions by American judges is today an accepted and largely unchallenged practice. But their failure was also discursive in that their desire for courts to speak as anonymous, composite, and impersonal institutions runs counter to one of the main discourses on judicial legitimacy today. When lawyers in the 1980s and 1990s expressed an anxiety that the federal judiciary was becoming bureaucratized, they worried that they could no longer detect individual responsibility or superior traits of personal character behind judicial decisionmaking. American jurists now seemed unanimous in their belief that the personal, non-institutional character of judging was essential to judicial legitimacy.

This Article examines how lawyers at both ends of the twentieth century discussed the nature of judicial authority in terms of whether it

4. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

5. *Id.* at 1274.

6. *Id.*

was personal or impersonal. Lawyers wrestling with the question of published dissent in the nineteenth century were, of course, dealing with a different institutional feature of the judiciary than lawyers concerned about the diffusion of adjudicative responsibility within the federal judiciary eighty years later. Yet there is an important commonality in these two groups of lawyers' discussions of the "personal" nature of judicial authority: both groups of lawyers reasoned about whether it was desirable for the judicial office to integrate a judge's official role and his or her private self. Those who argued for a prohibition on dissent argued that law reports should only contain expressions by judges in their official capacity announcing the law on behalf of the court and should not contain statements by them as individuals. By contrast, when lawyers later worried that the federal judiciary had become bureaucratized, they expressed a concern that adjudication be carried out by judges who acted not only in their capacity as officials, but also in their capacity as individuals, guided by personal conscience, experience, and virtue as well.

The Article proceeds in five parts. Part I examines the late nineteenth- and early twentieth-century debates over the propriety of published judicial dissent in courts of last resort. In Part II, I contrast the debate over dissenting opinions around the turn of the twentieth century with the discussion of judicial bureaucratization towards the century's end. The comparison reveals a striking similarity in the terms in which judicial legitimacy was discussed, as in both episodes lawyers understood the distinction between personality and impersonality to be essential to judicial legitimacy. I then situate that distinction in Weberian accounts of institutional modernization. Though turn-of-the-century opponents of dissent constructed dissenting opinions as no more than a personal statement by a judge as an individual, there is of course no reason that dissenting opinions must be understood as such. As Part III explores, the publication of dissenting opinions might further a number of different institutional goals of the judiciary. Part IV explores how the terms in which turn-of-the-century lawyers opposed dissenting opinions might suggest the usefulness, and the limitations, of a Weberian framework to understanding broader changes to nineteenth-century officeholding. Finally, with the caveat that the rise and fall of diffuse intellectual movements do not lend themselves to strong causal accounts, this Article speculates on why the debate over dissenting opinions died off when it did and why lawyers were attracted to a vision of judicial authority as commingling a judge's personal and official capacities.

## I. DISSENT – THE TURN OF THE CENTURY DEBATE

"A dissenting opinion . . . has nothing more than individual authority. By the suppression of dissenting opinions and statements of dissent space will be economized in our reports; and the dignity and influence of our judicial decisions will be greatly enhanced,"[7] opined the *Albany Law Journal* in 1874. Frequently editorializing on the topic starting in the 1870s, the *Albany Law Journal* took interest in the propriety of published judicial dissent well before most of its contemporaries. By the late 1880s, other publications had begun to take a stance on whether dissenting opinions should be published. The exchange of articles culminated in an explosion of interest around the turn of the century, as bar associations and law journals across the country earnestly and intensely debated the question of whether it was proper to allow dissenting opinions to be published in law reports. Louisiana went so far as to prohibit their publication by constitutional amendment in 1898; similar steps were considered in other states.

The opponents of dissenting opinions won few victories, and their arguments, like those of their adversaries, were often characterized more by rhetorical bombast than intellectual sophistication. But through their very grandiloquence, both the defenders and opponents of dissent provide a window into tensions in the legal profession's understanding of the nature of judicial and legal authority. As this Part explores, their debate turned not only on competing understandings of the nature of law, but also on competing visions of the nature of courts and of the judicial office. The objection expressed by those opposed to published dissent was not only that dissenting opinions suggested that law was indeterminate and that courts might be fallible, but also that courts were corporate units and that it was therefore inappropriate to publish the private views of a judge in law reports. By contrast, those who celebrated or defended dissent promoted an image of courts as collections of individual judges; they understood dissenting opinions not only to be necessitated by norms of democratic publicity, but also to be valuable as expressions of individual conscience by heroic, virtuous judges.[8]

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7. *Current Topics*, *supra* note 1.

8. As a prefatory matter, I note some other efforts to suppress dissenting opinions that are unrelated to the national debate explored in this Article.

The justices of the Massachusetts Supreme Judicial Court, as a matter of long-standing tradition, dissented only rarely in the nineteenth century. *See Current Topics*, 33 ALB. L.J. 161, 162 (1886). Although the reasons that this tradition existed in Massachusetts are unclear, the fact of its existence often surfaced in the debates over dissent in the final third of the nineteenth century. *See, e.g.*, *id.*; *Current Topics*, 33 ALB. L.J. 421, 423 (1886) (explaining that "[w]e are quite willing to off-set the practice of Massachusetts against this 'Star Chamber' claptrap"); *Current Topics*, 34 ALB. L.J. 461, 462 (1886) (acknowledging that "a dissenting opinion of the Massachusetts Supreme Court has

*A. To Publish or To Prohibit: Controversy with the Profession*

Founded in 1870 and published weekly, the *Albany Law Journal* was the country's leading legal periodical in the final third of the nineteenth century.[9] As one contemporary newspaper gushed, "[T]he *Albany Law Journal* is the ranking legal publication in the United States and its editorial utterances have as much weight among the members of the profession at large as a number of the courts themselves."[10] Taking advantage of the improved postal system, the *Albany Law Journal* was the most successful of a number of legal periodicals that catered to the expanded and democratized American bar in the years following the Civil War. It functioned as a legal variety magazine, its pages filled by reports of recent cases, flowery essays on legal topics, pompous editorials, and waggish gossip.[11] Starting in its early years of publication, the *Albany Law Journal* persistently "advocated the abandonment of the practice of reporting dissenting opinions"[12] and did so well into the next century.

Though the *Albany Law Journal* appears to have taken the lead in the discussion and its initial pronouncements appear to have gone unanswered, by the 1880s dissenting opinions had become a hot topic.[13] Virtually all the major American legal periodicals engaged in a heated exchange of editorials over the propriety of dissenting opinions, with the exchange reaching a crescendo in the period from 1898 to 1906. The *Central Law Journal* joined forces with the *Albany Law Journal* in arguing that judicial dissent should be prohibited.[14] These two

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recently been published" but observing that the publication was only in "a reporting periodical," not "in the official volume of reports as yet"); *Dissenting Opinions*, 22 AM. L. REV. 611, 611 (1888). Similarly, the Pennsylvania legislature had prohibited the publication of dissenting opinions in the state's official reporter but to "little avail," *see* Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 207-09 (1923), and for reasons that appear unrelated to the later national discussion of dissent that this Article investigates. *See also* KY. CONST. OF 1792, art. V, § 4 (noting that "it shall be the duty of each judge of the supreme court, present at the hearing of any such case, and differing from a majority of the court, to deliver his opinion in writing").

9. *See Irving Browne*, 1 GREEN BAG 509 (1889) (stating that the *Albany Law Journal* "is undoubtedly more read and quoted by lawyers and newspapers than any of its contemporaries"). At the end of its first year of publication, the *Law Journal* itself claimed to have attained the highest circulation of any legal periodical in the country. *Our Second Volume*, 2 ALB. L.J. 1 (1870).

10. BISMARCK DAILY TRIB. (Bismarck, N.D.), June 17, 1891, at 2.

11. *See* ERWIN SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 191-93 (discussing the rise of general-interest legal periodicals, including the *Albany Law Journal* after the Civil War); Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 736, 751-63 (same).

12. *Reporting Dissenting Opinions*, 18 ALB. L.J. 284, 284 (1878).

13. As early as 1865, the *Law Intelligencer* had called dissenting opinions "judicial treason" and urged reporters not to publish them. *Should Dissenting Opinions Be Reported?*, *reprinted in* 1 UPPER CAN. L.J. (N.S.) 177-78 (1865).

14. *See, e.g.*, *Dissenting Opinions*, 22 CENT. L.J. 313, 313 (stating that it "concur[red] very heartily with the views of the *Albany Law Journal* . . . on the announcement and publication of dissenting opinions").

publications were supported by articles in the *Green Bag*,[15] the *Law Magazine and Review*,[16] the *American Lawyer*,[17] and the *Washington Law Reporter*.[18] The defense of the dissenting opinion was led by the *American Law Review*, supported by the *Southern Law Times*[19] and *Law Notes*,[20] as well as by articles in the *Yale Law Journal*[21] and the *American Law Register*,[22] among others.[23]

Newspapers of general circulation took sides as well,[24] and the issue was taken up at meetings of bar associations across the country. A report to the Virginia State Bar Association noted that "it is questionable whether dissenting opinions ought to be reported."[25] The neighbors in West Virginia were less equivocal: the periodical of that state's bar association "heartily endorsed" the prohibition of dissenting opinions.[26] Between 1898 and 1904, the bar associations of Tennessee,[27] New York,[28] Texas,[29] Missouri,[30] and Michigan[31] all heard addresses or committee

15. *See* William Bowen, *Dissenting Opinions*, 17 GREEN BAG 690 (1905).

16. *See* C.A. Herreschoff Bartlett, *Dissenting Opinions*, 32 L. MAG. & REV. 54 (1906).

17. *See* Henry Wollman, *Stability of the Law—The Income Tax Case*, 6 AM. LAW. 48 (1898).

18. *See Dissenting Opinions*, 15 WASH. L. REP. 650 (1878). North of the border, the *Canada Law Journal* weighed in against dissenting opinions, but seemed to reveal some confusion on its part as to what they actually were. *See Dissenting Judgments*, 39 CAN. L.J. (N.S.) 423 (1903).

19. *See Current Topics*, 33 ALB. L.J. 261, 261 (1886) (quoting *Southern Law Times*'s support for dissenting opinions).

20. *Unanimity of Judicial Opinion*, L. NOTES 284 (1905).

21. *See, e.g.*, *Editorials*, 6 YALE L.J. 155, 156 (1897).

22. *See Notes on Recent Leading Articles in Leading Periodicals*, 54 AM. L. REG. 61, 63 (1906).

23. *Case and Comment*, meanwhile, was one of the few legal periodicals not to have taken a clear stance on the issue. *See Dissenting Opinions*, 4 CASE & COMMENT 99 (1898) (discussing arguments in debate over dissenting opinions without clearly taking sides); *see also Dissenting Opinions*, 19 HARV. L. REV. 309, 309 (1906) (weakly defending dissenting opinions).

24. *See, e.g.*, *Dissenting Opinions*, PHILA. INQUIRER, Dec. 16, 1908, at 8; *Dissenting Opinions*, TRENTON EVENING TIMES, Aug. 5, 1898, at 4; *Dissenting Opinions from the Bench*, HARTFORD COURANT, Jan. 25, 1904, at 10; EVENING POST (N.Y.C.), Nov. 29, 1886, at 2; *From Bench and Bar*, N.Y. TRIB., Oct. 26, 1890, at 19; *The Dissenting Opinions*, HARTFORD COURANT, Mar. 14, 1904, at 9; Letter to the Editor, *Uncertainty of the Law*, S.F. DAILY BULL., Apr. 2, 1890, at 2; *The Value of Judicial Dissent*, S.F. DAILY EVENING BULL., Apr. 4, 1890, at 2; *see also* Emlin McLain, *Dissenting Opinions*, 14 YALE L.J. 191, 191 (1905) (noting concern over dissenting opinions by non-lawyers); *Should Dissenting Opinions of Judges Be Suppressed?*, 32 AM. L. REV. 896, 896 (1898) (noting interest of lay press).

25. Robert M. Hughes, *Law Reporting*, 1 VA. L. REG. 309, 312 (1895-96).

26. *Dissenting Opinions: A Sane and Forcible Presentation*, 14 THE BAR: OFFICIAL J. OF THE W.V. BAR ASS'N 4, 4 (1907).

27. Caruthers Ewing, *Dissenting Opinions*, *in* PROCEEDINGS OF THE SEVENTEENTH ANNUAL MEETING OF THE BAR ASSOCIATION OF TENNESSEE 106, 111 (1899).

28. *Suppression of Dissenting Opinions*, 38 AM. L. REV. 911, 911 (1904); *see also Program of the Twenty Sixth Annual Meeting of the New York State Bar Association*, *in* PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 673, 676 (1903) (listing as topic for discussion of Committee on Law Reform, "Should the publication of dissenting opinions be prohibited by law?").

29. PROCEEDINGS OF THE TWENTY-SECOND ANNUAL SESSION OF THE TEXAS BAR ASSOCIATION 40 (1903).

30. *See* V.H. Roberts, *Dissenting Opinions*, *in* PRESIDENT'S ANNUAL REPORT TO THE BOARD OF CURATORS (UNIVERSITY OF MISSOURI), 1904-1905, at 43 (1905).

reports on the propriety of dissenting opinions, some advocating their prohibition, others defending them. The Pennsylvania Bar Association discussed the matter in 1908,[32] while as early as 1886, the influential Judge John Dillon had secured the adoption of a resolution by the American Bar Association providing that "it does not deem it practicable to interfere by legislation to prohibit or limit the publication of any class of reports."[33] In 1898, the ABA Committee on Law Reporting and Digesting, compelled by the "good deal of discussion of late" on the subject, again defended the publication of dissenting opinions in its report to the Association.[34] Even one of the speakers at the first annual meeting of the Oklahoma and Indian Territory Bar Association advocated the prohibition of dissenting opinions in their soon-to-be state.[35]

Louisiana might have become the crowning achievement of those seeking to ban the dissenting opinion when its 1898 constitution provided that "[c]oncurring and dissenting opinions shall not be published."[36] The *American Law Review*, the periodical that led the defense of dissenting opinions, scoffed: "So much the worse for Louisiana. That State has had in times past some unsatisfactory institutions; and now it leads the way in suppressing light and truth."[37] The *Washington Post* expressed concern about Louisiana's move to "muzzl[e] dissenting judges,"[38] while William Wirt Howe, then president of the American Bar Association and a New Orleansian himself, noted the development with approval in his annual address to members. Dissenting opinions, Howe remarked, "tend to weaken the authority of the Court," and being "entirely unknown in Continental Europe . . . cannot be essential to the administration of justice."[39]

For all this, Louisiana's prohibition on dissent serves uneasily as an example of the handiwork of either dissent's nationwide detractors or their local allies. In spite of the interest outside Louisiana in the state's

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31. Judge Carpenter, *The Dissenting Opinion*, *in* PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF THE MICHIGAN STATE BAR ASSOCIATION 124 (1904).

32. *Report of the Committee on Grievances*, *in* REPORT OF THE FOURTEENTH ANNUAL MEETING OF THE PENNSYLVANIA BAR ASSOCIATION 135, 140 (1908). The Pennsylvania Bar Association took up the propriety of dissenting opinions, although only semi-seriously, after a member of the public filed a grievance "to the effect that twelve jurymen are compelled to agree upon a verdict while the judges of the appellate courts are not only allowed to dissent, but to record their reasons therefor." *Id.*

33. John F. Dillon, *Law Reports and Law Reporting*, *in* 9 ANN. REP. A.B.A. 257, 271, 273 (1886); *see* 9 ANN. REP. A.B.A. 9 (adopting the resolution).

34. *Annual Report of the American Bar Association*, *in* 21 ANN. REP. A.B.A. 437, 443 (1898).

35. W.T. Hutchins, *A System of Judiciary for the New State*, *in* PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE OKLAHOMA AND INDIAN TERRITORY BAR ASSOCIATION 77, 84 (1904).

36. LA. CONST. OF 1898, art. 92.

37. *Should Dissenting Opinions of Judges Be Suppressed?*, *supra* note 24, at 896.

38. *Muzzling Dissenting Judges*, WASH. POST, June 26, 1898, at 6.

39. William Wirt Howe, *Address of the President*, 21 ANN. REP. A.B.A. 235, 259 (1898).

prohibition of dissenting opinions, no large number of the delegates at the Constitutional Convention appears to have been self-consciously involved in the national debate over judicial publication practices.[40] The local newspapers did not discuss judicial opinion-writing practices in the period leading up to the Convention, though one did hail the end of the "existing abuse" after the Convention had ended and express its "hope that the whole country will follow its [Louisiana's] example."[41] A list of proposed reforms to the judiciary published by the New Orleans Law Association during the Convention made no reference to dissenting opinions.[42] Records of the Convention's proceedings shed little light on the prohibition's motivations.[43]

Writing in 1963, Louisiana Supreme Court Justice Joe Sanders thought the ban was "doubtless an economy measure," pointing to the fact that the prohibition appeared in a provision of the constitution that also provided that the position of official court reporter should be awarded to the lowest bidder.[44] Sanders also noted that "dissenting opinions continued to be published in the Southern Reporter, a private publication,"[45] which provides considerable support for his interpretation of the prohibition's motivations. Of course, Louisiana's judiciary is also shaped by its self-

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40. The delegates hardly imagined themselves national innovators: one delegate reported back to the Louisiana Bar Association that "[i]f I were asked to name the dominant and controlling characteristic of the convention I should say it was conservatism." Thomas J. Kernan, *The Constitutional Convention of 1898 and Its Work*, *in* PROCEEDINGS OF THE LOUISIANA BAR ASSOCIATION, 1898-1899, at 56 (1899). Reform of the judiciary was one of the Convention's goals, *Convention in Session*, DAILY PICAYUNE, Feb. 9, 1898, at 8 (opening address of Convention president Ernest Kruttschnitt). But as the same delegate reported back to the state bar association: "[T]he convention interpreted its mandate from the people to be, to disenfranchise as many negroes and as few whites as possible, without violating the prohibition of the fifteenth amendment to the Federal Constitution." Kernan, *supra*, at 57. The delegate also reported that "the publication [of law reports] will be let to the lowest bidder, irrespective of residence, and the publication of concurring and dissenting opinions is prohibited. It is thought that this will decrease both the dissent and the cost of reports to the profession," *id.* at 64, but he did not appear to find this development worthy of further comment.

41. *See Should Dissenting Opinions of Judges Be Suppressed?*, *supra* note 37 (quoting the New Orleans *Times-Democrat*); *Dissenting Opinions*, TRENTON EVENING TIMES, *supra* note 24.

42. *The Law Association: Annual Meeting in Which Lively Interest Is Taken*, DAILY PICAYUNE, Mar. 1, 1898, at 2.

43. The proceedings reveal only that the Committee on the Judiciary proposed the language prohibiting dissenting opinions as part of its general recommendations to the Convention, which the plenary Convention adopted in their entirety. *See* OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUES., FEB. 8, 1898 (1898).

44. Joe W. Sanders, *The Role of Dissenting Opinions in Louisiana*, 23 LA. L. REV. 673, 678 (1963); *see also* Kernan, *supra* note 40 (citing reduced cost for lawyers purchasing reports as one reason the convention prohibited dissenting opinions).

45. *Id. Compare* State v. Citizens' Bank of La., 27 So. 709 (La. 1899) (publishing two dissenting opinions and one concurring opinion) *with* State v. Citizens' Bank of La., 52 La. Ann. 1086, 1103 (1899) (noting that the justices "handed down" the dissenting and concurring opinions, but not publishing them).

understanding as the inheritor of civil law traditions, although the historical record contains no suggestion that this self-understanding was related to the state's prohibition on dissent.[46] Whatever motivated its enactors, the constitutional prohibition on dissent was maintained when Louisiana adopted another constitution in 1913,[47] only to be removed when Louisianans adopted yet another constitution in 1921.[48]

Aside from Louisiana, no state actually banned dissenting opinions. At least one bill prohibiting dissenting opinions was introduced into the New York legislature, but little came of it.[49] In sum, much ink was spilled debating whether there was a need for a change in the practice of publishing dissent, but efforts to effect change were meager and almost uniformly unsuccessful. That this was so might suggest that the interest in dissent was largely driven by editors seeking to engineer a controversy that would sell magazines and by recently formed bar associations in search of matters on which to write reports.

It is hard to say what else might have caused this sustained interest in dissenting opinions. What statistical evidence there is does not indicate any marked increase in the rate of dissent during the second half of the nineteenth century.[50] Nor is there any sign that dissenting opinions decreased in frequency after 1906, when the controversy over them died

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46. *Cf.* A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 59 TUL. L. REV. 830, 833-36, 841-42 (1980) (suggesting that a self-conscious effort to preserve and cultivate Louisiana's civilian traditions did not begin until the late 1930s). Louisiana had also long alternated between elective and appointive methods of judicial selection; as a state, it had never had the professional, civil service system of promotion to which the absence of dissent in Continental civilian systems is often attributed. *See* BEN ROBERTSON MILLER, THE LOUISIANA JUDICIARY 7-84 (1932); Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, 20 LOY. L. REV. 231, 233 (1974) ("The institutional origin of the Louisiana judge has common law rather than civil law roots . . . . His opinions are not impersonal emanations of a judicial bureaucracy . . . .").

47. LA. CONST. OF 1913, art. 92.

48. *See* LA. CONST. OF 1921. Accounts of the 1921 Constitutional Convention have little to say on the lifting of the prohibition on dissent. *See, e.g.*, Theodore G. Gronert, *The Louisiana Constitutional Conventions of 1913 and 1921*, 4 SW. POL. & SOC. SCI. Q. 301, 306-08 (1924) (discussing judicial reform in Louisiana constitutional conventions without noting the change in the provisions on dissenting opinions).

49. PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, TWENTIETH ANNUAL MEETING 79 (1897) (nothing that a bill "substantially prohibiting dissenting opinions in courts of final resort" was introduced in the New York legislature in 1886); *Current Topics*, 33 ALB. L.J. 161, 161 (1886) (mentioning the bill).

50. *See* Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 132 (1977); *see also* SIMEON EBEN BALDWIN, THE AMERICAN JUDICIARY 270 (1905) (stating that in the latest volume of reports, there were dissents in fewer than twenty percent of cases of the highest court of all but one state and that, in the aggregate, "out of nearly 5,000 cases decided a dissent is stated in 284 only"); *Unanimity of Judicial Opinion*, *in* JUNE 1904 LAW NOTES 284-85 (same). In 1903, the Texas Bar Association thought it proper to hear a formal committee report on the propriety of dissenting opinions in courts of last resort, even though, as the Committee noted, the Texas Supreme Court filed hardly any dissents. *See* Ewing, *supra* note 27.

off.[51] It is true that the court most in the nation's eye, the federal Supreme Court, handed down a series of five-to-four decisions during this period, with particularly scathing dissenting opinions. These dissents, particularly those in the Income Tax Cases,[52] the *Northern Securities* case,[53] and the Insular Cases[54] (described as "the climax of dissenting opinions"[55]) contributed to the concern about the propriety of publishing dissents generally. (Despite the canonical status they enjoy today, the dissenting opinions in *Plessy v. Ferguson*[56] and *Lochner v. New York*[57] appeared to have barely registered on the consciousness of the legal profession and played no part in the debate over dissenting opinions).[58] But the Supreme Court had previously decided controversial issues by one-vote majorities, and had even done so over vigorous dissents,[59] without provoking a drive to ban dissenting opinions. Furthermore, much, probably even most, of the energies of anti-dissenters was directed at state judiciaries, not at the federal Supreme Court.

Courts' burgeoning caseload certainly provided some motivation to

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51. *See* Kagan, *supra* note 50, at 132; C. Herman Pritchett, *Politics and Value Systems: The Supreme Court, 1945-1946*, 8 J. POL. 499, 504 (1946) (documenting a steady increase in the frequency of dissenting opinions on the U.S. Supreme Court from 1910 to 1945).

52. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 652 (1895) (White, J., dissenting) (intimating that the Court had "depart[ed] from the settled conclusions of its predecessors" and determined the case "according to the mere opinion of those who temporarily fill its bench"); *id.* at 683 (Harlan, J., dissenting) ("Such a result is one to be deeply deplored. It cannot be regarded otherwise than as a disaster to the country."); *id.* at 695 (Brown, J., dissenting) ("[T]he decision involves nothing less than a surrender of the taxing power to the moneyed class."). These dissents were widely published in the press, *see, e.g.*, *Justice Harlan's Dissent: He Is Very Emphatic in the Expression of His Views*, N.Y. TIMES, May 21, 1895, at 3, and if the enactment of the Sixteenth Amendment is any indication, they were successful as appeals to the people.

53. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

54. De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

55. Albert H. Putney, *Five to Four Constitutional Law Decisions*, 24 YALE L.J. 460, 465 (1915); *see also* V.H. Roberts, *Dissenting Opinions*, 39 AM. L. REV. 23, 26 (1905) ("[T]he recent division of the United States Supreme Court in the 'Northern Securities Case,' has to no small extent re-awakened the old controversy respecting the value of dissenting opinions."); L.S. Rowe, *The Supreme Court and the Insular Cases*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 226 (1904) ("[T]he series of opinions [in the Insular Cases] brings up in acute form the question of the desirability of elaborate dissenting opinions.").

56. 163 U.S. 537 (1896).

57. 198 U.S. 45 (1905).

58. Indeed, a 1917 article assessing Justice Harlan's dissenting opinions accorded *Plessy* only the briefest of mentions, though it paid more attention to *Lochner*. *See* Thomas Jefferson Knight, *The Dissenting Opinions of Justice Harlan*, 51 AM. L. REV. 481, 500, 503-05 (1917).

59. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 135 (1873) (Field, J., dissenting) (opining that if courts uphold legislation such as that upheld by the majority "our government will be a republic only in name"). The Supreme Court's sudden change of direction in the Income Tax Cases in the 1890s, *see supra* note 52 and accompanying text, was surpassed in abruptness by that in *Hepburn* and *Knox* (the Legal Tender Cases) in the 1870s. *See* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870). The latter cases, however, did not spark a broad call to prohibit dissenting opinions, so the former must not have been a sufficient condition to do the same.

abolish dissent.[60] Not only were courts overworked, increased judicial output had "overburdened [practitioners] with a constantly increasing load of legal lore," causing some to hope that law reports could be shortened by omitting the dissenting opinions.[61] But scarce space in law reports hardly seems to have been the main concern of those opposed to dissent.[62]

Though they were quick to pen turgid editorials, the opponents of dissent showed little interest in the kinds of specifics one would expect from those genuinely committed to bringing about change: Was disclosure of the fact of dissent to be prohibited or just publication of the reasoning of the dissenting judge or judges? Should dissent in intermediate appellate courts remain public? Should judges be prohibited from expressing disagreement at all, or just within the pages of law reports? What was to be done with concurring opinions? Only rarely did the opponents of dissent descend to consider such details.

### *B. Abolishing Individual Authority: The Case Against Dissent*

Difficult as it is to give an account of the controversy's causes, my intent here is to examine the terms in which those who argued about dissent reasoned about their disagreement. Roughly three arguments implicating central judicial values were advanced against dissenting opinions. First, as one might expect, many of the lawyers opposed to the publication of dissent were concerned that dissenting opinions suggested

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60. *See* ROSCOE POUND, ORGANIZATION OF COURTS 200 (1942); *see also* F.T. Hamlin, *The New York Constitutional Convention*, 4 YALE L.J. 213, 217 (1895) (remarking that the New York judiciary was "in an unfortunate condition . . . [having] broken down under the stress of the business it has been called upon to do. [The Court of Appeals] had proved entirely inadequate to cope with its cases."). In 1871, the *Albany Law Journal* attributed the New York Court of Appeals' accomplishment in deciding "thirty percent more cases than it otherwise could have heard and determined" in part to its success in, as much as possible, "cut[ting] off that nuisance which has so long infested our court of appeals reports—dissenting opinions." *Current Topics*, 3 ALB. L.J. 431, 432 (1871).

61. Frederick A. Teall, *Dissenting Opinions*, 67 ALB. L.J. 207, 208 (1905); *see, e.g.*, *Law Reporting and Digesting*, *in* 21 ANN. REP. A.B.A. 443 (1898) (considering, but not recommending, a prohibition on dissenting opinions as one way "to retard the too rapid growth of the reports"); *The Deluge of Decisions: What Shall We Do to Be Saved?*, 58 ALB. L.J. 219 (1898) (same); *see also* 46 CENT. L.J. 309, 309 (1898) (considering it "an important reason . . . for abolishing dissenting opinions . . . that the main opinion would then come to be much shorter"); Edward G. Whitaker, Annual Address as President of the N.Y. State Bar Association (Albany, Jan. 20, 1897), *in* PROCEEDINGS OF THE N.Y. STATE BAR ASSOCIATION, supra note 49, at 63, 64 (noting that "the vast increase of court law and judicial dicta is becoming a terrible burden by which justice itself is being oppressed" and suggesting omission of dissenting opinions from law reports as a partial solution).

62. Some expressions of concern about the space in law reports were inflected by more profound concerns about the nature of judicial authority. After asking "what good is accomplished by a dissenting opinion? It is not an expression of the law, but of what is *not* the law," one writer went on to vent his frustration with the forty-seven pages occupied by two dissents in *Kean v. Calumet Canal Improvement Co.*, 190 U.S. 452 (1903), railing, "Forty-seven pages of no law! Forty-seven pages in disparagement of the law! for it is nothing else. Forty-seven pages to unsettle and discourage the student of the law! Forty-seven pages of cogent argument to be hurled against courts by those who already have too little respect for the law." Teall, *supra* note 61, at 207-08.

that law was indeterminate. That concern was often coded, or poorly articulated, as a concern that dissenting opinions "encourage[d] litigation"[63] or detracted from "certainty in law."[64] Dissenting opinions, it was said, might "puzzle the ordinary mind,"[65] "unsettle and discourage the student of the law,"[66] and "bring judicial authority into contempt."[67] A speaker at the Tennessee Bar Association was more forthright: after expressing concern that "this constant dissenting and division has led the public to believe that the law is a very uncertain and unsettled arrangement,"[68] he asserted that "[l]aw is a science, and not a guessing contest," but then added that even "[i]f it be the latter, judges should not spread the idea."[69]

But many of dissent's opponents framed their argument as relating not to the nature of law, but instead to the nature of courts and the judicial office.[70] Doing so, they welded two related arguments: they claimed that

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63. *See Reporting Dissenting Opinions*, *supra* note 12.

64. *See Current Topics*, 33 ALB. L.J. 501, 502 (1886) ("[I]t is this . . . uncertainty of law, traceable to dissenting opinions, that is one of the greatest mischiefs in judicial administration.").

65. Howe, *supra* note 39, at 259.

66. Teall, *supra* note 62, at 207; *see* Bartlett, *supra* note 16, at 55 (stating that dissenting opinions tend "to bring unrest and doubt not only in the minds of the legal profession but among the public."); *From Bench and Bar*, N.Y. TRIB., *supra* note 24 ("[T]he dissenting opinion is at times fully as conclusive to the ordinary mind as the opinion which expressed the sentiment of the majority of the judges.").

67. Bartlett, *supra* note 16, at 57. One can only marvel at the suggestion that the dissenting opinion in *Dred Scott* caused the Civil War. *See* Bowen, *supra* note 15, at 696; PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, supra note 49, at 79 (1897) (quoting George S. Batcheller as suggesting that the dissenting opinions in *Dred Scott* "brought about a political, if not a sanguinary revolution").

68. Ewing, *supra* note 27, at 117.

69. *Id.*

70. The *Albany Law Journal*, for instance, was sensitive to the charge that banishing dissent in order to hide legal indeterminacy might seem profoundly undemocratic. But it suggested that such criticism of its desire to prohibit dissent simply missed the mark, because, in its view, "[i]n five cases out of six, the rule is just as good one way as the other; the virtue is in having a fixed rule." *Current Topics*, *supra* note 19, at 261. The kinds of cases the *Albany Law Journal* had in mind—or at least a great many of them—were not constitutional cases of political import. Indeed, constitutional cases were sometimes even excepted from the controversy. *See, e.g.*, Samuel C. Graham, *Some Philosophy of the Law and Lawyers*, *in* REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 197 (Eugene C. Massie ed., 1903) (noting disagreement about the publication of dissent but stating that "[a]ll . . . agree that if great constitutional and political questions, which have provoked differences of opinion between people and parties, must at last be settled by a divided court, that the world should know the reasons which impelled the opinions."). Moreover, opponents of dissent were particularly fixated on publication in official law reports and expressed no, or fewer, reservations about the dissemination of dissenting views to the public through unofficial reporters or law journals. *See infra* notes 75-77 and accompanying text.

This is not to say that some opponents of judicial dissent were uninterested in promoting what we might today call a juricentric vision of the Constitution, in which judicial pronouncements on the meaning of the Constitution should be authoritative and final and that dissenting opinions, as "appeals to the people," were a threat to judicial supremacy and the rule of law. *See, e.g.*, Wollman, *supra* note 17, at 49 ("The result of a dissenting opinion is simply to open up for future discussion . . . and bickering the question which should then be finally settled by that tribunal . . . when once it settles it, it should be settled forever."); *cf.* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from*

appellate courts were primarily composite units, not collections of judges and also that dissenting opinions amounted to no more than personal statements by the judge as an individual which, as such, were not deserving of publication in law reports. Thus, many opponents of dissent expressed their concern not as being that the public might come to know that judges sometimes disagree as to what the law is, but instead that the publication of dissenting opinions in law reports violated norms of professional role differentiation that implicated the nature of courts' self-presentation as institutions. Courts should be impersonal, composite units, they argued, so the personal views of judges deserved no place in law reports.

Such reasoning was in evidence as early as 1870, when the *Albany Law Journal* expressed its view that courts should write opinions as if they were composite institutions, not collections of individuals, or in its colorful phrase, "several courts of one judge each."[71] The *Albany Law Journal* deployed this corporate notion of courts against the publication of dissenting opinions and indeed, against even the acknowledgment of dissent among the members of a court. A court, like the decisions it issues, "is theoretically a unit," it explained, "and there is no theoretical or practical good in disclosing the fact that in a particular case it is made up of discordant fractions." [72]

To promote such a corporate notion of the appellate court, the *Albany Law Journal* insisted that, in law reports, judges should speak in what it constructed as their only official capacity, that of pronouncing the law on behalf of the court. The *Albany Law Journal* dismissed the notion that "judges have a right to not to appear to accede to propositions from which they really dissented."[73] "[W]rongful suspicion" of holding the views of the court's majority, even where one did not agree with them, the *Albany Law Journal* wrote, "may be one of the penalties of the position. It is no part of the business of a judge to apologize for his own opinion or to censure the opinion of the majority of his brethren. . . . It seems quite certain that so far as judges themselves are concerned therefore, it is better on many accounts that their personal views should not be disclosed."[74]

The *Albany Law Journal* suggested that it would be preferable for judges to express dissent in their capacity as private citizens by publishing

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*the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17 (2003) (defining juricentrism as the "notion that courts have the exclusive prerogative to declare constitutional meaning"). But, again, the debate over dissenting opinions did not fixate on constitutional cases.

71. *Courts and Decisions*, 1 ALB. L.J. 405, 405 (1870).

72. *Reporting Dissenting Opinions*, *supra* note 12, at 285.

73. *Id.*

74. *Id.*

dissenting opinions as articles in law reviews. The *Daily Register* had proposed that judges publish dissenting opinions in the popular press so that:

> [t]he judgement of the court is embodied in the reports as an authoritative declaration of the law of the land, qualified only by the indication that 'Justice S.' dissented and the dissent would be spread abroad in the public journals in an ephemeral form, where it would reach the public more freely, and the views of the dissenting judge would have an opportunity to win their way in public approval and react on public opinion, not authoritatively, nor by way of impugning the authority of the decision, but as forming part of the great body of that general judgment on affairs of public concern by which judges, like all other officers, must, and ought to be, in a proper degree, influenced; and especially would have a better opportunity to influence legislation.[75]

Though it responded to this proposal with some skepticism, the *Albany Law Journal* conceded that the publication of dissenting opinions in the popular press was "less to be deprecated . . . than the publication of dissenting opinions in the reports."[76] The New Orleans *Times Democrat*, a supporter of its home state's constitutional prohibition on dissenting opinions, likewise thought that "[i]f dissenting judges desire to controvert the opinions of their brethren of the majority they should do it in the pages of law journals instead of forcing them upon the public through the medium of the reports."[77] These proposals suggest that a desire to hide legal indeterminacy or to exclude the public from the generation of legal meaning was not the central concern of at least some advocates of a prohibition on dissent. According to their logic, a judge might express his dissentient, personal views when writing as a citizen for publication in a magazine, just not when writing in his capacity of judge for the law reports.

When the debate over dissent reached its apex around the turn of the century, this institutional objection to dissent—that is, that because a court is a composite institution and a dissenting opinion is nothing more than a statement by a judge as an individual, only majority opinions should be published in law reports—became a central argument against the publication of dissent. An 1898 article in the *American Lawyer* contended that "dissenting opinions can have but one purpose, and that is

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75. *Dissenting Magazine Articles*, 18 AM. L. REV. 468, 468 (1884) (internal quotation marks omitted). The *Daily Register*'s understanding of the role of dissenting opinions is remarkably similar to that of contemporary popular constitutionalists such as Lani Guinier. *See generally* Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

76. *Dissenting Magazine Articles*, *supra* note 75, at 468 (internal quotation marks omitted).

77. *See Dissenting Opinions*, TRENTON EVENING TIMES, *supra* note 24.

to give a judge an opportunity of exhibiting his individual views and opinions."[78] But, its author continued, "the decision should be that of the court, and not of the judges as individuals . . . . The decision rendered should not reflect the opinion of this judge or that judge but should be the opinion of the court."[79] C.A. Hereschoff Bartlett, writing in the *Law Magazine and Review*, was even more forceful in promoting the notion that appellate courts were units and that dissents were mere statements by individuals: "The names of individual judges who concur or dissent should be obliterated from the reports. What the legal profession wants are the judgments of its Courts as a united body and not the opinions of individual judges."[80] He continued: "Judgements of the highest Courts should be their judgement pure and simple, in which all individuality of members of the Court disappears and is absorbed in the united opinion of the Court pronounced by the judge who renders it."[81] A 1905 article in the *Green Bag* concurred in Bartlett's assertion that "individuality" in law reporting was noxious: "Of the many injurious aspects of the Dissenting Opinion, one of the most destructive is that by emphasizing the personal composition of courts, it is subversive of their great anonymous authority."[82] A court is a "different entity from an aggregation of . . . distinguished lawyers;"[83] the danger of a dissenting opinion, its author proclaimed, was that it "destroys [a court's] impersonality" and thereby "destroys the authority by which alone [a court] lives."[84]

These appeals to impersonality were more than appeals to unanimity. Often it was unclear if those appealing to the "anonymous" or "impersonal" authority of courts also opposed the appearance of the names of the authors of majority opinions in law reports. But some, such as the commentators of the *Central Law Journal*, understood their opposition to dissenting opinions to imply that all judicial opinions should be pronounced per curiam.[85] These views were shared by George

78. Wollman, *supra* note 17, at 49.

79. *Id.*

80. Bartlett, *supra* note 16, at 55.

81. *Id.* In a similar vein, the editors of *The Bar* opined:

> [T]he most pernicious effect [of dissenting opinions], in our view, is that of individualizing the members of a tribunal which under the theory of our government is an integral body, in which the individual members are merged into a unit constituting a distinct department. When the majority promulgates an opinion it is the judgement of the court, and not of the individual members of the Court and it ought to carry with it all the force and dignity, as it does in effect, carry the full authority of a department of the government.

*Dissenting Opinions*, 12 THE BAR 7-8 (1905).

82. *See* Bowen, *supra* note 15, at 696.

83. *Id.*

84. *Id.*

85. *See Jetsam and Flotsam*, 46 CENT. L.J. 309, 309 (1898).

Batcheller, who introduced a bill in the New York legislature to "substantially prohibit" dissent at the Court of Appeals. He too explained that if a court ceased to publish dissenting opinions and if judges stopped signing their names to majority opinions, there would be "no personality in the decisions of the court [which would] give[] greater stability to the decisions of the tribunal."[86]

Impersonality, then, at times subsumed anonymity, but at other times it meant even more than just anonymity. One of the more widely published articles objected to dissent on the grounds that "[i]t is well known that the courts of least dignity, as the justices' courts, are those in which the personality of the judge is the most striking feature."[87] In such usage, "personality" cannot mean only unanimity or even just anonymity, but instead implicates the extent to which a legal decision seems the product of abstract, impersonal norms, and not the product of a concrete individual's personal views of the justice of the case.

Thus, to promote the notion of the appellate court as a composite unit, which made decisions on the basis of determinate, impersonal norms, opponents of dissent constructed the judicial role as involving only the announcement of the law and insisted that law reports contain only the statements of judges speaking in this official role. And, as I will now explore, just as those opposing dissenting constructed dissenting opinions as mere personal statements by the judge as an individual, many of those who defended or valorized dissenting opinions understood them as expressions of a judge's virtuous character and integrity of personal conscience.

### *C. In Defense of Dissent: Publicity and Personality*

A significant number of lawyers and legal periodicals rallied to the defense of dissenting opinions. They wielded a number of arguments. They asserted that democratic notions of publicity required the publication of dissenting opinions; they also directly opposed the notion that courts are composite institutions, appealing to a different vision of judicial authority, according to which courts were public collections of individual judges. Simultaneously, as I shall explore, a literature developed that celebrated dissenting opinions as the expressions of a judge's moral virtue and rectitude of character.

Some defenders of dissenting opinions understood the argument to be

86. PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, supra note 49, at 79 (1897).

87. Bowen, *supra* note 15, at 696; *cf.* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 336 (Talcott Parsons ed., A.M. Henderson & Talcot Parsons trans., 1947) (referring to the "still quite patriarchal, summary and highly irrational jurisdiction of the justices of the peace.").

about the nature of law. As the *Harvard Law Review* summarized:

> [M]any advocates of dissenting opinions are willing to have the law temporarily unsettled by a cogent dissent, since they do not admit the total undesirability of such a condition. So long as courts are permitted to reverse their own decisions, the law will never be definitely fixed. Moreover, as the law is not composed of unrelated rules, it will always be found that parts out of harmony with the whole will require alteration to avoid contradictions.[88]

But arguments related to the nature of law were never distant from arguments about the nature of courts. Writing in the *Yale Law Journal*, Justice Emlin McLain of the Iowa Supreme Court argued that "[o]ne of the most significant features of our entire judicial system is the publicity with which every stage in the proceeding is attended. To suppress [dissenting opinions] would probably lead to the disquieting belief that the real uncertainties of litigation are much more numerous and dangerous" than they actually are.[89] The *American Law Review* argued that dissenting opinions distinguished judging "from a mere arbitrary exercise of power" and that their publication was required by the "fundamental principle of Anglo-American law that the courts of justice shall be *open*."[90] Courts, it argued, should not pretend to "the infallibility which has been ascribed to an œcumenical council of the Church of Rome."[91] An article in the *Nebraska State Journal* equated dissenting opinions with democratic publicity in particularly forceful terms, claiming that "the dissenting opinions of judges of our courts . . . start the lifeblood of advancement of human liberty and free government coursing through the body politic," and concluding that "[w]e need more of them."[92]

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88. *See Dissenting Opinions*, HARV. L. REV., *supra* note 23, at 309. Professor V.H. Roberts defended dissenting opinions in a widely published article on the grounds that "the well considered opinion of the dissenting judge is often the clarion voice of a whole people lifted in protest against laws which have become obsolete or unjust." V.H. Roberts, *supra* note 55, at 26; *see* S.F. DAILY EVENING BULL., Apr. 4, 1890, *supra* note 24 ("The law is *uncertain* and will ever remain so in some measure until the constitution of human nature is changed, and the frequency of dissenting opinions should and does indicate that the vitality and shifting life of the people are not fitted to a bed of Procrustes, and that people are not in their life and business compelled to follow the dead letter . . . ."); *see also Publication of Dissenting Opinions*, N.Y. TIMES, Nov. 30, 1886, at 4 (arguing that dissents may be useful for courts in other states and that to stop their publication "would be to check the progress of adjudication towards absolute soundness").

89. *See* McLain, *supra* note 24, at 192.

90. *Dissenting Opinions*, 20 AM L. REV. 428, 429 (1886).

91. *Id.*; *see Should Dissenting Opinions of Judges Be Suppressed?*, *supra* note 24 (arguing that "a movement for the suppression of dissenting opinions is a movement for the suppression of judicial argument; a movement for the suppression of light and truth," and that "what is wanted in the administration of justice is plain truth, openness and publicity").

92. *Repugnant in Practice*, NEB. ST. J., Jan. 13, 1898, at 2. The association of "American democracy" with dissenting opinions appears to have been strong enough that American occupying forces, engaged in one of the nation's periodic attempts to export democracy, ordered that Puerto Rican and Cuban courts publish dissenting opinions. *See* General Orders No. 118, Headquarters

The *American Law Review* directly countered the contention by opponents of dissent that courts were corporate units, insisting instead that courts should write opinions as if they were, in fact, collections of individual judges. If it could have had its way, it would have returned to a system of *seriatim* opinions: it urged that "each judge should study the record separately and state his opinion publicly. This would be in some respects an ideal administration of justice."[93] The *American Law Review* was attracted to this traditional vision of courts at least in part because it desired the ability to identify judicial opinions as the products of concrete individuals. The *American Law Review* professed its failure to understand why some "opinions are delivered *per curiam* instead of being fathered by the particular judge who writes the opinion."[94] A popular manual entitled *The Study of Cases*, which defended dissenting opinions, likewise declared that "if the opinion of the court is rendered anonymously, that is to say, *per curiam* it does not receive as high respect as an opinion vouched for by some one judge and adopted by the court."[95]

In contrast to the criticism of dissent as an expression of private idiosyncrasy, a literature developed celebrating dissenting opinions as expressions of a judge's virtuous character. One author praised Justice Peter Daniel's dissenting opinions because they "exhibit patience, industry and profound research, and while they are not always fair and temperate in language, there is no doubt that they represent the

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Department of Porto Rico, Aug. 16, 1899, at ¶ 65, *reprinted in* LAWS, ORDINANCES, DECREES, AND MILITARY ORDERS HAVING THE FORCE OF LAW IN PORTO RICO, MAY 1, 1900, at 610, 614 (1909); Military Order No. 63, Headquarters Division of Cuba, Adna R. Chaffee, May 25, 1899, *reprinted in* CIVIL REPORT OF MAYOR-GENERAL JOHN R. BROOKE 42 (1900).

93. *Curbing the Law Reports*, 37 AM. L. REV. 923, 924 (1903). J.H. Baker has called attention to how late nineteenth-century legal reforms in England culminated a long transformation in the conception of a court from what he calls "court as meeting" to "court as institution." *See* J.H. BAKER, *The Changing Concept of a Court*, *in* THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 153 (1986). The turn-of-the-century American disagreement over the nature of a court may well have been one of the episodes in the much longer evolution of the cultural and professional understandings of that institution, which Baker describes. At the beginning of the century, in some states the very institution of an appellate court of last resort, composed of professional judges, was an innovation. Georgia serves as an extreme example: not only was there no appellate court until 1845, but judges were even chastised by a resolution of the legislature for "illegally assembling themselves together" to discuss legal questions. Bond Almand, *The Supreme Court of Georgia*, 6 GA. BUS. J. 95, 96, 105 (1943) (quoting the resolution). In other states, such as New York, the final appeal was to a body not easily recognizable as a court: until 1846, final appeal in New York was had to a body composed of the New York State Senate, the Lieutenant Governor, Supreme Court judges, and the Chancellor of Equity. N.Y. CONST. art. XXXIII (1777); N.Y. CONST. art. V, § 1 (1821). It, and other "absurdities," were abolished by the 1846 Constitution. ALDEN CHESTER, COURTS AND LAWYERS OF NEW YORK 793 (1925). Such courts of last resort would be difficult to conceive—to borrow the words of one editorial opposing dissent—as "an integral body, in which the individual members are merged into a unit constituting a distinct department." *Dissenting Opinions*, THE BAR, *supra* note 81, at 7.

94. Per Curiam *Opinions*, 25 AM. L. REV. 611, 611 (1891).

95. EUGENE WAMBAUGH, THE STUDY OF CASES: A COURSE OF INSTRUCTION IN READING AND STATING REPORTED CASES § 45 (2d ed. 1894); *see id.* at § 47 (acknowledging that "there is in some quarters opposition to publishing dissenting opinions," yet defending their publication).

conscientious views of the writer, and were dictated solely by what he believed to be the justice of the case."[96] The same author concluded: "One cannot fail to admire the pluck of the stout old Virginia gentleman, who for nineteen years fought single-handed for his convictions . . . . As an example of moral courage, the career of Mr. Justice Daniel has few, if any, parallels in the judicial history of the country."[97] In an article that was reprinted in a number of journals, Hampton Carson, then attorney general of Pennsylvania, depicted "a dissenting judge [as] the leader of a forlorn hope [or] the champion of a lost cause," whose "independence of view . . . boldly asserted itself in spite of the pressure of the majority."[98] Another article of the time extolled great dissenting judges as "independent thinkers [who] gave their dissenting opinions because they have found them the only means of preserving their independence of thought and perfect honesty of character."[99] Dissenting opinions, yet another author wrote, "faithfully indicate the searching investigation of fearless and independent jurists into the law and the facts."[100]

Such valorization of "great dissenting opinions" is consistent with the nineteenth-century constructions of the judicial office and judicial authority that have been explored by a number of historians. Most of the debate over dissenting opinions occurred within bar associations and on the pages of publications catering to lawyers.[101] In the words of Stephen Botein, "[J]udgeship . . . was an essential ingredient in the symbolic language of the American legal profession. Prominent lawyers . . . defined and extolled judicial office in such a way as to promote a general image of themselves as a kind of 'traditional' intelligentsia."[102] Many in the legal profession were anxious about the perceived decline of lawyers from their status as members of an elite intelligentsia into the sordid servants of cutthroat capitalism, or perhaps worse, into ordinary, tedious businessmen.[103] Defense of the majestic figure of the individual judge

96. H.B. Brown, *The Dissenting Opinions of Mr. Justice Daniel*, 21 AM. L. REV. 869, 870 (1887).

97. *Id.* at 900.

98. Hampton L. Carson, *Great Dissenting Opinions*, *in* REPORT OF THE SEVENTEENTH ANNUAL PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION 273, 274 (1894).

99. *Dissenting Opinions*, 54 AM. L. REV. 63, 64 (1906).

100. *The Value of Judicial Dissent*, *supra* note 24.

101. But for examples of interest in the debate over dissenting opinions by the lay press, see sources cited *supra* note 24.

102. Stephen Botein, *"What We Shall Meet Afterwards in Heaven": Judgeship as a Symbol for Modern American Lawyers*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 47, 50 (Gerald L. Gelson ed., 1983).

103. RICHARD HOFSTADTER, THE AGE OF REFORM 154-63 (1955); *see also* Robert Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, *in* NEW HIGH PRIESTS, *supra*, at 51, 62; John Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 78

beholden only to the law and justice emphasized the Bar's camaraderie with such figures of the bench and may have helped lawyers overlook the increasing affinity of their profession to a business like any other. Appeals by the opponents of dissents to institutional impersonality, similar to that of Continental European judiciaries,[104] suggests that another vision of judicial authority stood in some tension, if perhaps not outright contradiction, with the idealization of the individual hero-judge chronicled by historians. Many lawyers argued that appellate courts should write opinions as if they were impersonal institutions, not collections of heroic, individual judges. As I will now explore, that view—that of dissent's opponents—stands in stark contrast to lawyers' understanding of the ideal form of judicial authority towards the end of the twentieth century.

## II. THE "BUREAUCRATIZATION OF THE JUDICIARY" IN THE LATE TWENTIETH CENTURY

In the final two decades of the twentieth century, a significant number of lawyers came to express concern about what they called the

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(Gerard W. Gawalt ed., 1984). For an example of such anxiety, see John F. Dillon, *The True Professional Ideal*, *in* REPORT OF SEVENTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 409, 410 (1894). Dillon describes an ideal lawyer "who by unwearied industries masters the vast and technical learning and details of his profession, but who, not satisfied with this, studies the eternal principles of justice [and views a court as] a temple where faith, truth, honor and justice abide and he one of its ministers." Given this ideal, Dillon was distressed by the tendency "in our modern life . . . to assimilate the practice of law to the conduct of commercial business." *Id.*

Worship of the judge as a moral hero had a long tradition among lawyers, and many late nineteenth-century lawyers were appealing to this traditional notion of the judge. Consider, for example, Timothy Walker's 1837 paean to the judge as a superhuman moral hero, at the "topmost round of the [legal] ladder":

> [H]ere [i.e., in the judge] all the high qualities of [the lawyer's] nature are called into exercise. The sagacity which cannot be misled by sophistry; the integrity which nothing can shake or bribe; the stern impartiality, which forgets the party and looks only at the cause; the dignified courtesy, which rebukes levity while it wins respect: these are the qualities, without which all the learning of a Coke would not make a worthy judge; and which no where shine so conspicuously as from the bench.

Timothy Walker, INTRODUCTORY LECTURE ON THE DIGNITY OF THE LAW AS A PROFESSION: DELIVERED AT THE CINCINNATI COLLEGE, ON THE FOURTH OF NOVEMBER, 1837 (Gale, Making of Modern Law 2009) (1837); *see also* Susanna Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151 (1998) (describing the long tradition of judicial hagiography among American lawyers).

104. There is no clear indication that the opponents of dissenting opinions were motivated by a desire to imitate Continental European institutions, although there was a certainly an awareness of the Continental example. *See, e.g.*, Howe, *supra* note 39, at 259. The frequent reference by those defending dissent to the "Anglo-American" system of justice, of which dissenting opinions were supposedly an essential part, might also be interpreted as an implicit distinction from more statist Continental judiciaries. *See, e.g.*, *Dissenting Opinions*, 20 AM L. REV., *supra* note 90, at 429. The author of one of the more widely published polemics against the dissenting opinions, C.A. Hereschoff Bartlett, also took great interest in the French judiciary. *See* C.A. Hereschoff Bartlett, *The French Judicial System*, 38 L. MAG. & REV. 257 (1913).

"bureaucratization" of the judiciary.[105] These lawyers worried, in the words of one of their number, that the expansion of judicial support staff from law clerks to magistrate judges had "subtly alter[ed] . . . the 'personal' character of the judicial office."[106] Now members of the legal profession almost uniformly expressed the view that the "personal" quality of judging was central to judicial legitimacy.[107] Even those skeptical about the extent to which the judiciary had actually been "bureaucratized" affirmed the importance of "maintaining a personalized judiciary" that employed the "personalized decision-making that is the historic strength of our judiciary."[108]

By opposing corporate, institutional anonymity to personality or individuality and finding the distinction to be essential to judicial legitimacy, these lawyers reasoned about judicial legitimacy in terms strikingly similar to those used in the debate about dissenting opinions around the century's beginning. To be sure, there were differences. Lawyers at the end of the century were primarily concerned not about judicial self-presentation, but instead about the way in which judicial decisions were actually made; they worried that judicial staffs, rather than judges themselves, had assumed much of the judicial function. But when they sought to explain why the delegation of the judicial task to subordinates, but not the delegation of the task of other government officials,[109] created grave concerns about legitimacy, they argued that the

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105. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 4 (1993); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 102-19 (1985); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 951-54 (2000) (providing a historical overview of the expansion of the federal judiciary's institutional capacities and the diffusion of adjudicatory authority away from Article III judges); *cf.* WOLF V. HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE 134 (1990) (describing "at least four separate ways in which the notion[] of bureaucracy . . . [is] used in discussions of the . . . courts").

106. Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 791 (1981).

107. *See* Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983) ("[B]ureaucratization tends to corrode the individualistic processes that are the source of judicial legitimacy."); Patrick E. Higginbotham, *Bureaucracy: The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 265 (1980) ("[T]he judicial task is nondelegable. Central to it is the judge, who must make the decision."); Alvin Rubin, *Bureaucratization of Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 654 (1980) (expressing concern about "the conversion of federal judges from individual decision-makers to spokesmen for a faceless bureaucracy"); Joseph Vining, *Justice, Bureaucracy and Legal Method*, 80 MICH. L. REV. 248, 251 (1981) (observing with dismay that the Supreme Court is "no longer nine judges in dialogue with one another").

108. Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 769 (1983).

109. *See, e.g.*, Fiss, *supra* note 107, at 1443 ("[I]n the context of the judiciary, bureaucratization poses a unique challenge to the legitimacy of government power."). After all, nothing is more natural than for the statutory responsibilities of, for instance, the Attorney General to be carried out by his or her subordinates. *Cf.* 28 U.S.C. § 510 ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or

ability to detect a concrete, identifiable individual behind judicial decisionmaking, one with a sense of conscience, personal character, and emotional experience, was essential to judicial legitimacy.

Owen Fiss posited that "we" only accept judicial power if there lies individual, personal responsibility behind decisions: "By signing his name to a judgment or opinion, the judge assures the parties that he [has listened to all parties affected] and assumes individual responsibility for the decision."[110] "Bureaucratization," for Fiss, "raise[d] the spectre that the judge's signature is but a sham."[111] Patricia Wald reasoned that "to preserve and to reinforce public confidence" in courts, judges must render impartial decisions "while preserving the values of the judge's own personal reasoning, experience, and ultimately, sense of responsibility."[112] In a perceptive formulation, she diagnosed the "fear of failing to . . . maintain[] a personalized judiciary that applies impersonalized rules" as being "at the heart of the alarms that have been sounded about judicial bureaucratization."[113] Joseph Vining explained that judicial opinions "exert their authority over us and command our respect and serious attention only to the extent that we hear a person speaking through them."[114] He worried about the rise of "bureaucratic writing," that is, "opinions . . . [that] seem things written by no one at all."[115] Other writers similarly expressed their concern about bureaucratization as being that it threatened to deprive judicial decisionmaking of its personal character.[116]

The twentieth-century opponents of judicial bureaucratization were deeply influenced by a Weberian theory of modernization and some announced that their project was, in part, a struggle against some of that theory's implications. Vining attributed his reverence of courts to their status as one of "the last of the great voices to be rationalized,"[117] while Anthony Kronman, one of the most important contemporary interpreters of Max Weber, devoted attention to judicial bureaucratization largely as an extension of his campaign against the "disenchantment of the world"[118] and the "flatten[ing] . . . process of rationalization . . . that has undermined the basis of every traditionalist claim to authority."[119]

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agency of the Department of Justice of any function of the Attorney General.").

110. Fiss, *supra* note 107, at 1458.

111. *Id.*

112. Wald, *supra* note 108, at 769.

113. *Id.*

114. JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 14 (1986).

115. Vining, *supra* note 107, at 251.

116. *See* sources cited *supra* note 107.

117. *See* VINING, *supra* 114, at 19.

118. *See, e.g.*, Anthony T. Kronman, *Precedent and Tradition*, 99 YALE. L.J. 1029, 1046 (1990).

119. *Id.*; *see* KRONMAN, *supra* note 105, at 315-20.

In Weber's highly stylized, ideal-typical account, the appearance and increasing importance of the distinction between the personal and the official is one of the hallmarks of legal and organizational modernization. Weber characterized modern societies as increasingly dominated by rational-legal bureaucratic authority, what he called a "spirit of formalistic impersonality,"[120] while he described both traditional and charismatic authority as "personal." [121] For Weber, rational-legal authority was "impersonal" because in a bureaucracy, authority was owed to the office, not its incumbent,[122] and there exists "complete separation of the property belonging to the organization, which is controlled within the sphere of office, and the personal property of the official, which is available for his own private use."[123] In other words, for Weber, modernization was largely a story of role-differentiation in which authority figures come to wield power not because of who they intrinsically are as individuals but because of the official roles they assume.[124] Traits of character, individual conscience, bonds of friendship, and personal loyalty—much of what has been described as "m[a]n as a concrete psycho-organic unit"[125]—fall on the side of the private or personal and so, in Weber's view, are separated from the modern official's exercise of power.[126] Correspondingly, the

120. *Id.* at 340.

121. WEBER, *supra* note 87, at 336 (describing traditional authority and charismatic authority as resting "upon *personal authority*"); *id.* at 328 ("In the case of traditional authority, obedience is owed to the *person* of the chief." (emphasis added)); *id.* at 341 ("[T]he object of obedience is the *personal authority* of the individual which he enjoys by virtue of his traditional status . . . ." (emphasis added)); *id.* at 328 (arguing that charismatic authority "rest[s] on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person"); *id.* at 363-64 (arguing that, in the "pure form of charismatic authority . . . the social relations involved are strictly personal, based on the validity of charismatic personal qualities").

122. *Id.* at 328 ("[O]bedience is owed to the legally established impersonal order. It extends to the persons exercising the authority of office under it only by virtue of the formal legality of their commands and only within the scope of authority of the office.").

123. *Id.* at 331; *see also id.* at 333-34. The relation between these two aspects of the division between the personal and the official is not obvious, but, presumably, both aspects of role-differentiation permit increased centralization and efficiency. *Cf.* NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY 45 (Stephen Holmes trans., 1982) (suggesting that "the essential characteristics of Weber's model of bureaucracy, the separation between the workplace and the family, between business and personal property [and its] impersonal orientation[,] can be formulated in the following single proposition: They free the system from a concern with the motivational structure of its members.").

124. Writing in a Weberian tradition, Niklas Luhmann insists that modern societies "exclud[e] men as concrete psycho-organic units," and that "socio-cultural evolution" can be "define[d] . . . by reference to the increasing separation or differentiation between interaction systems." LUHMANN, *supra* note 123, at xx, 77. In each "interaction system," individuals assume different roles, none of which fully subsumes him or her as a "concrete psycho-organic unit[]." *Id.* at xx; *see also infra* note 160 and accompanying text.

125. LUHMANN, *supra* note 123, at xx.

126. *Cf.* Lloyd I. Rudolph & Susanne Hoeber Rudolph, *Authority and Power in Bureaucratic Administration: A Revisionist Interpretation of Weber on Bureaucracy*, 31 WORLD POL. 195, 204-05 (1979) (noting the difficulties in Weber's use of the distinction between personal and official authority to describe modernization, especially the failure of his ideal-typical model to acknowledge

modern official is expected more sharply to differentiate between when he or she is acting as a private individual and when he or she is acting in an official capacity.

Influenced as they were by a Weberian theory of modernization, those who bemoaned the bureaucratization of the judiciary often framed their complaint in terms of the manner in which the distinction between the official and the personal organized the judicial role in the late twentieth century. Fiss, who disavowed concern about bureaucratization in Weber's sense of the term,[127] nonetheless reasoned that "we insist that each judge—*as an individual* and as an official—accept full responsibility for his decisions by signing his opinion and disclosing his vote."[128] Fiss worried that in a bureaucratized judiciary, judges no longer assumed personal, individual responsibility for their decisions. Vining worried that the increased size of judicial staffs had led to the loss of an "intimate" relationship between judge and clerk, evoking notions of affect usually associated with the private and personal.[129] Kronman worried that bureaucratization had caused a "depreciation of the lawyer-statesmen ideal" in the courts,[130] an ideal he identified with the nineteenth-century bar's "hero figures"[131] who distinguished themselves by their "qualities of character."[132] In sum, though their precise concerns were varied, these authors shared a belief that bureaucratization threatened to remove from judging the traits of character, emotional experience or conscience frequently associated with the private or personal, but which were, in their view, necessary to judicial legitimacy. They resisted the notion that judges might act merely as officials, and yearned for judicial decisions to be and seem the products of a fully integrated person, one acting both in an individual and in an official capacity.

This desire stands in contrast to the role differentiation demanded of judges by those who advocated that dissent be prohibited and that "all individuality of members of the Court disappear and [be] absorbed in the united opinion of the Court."[133] Unlike Fiss, who wanted to see in the judge's signature an indication that he or she had engaged with a case as a matter of personal conscience, opponents of dissent insisted that judges' expressions in law reports contain a thinner, less authentic expression of

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the importance of affect and honor in bureaucratic administration).

127. Fiss, *supra* note 107, at 1452 (stating that "the Weberian model does not fit the American judiciary").

128. *Id.* (emphasis added).

129. *See* Vining, *supra* note 107, at 251.

130. KRONMAN, *supra* note 105, at 320.

131. *Id.* at 12.

132. *Id.* at 16.

133. Bartlett, *supra* note 16, at 55.

their personal selves as it was "one of the penalties of the position," at times, to "appear to accede to propositions from which [a judge] really dissented."[134]

## III. DISSENTING OPINIONS AND PERSONAL AUTHORITY

As I explored in Part I, many of the turn-of-the-century lawyers celebrating or criticizing dissent agreed that dissenting opinions were personal statements of a judge as an individual, not statements of an official, and they discussed the value of publishing dissenting opinions in terms of whether such statements deserved publication in law reports. As shown by these lawyers' construction of a dissenting opinion as merely a statement by an individual, their desire for anonymous, *per curiam* opinions, their association of "personality" with justices of the peace,[135] and by the literature valorizing dissenting opinions as an expression of a judge's inner nature and moral character, for many of those involved in the debate, "personality" meant the ability to detect a concrete individual behind a judicial decision. To put the controversy in Weberian terms, many turn-of-the-century lawyers disagreed about whether the publication of judges' personal views violated the norms of role-differentiation that applied to them as modern officials.

But, as I briefly explore in this Part, a dissenting opinion of course need not be understood as merely a private statement by an individual. If, for a dissent to be more than a private statement by an individual, it must further some institutional goal of the judiciary, there are a number of ways in which a dissent may be understood as furthering such goals. Moreover, by the time bureaucratization came to occupy a central place in the discussions of the judiciary, concern with fractured majority opinions had largely spilled over into a disdain for dissent. Thus, the very lawyers who championed the personal character of the judicial role did not understand dissent as a valuable expression of a judge's authentic personality. But, as I will also show, the turn-of-the-century literature's understanding of dissent as either an expression of a judge's character or as a statement by a judge as an individual also endured.

To find reasons that a dissenting opinion is more than a statement by a judge as an individual, one need look no further than the prolific literature on dissenting opinions generated by judges on America's highest courts.[136] As these judges insist, dissent can play a number of institutional

134. *Reporting Dissenting Opinions*, *supra* note 12, at 285.

135. *See* Bowen, *supra* note 15, at 696.

136. *See, e.g.*, ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 14-19 (1955); William Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986);

roles.[137] A published dissenting opinion, for instance, may increase the likelihood that losing parties accept the legitimacy of judicial adjudication by holding out the possibility that they may prevail in subsequent litigation; it may galvanize popular mobilization against unpopular decisions, thereby providing a check on an otherwise democratically unresponsive judiciary; or it may improve the quality of the reasoning in majority opinions. The mere possibility of publishing a dissenting opinion may give true unanimity more force when it is actually achieved and it may encourage court majorities to be less broad in their holdings, forcing them to consider the views of judges in the minority if they want to avoid public expressions of disagreement.[138] The roles a dissenting opinion in fact does play vary from case to case and are highly dependent on the specific concerns and features of a legal system.[139] H.L.A. Hart's remark

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Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1952) (reflections of a justice of the California Supreme Court); William O. Douglas, *The Dissenting Opinion*, 8 LAW. GUILD REV. 469 (1948); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990) (written while a judge on the D.C. Circuit); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010); Michael A. Musmanno, *The Value of Dissenting Opinions*, 29 PA. BAR ASSOC. Q. 268 (1957) (reflections of a justice of the Pennsylvania Supreme Court); Antonin Scalia, *Dissents*, OAH MAG. HIST. 18 (1998); Antonin Scalia, *The Dissenting Opinion* 1994 J. SUP. CT. HIST. 33; Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUD. SOC. 78 (1942). The dissenting opinion is a favorite topic for leading judicial figures in other legal cultures as well. *See, e.g.*, Willi Geiger, *Die Abweichende Meinung beim Bundesverfassungsgericht und ihre Bedeutung für die Rechtsprechung*, *in* DIE FREIHEIT DES ANDEREN: FESTSCHRIFT FÜR MARTIN HIRSCH 461 (Hans-Jochen Vogel et al. eds., 1981) (reflections of a judge of the German Federal Constitutional Court); Michael D. Kirby, *Judicial Dissent—Common and Civil Law Traditions*, 23 L.Q. REV. 379 (2006) (reflections by an Australian High Court justice); Claire L'Heureux-Dubé, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L.J. 495 (2000) (reflections by a Canadian Supreme Court justice); Luzius Wildhaber, *Opinions dissidentes et concordantes de juges individuels à la Cour européenne des droits de l'homme*, *in* DROIT ET JUSTICE: MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 529 (Réne-Jean Dupuy ed., 1999) (reflections by a President of the European Court of Human Rights).

137. Perhaps dissenting opinions even have value as "an appeal to the intelligence of a future day," CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928), or as a strategy to preserve a court's future legitimacy after a court's majority comes to be understood as having committed grave moral error. *Cf.* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000) (arguing that the canonization of dissenting opinions has allowed the Supreme Court to reverse lines of its jurisprudence while preserving its institutional legitimacy).

138. Versions of all of these arguments are advanced in the sources cited *supra* note 136.

139. A full account of the dissenting opinion would need to explain it in the context of diverse institutional variables, including the role of public reason-giving in a judicial system, *cf.* MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 27-61 (2004) (arguing that public discursive reason-giving is antithetical to the French judicial system's traditional account of its own legitimacy), and the possibly competing values of judicial independence and judicial secrecy. *See* Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT'L 162, 168-69 (2003) (suggesting that in legal orders where the executive is strong relative to the judiciary, the secrecy of judges' votes and the absence of dissenting opinions are perceived as promoting judicial independence, while in legal orders where judicial independence is conceived of as the independence of each individual judge from other judges, dissenting opinions are perceived as a guarantee of judicial independence); *see also* Kurt H. Nadelman, *The Judicial Dissent, Publication v. Secrecy*, 8 AM. J. COMP. L. 415 (1959) (comparing different legal orders' resolutions of the tension between the values of deliberative secrecy and publicity in adjudication). The form itself of the dissenting opinion varies greatly across jurisdictions

that dissenting opinions "have no consequences within the system . . . because no one's rights or duties are altered thereby"[140] only holds if the "system" is defined narrowly as the set of legal rules and not the institutions through which law is pronounced and through which it acquires social legitimacy.

A view of judicial legitimacy that places great importance on judges' conscience and qualities of character, such as that of those concerned about judicial bureaucratization, might even place great value on the practice of published dissent precisely *because* it serves as a venue for expression by judges as individuals. But by the time concerns about bureaucratization of the judiciary arose, fractured majority opinions had become a concern for the legal profession, clouding over the possibility of seeing in separate opinions the expressions of an authentic integrated person. Those writing on bureaucratization generally saw in dissent not valuable expressions of personality but instead "mere selfishness"[141] or the hollow work of judicial staffs.[142] For Joseph Vining to realize his desire to hear a person speaking through a judicial opinion, he needed to imagine that "a multi-member institution can have a single voice."[143] In other words, the desire of these lawyers to understand a judicial opinion as the work of an undifferentiated person was focused on opinions for the court, those that had the force of law; therefore, there was little attraction for them in the possibility of viewing a dissenting opinion as an expression of authentic, integrated personality.

That earlier view of dissent, however, also persisted. At the same time as many judges and academic lawyers worried about the bureaucratization of the judiciary and criticized the fracturing of majority opinions, Justice Brennan defended dissent not only as an assurance that each judge has brought his or her "individual intellect[] to bear on the issues that come before the Court,"[144] but also because it might serve as a venue for public

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and legal cultures, even where they are permitted. Since 1966, the Judicial Committee of Privy Council has permitted only one collective dissent. *See* John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 234 (2000). While in American courts an "opinion of the court" is published, the author of even that opinion is identified by name, while in the current German Federal Constitutional Court the author of the majority opinion is undisclosed while dissenters sign their opinions by name. Further, some jurisdictions allow for oral dissents (indeed entirely public oral deliberations) but do not provide for published dissenting opinions, *see* Laffranque, *supra*, at 166 (discussing certain jurisdictions in Switzerland), while the United States Supreme Court holds secret deliberations but allows for both written and oral dissents. *See generally* Guinier, *supra* note 75; *see also* 8 CAHIERS DU CONSEIL CONSTITUTIONNEL (2000) (symposium issue with contributions on dissenting opinions in different jurisdictions and debating their merits).

140. H.L.A. HART, THE CONCEPT OF LAW 138 (1961).

141. KRONMAN, *supra* note 105, at 343.

142. *Id.* at 346-47.

143. VINING, *supra* note 114, at 111-12.

144. Brennan, *supra* note 136, at 435.

expression of personal conscience. Justice Brennan celebrated "a special kind of dissent"[145] "in which a judge persists in articulating a minority view of the law in case after case presenting the same issue."[146] This kind of dissent, he admitted, stands in great tension with a judge's "duty to acquiesce in the rulings of the court."[147] Such a dissent, as Justice Brennan wrote, instead must "constitute a statement by the judge as an individual."[148]

While excessive dissent could be imagined as a symptom of bureaucratization, Justice Brennan's vision of dissent still resonates with some important contemporary understandings of the practice. One academic interpreting Justice Brennan has even speculated that there may be "constitutional foundations for a judicial *right* to dissent," premising the argument primarily on a judge's right as an individual "citizen not to be compelled to join in a message with which s/he does not agree."[149] In doing so, he conceives the judicial office as integrating a judge's personal role (as a citizen) and official role in a way the Supreme Court, at least, does not understand most administrative offices to do,[150] and as similar to the integration of the personal and the official championed by the opponents of judicial bureaucratization. Thus, even if they did not always manifest themselves together, the understanding of dissent as an expression of the judge as an individual survived into the twentieth century along with the ideal of the judgeship as commingling a judge's official and private selves.

## IV. MODERNIZATION AND THE JUDICIAL OFFICE

A German scholar has suggested that dissenting opinions disappeared from the German judiciary as it acquired the features of a Weberian bureaucracy in which "personal features" had no place.[151] In such a bureaucracy, we are told, dissenting opinions "are a relic from a pre-modern procedure that could hardly be justified on rational grounds."[152] If

145. *Id.* at 436.

146. *Id.* at 437.

147. *Id.*

148. *Id.*

149. Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 HASTINGS L.J. 683, 685 (1999); *see id.* at 696 (arguing that prohibiting dissent would "intrude on the judge's right as a citizen" under the First Amendment not to join in a message with which he or she disagrees).

150. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.").

151. Gerd Roellecke, *Sondervotum*, *in* 1 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 363, 375 (Peter Bardura & Horst Dreier eds., 2001).

152. *Id.* at 373-75. Roellecke's commentary reflects on the practice of dissenting opinions at the German Federal Constitutional Court. This court and much of the German legal profession engaged in

dissenting opinions ever are only statements by a judge as an individual, the practice of their publication might indeed seem oddly anachronistic, if one also accepts—as many of the opponents of judicial bureaucratization appeared to do—a Weberian account of institutional modernization. The commingling of the judge's personal and official selves championed by opponents of judicial bureaucratization likewise ran counter to a Weberian understanding of the norms governing modern officialdom.

That American institutions, and especially courts, are not perfect instantiations of Weberian legal-bureaucratic authority is, of course, not news.[153] Weber's influence has nonetheless been particularly palpable in the historiography of nineteenth-century American officeholding. Many historians have described officeholding in the early nineteenth century as characterized by the weakness, or absence, of the distinction between the personal and the official, while describing the end of the century as dominated by an increasingly impersonal official role. Bernard Silberman, for instance, has argued that the rise of "rational-legal" organizational structures brought with it "the transformation of the administrative role," including in particular "the relationship of the individual to the office."[154] Jerry Mashaw has described the "symbolic" change in nineteenth-century public administration as "[t]he government's actions [became] depersonalized and objectified. Administrative actions [became] the actions of the United States, not the personal actions of longtime incumbents;"[155] he has called the change the "objectification of office."[156]

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perhaps the only debate over dissenting opinions that matched the intensity of the turn-of-the-century American debate that this Article examines. For the proceedings of the forty-seventh Law Congress, which eventually led to the adoption of dissenting opinions, see VERHANDLUNGEN DES 47. DEUTSCHEN JURISTENTAGES (1968). *Cf.* Ernst Friesenhahn, *Referat zum 47. DJT 1968*, *in* VERHANDLUNGEN DES 47, *supra*, at R.33 (arguing that the "main reason" to permit dissenting and concurring opinions is "to strengthen the personality of the judge, to put greater emphasis on the judge in his personal dignity as the medium of the adjudication").

153. Weber himself described the American judiciary as differing in many respects from an ideal-typical bureaucracy, among them that "in the American view, the judgment is the very personal creation of the concrete individual judge, to whom one is accustomed to refer by name, in contrast to the impersonal 'District Court' of Continental-European officialese," MAX WEBER, 2 ECONOMY AND SOCIETY 890 (Guenther Roth & Claus Wittich trans., 1968), and that the value of an American precedent, in Weber's view, depended on "the very personal authority of the individual judge" who authored it. *Id.* at 316; *cf.* VINING, *supra* note 114, at 17 ("Was one to treat as equivalent an opinion of Holmes in Massachusetts and an opinion of what's his name in Wyoming? Of course not."). Comparativists today continue to observe that American judiciaries, both federal and state, are designed around a "coordinate ideal" with large degrees of discretion conferred upon lower-level decision makers, a high degree of responsibility placed on lay officials (the jury), a relatively weak emphasis on hierarchical appellate review, and a decidedly non-bureaucratic mode of selection and promotion of judges. *See, e.g.*, MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 23-46 (1986).

154. BERNARD S. SILBERMAN, CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES AND GREAT BRITAIN 4 (1993).

155. Jerry Mashaw, *Administation and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1617 (2008).

Similarly, William Nelson has contrasted contemporary American government where officials "maintain[] a sharp separation between their official and private lives" with that of the early days of the Republic where "power was exercised by those who conjoined private and public authority to perform undifferentiated leadership roles."[157] And Matthew Crenson has described the Jacksonian period as one in which the "official duties of administrators were carefully separated from their private activities,"[158] contrasting it with the Federalist period in which "the principal reliance of government administration" was on the officeholder's "fitness of character."[159] The distinction between the personal and the official has also been used by those describing transformations of officeholding in an earlier age of American government. Gordon Wood, for instance, has described "office" in pre-Revolutionary America as "an extension into government of the private person," an understanding which, he argues, the Revolution put to an end.[160]

For whatever reason, courts and the judicial office are usually left out of these narratives of change in the nature of officeholding.[161] As an

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156. *Id.*

157. WILLIAM NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 2 (1982).

158. MATTHEW CRENSON, THE FEDERAL MACHINE 4 (1975).

159. *Id.* at x.

160. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 84 (1992). Wood has famously argued that the American Revolution, as "the most radical and most far-reaching event in American history," put an end to the "early modern society" where "all aspects of life were intertwined. The household, the society and the state—private and public spheres—scarcely seemed separable." *Id.* at 8. Wood's assertion that early American society was "undifferentiated" in all its domains places the personal/official distinction into a relationship with the two public/private distinctions that have played so prominent a role in accounts of the nineteenth century—namely, the distinction between (private) market and (public) government and that between the (private) family and the (public) outside world. *See generally* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER 192-204 (1993) (describing the division of corporations into municipal public corporations and private profit-seeking corporations); CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA (2002) (describing the decline of the household as the primary unit for the organization of labor and political authority in North America); Nicholas Parrillo, *Testing Weber: Compensation for Public Services in Bureaucratization and the Development of Positive Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 47 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011) (observing that "legislators, by reforming the way officers were paid, made the absence of the profit motive a defining feature of 'government'"); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE. L.J. 2117 (1996) (describing the rise of understanding of the family as "distinct from other spheres of social life" and as "a domain in which altruism and other-regard prevailed" and contrasting it with an earlier world in which "the rights of persons in private relations resembled the rights of persons in public relations"). In other words, Wood, like Luhmann, appears to subscribe to an understanding of modernity as a state of "increase[d] separation or differentiation between interaction systems," *see* LUHMANN, *supra* note 123, at 77, and the work of other historians of the nineteenth century provides, at least at a very abstract level, support for such an understanding.

161. *Cf.* Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73, 84 (2007) (suggesting that American political development scholars have largely ignored courts because they have wrongly assumed that they lack

increasing number of scholars have come to challenge the usefulness of a Weberian framework to understanding American institutional development,[162] the absence of the courts and the judicial office from such narratives might not seem troublesome. The Weberian framework is, to be sure, not without its difficulties, including its assumption of a relationship among the many different concrete phenomena it includes under the general heading of the separation of the person from the office.[163] But surely we need some general account of the change in the relationship of judges to the judiciary as an institution over the nineteenth century, and, for lack of a better alternative, a Weberian framework will likely be the place from which we start.[164] That dissent's nineteenth- and early twentieth-century opponents formulated arguments that drew on a distinction between the personal and official suggests the usefulness of a Weberian framework in understanding American institutional development. That these opponents failed and that an ideal of the judicial office as integrating the judge's private and official capacities succeeded in the late twentieth century suggests its limitations.

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"the complex institutional features—actors, structures, and rules—that make other political institutions worth studying").

162. For a critical summary of some of the literature and problems involved, see William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 761 (2008); and David Sugarman, *In the Spirit of Weber: Law, Modernity and the 'Peculiarities of the English,' in* 21 RÄTTSHISTORISKA STUDIER 217, 225-27 (1997). *See also* Parrillo, *supra* note 124, at 48 (contending that "the Weberian narrative is inadequate to explain the rise of non-profit government in America").

163. Weber, for instance, understood the division between person and office to include both a stricter separation between official property and personal property (including an increased use of salaries to compensate officeholders) and a differentiation of the source of normative authority that officeholders wielded. *See supra* notes 121-123 and accompanying text. Parrillo has complicated the relationship between these two phenomena, arguing that the use of private bounties to compensate American officeholders was in many instances "at the cutting edge of positivist rationalization." *See* Parrillo, *supra* note 124, at 57.

164. Some aspects of changes in judicial officeholding are usefully explained by the sharpening distinction between the personal and the official. For instance, at the beginning of the nineteenth century in a number of states, judges retained court filing fees as a form of personal compensation. *See* DAVID DUDLEY FIELD, RE-ORGANIZATION OF THE JUDICIARY: FIVE ARTICLES ORIGINALLY PUBLISHED IN THE EVENING POST, ON THAT SUBJECT (1846) (arguing that the "taking of fees by judges is an unseemly practice, tending to the perversion of justice"); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 138 (2005). *But cf.* SCOTT MESSINGER, ORDER IN THE COURTS: A HISTORY OF THE FEDERAL COURT CLERK'S OFFICE 11 n.22 (2002), *available at* https://public.resource.org/scribd/8763902.pdf ("Unlike the clerks, marshals, and district attorneys, the judges of the federal courts received a fixed salary in lieu of fees."). Meanwhile, many judges, including federal ones, were also expected to pay their own incidental expenses, for example, for travel, out of their own pocket. *See* James Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 3-13 (2008).

This relatively weak distinction between personal and official property may also have found reflection in the possibility that judges could hold a copyright in their opinions. This notion, Craig Joyce tells us, had "substantial foundation" before the Supreme Court's decision in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1373 (1985).

## CONCLUSION: THE ENDURANCE OF DISSENT, PERSONAL JUDGES AND IMPERSONAL LAW

By 1910, the legal profession had lost interest in the debate over dissenting opinions. Dissents continued to be published (except, until 1921, in Louisiana's official reports). By 1917, an article in the *American Law Review* could reflect, in the past tense, on how "quite a controversy" over dissenting opinions had arisen in law journals and bar associations.[165] The success of legal realism surely had much to do with why dissenting opinions ceased to be a cause for concern among members of the bar.[166] As Robert Post has explored, when lawyers ceased to understand the law as "a grid of fixed and certain principles designed for the settlement of disputes" and came instead to understand it as "the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes,"[167] then dissenting opinions came to seem less like a pernicious, private indulgence because they emphasized law's "flexibility and adaptability,"[168] which were now seen as important virtues.

There were likely more immediate causes for the dissipation of the bar's interest in dissent. For one, the *Albany Law Journal*, the leader of the opposition to dissent, went out of publication at the end of 1908.[169] For another, around 1905, at the very time the debate over dissenting opinions began to fade, the energies of bar associations turned to opposing the "judicial recall fallacy" and defending against the sustained progressive assault on the courts.[170] To be sure, dissenting opinions had a

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165. Knight, *supra* note 58, at 481, 483. Articles on dissenting opinions were occasionally published. *See, e.g.*, Knight, *supra* note 58; Berto Rogers, *Dissenting Opinions*, 35 L. NOTES 149 (1931); Walter Stager, *Dissenting Opinions, Their Purpose and Results*, 19 ILL. L. REV. 604, 607 (1924). But these articles were hardly part of a national conversation and did not vigorously advocate a prohibition on dissent.

166. Just as the sheer number of dissenting opinions did not appear to cause the controversy, no reduction in the number of dissenting opinions appears to explain the decline in interest in dissent later. If anything, dissenting opinions became more common. *See* Robert Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 132 (1977) (finding that dissenting and separate concurring opinions "appeared in 8.7 percent of all [state supreme court] cases in 1870-1900, in 10.5 percent in 1905-1935, in 15 percent in 1940-1970"). Nor did dissenting opinions from the most visible jurisdiction, the U.S. Supreme Court, become any more temperate. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 106 (1911) (Harlan, J., dissenting) (implying that the majority's decision "is a blow at the integrity of our governmental system, and, in the end, will prove most dangerous to all").

167. Post, *supra* note 4, at 1274.

168. *Id.*

169. *See Announcement*, 70 ALB. L.J. 384, 384 (1908).

170. *See* JOEL B. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION 53 (1965) (describing the ABA's response to the campaign against the judicial recall as an "intense, vituperative, almost hysterical propaganda offensive"); WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS 114 (1994) (noting that between 1908 and 1912 California, Oregon, Arizona, Nevada, and Colorado adopted judicial recall measures); SELECTED ARTICLES ON THE RECALL, INCLUDING THE RECALL OF JUDGES AND JUDICIAL

role to play in the judicial politics of the late Progressive Era and of the New Deal. By the 1920s, progressive and labor leaders regularly relied on dissenting opinions to criticize decisions of the Court's majority and, indeed, to challenge the very legitimacy of judicial review.[171] Meanwhile the president of the American Bar Association worried that "much of the current discontent [with judicial review] is caused perhaps by the publication of dissenting opinions,"[172] and Tennessee Senator John Shields likewise attributed progressive hostility to the judiciary to "the bad effect [that dissenting opinions] have upon the public mind concerning the wisdom of the court and the certainty of the law."[173]

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DECISIONS, at xl-xliii (Edith M. Phelps ed., 1915) (bibliography of extensive outpouring of articles by bar associations decrying judicial recall).

171. *See* John P. Frey, *Shall the People or the Supreme Court Be the Final Voice in Legislation*, 29 AM. FEDERATIONIST 629, 634 (1922) (pointing to a "large number of dissenting opinions" and remarking that the American trade union movement "has never been more vigorous or emphatic in [criticizing Supreme Court decisions] than were the Supreme Court Justices who wrote dissenting opinions"); Samuel Gompers, *Editorial*, 16 AM. FEDERATIONIST 49 (1909) (drawing support from Chief Justice Holmes's dissent in *Vegelahn v. Guntner*, 167 Mass. 72 (1896), and vehemently criticizing another Massachusetts decision after noting that "the dissenting judges in the case do not go as far as they might have gone in attacking the decision, though their comments are trenchant and vigorous"); Robert M. La Follette, *Child Labor and the Federal Courts*, 29 AM. FEDERATIONIST 469, 481 (1922) (remarking of *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), "[l]et the dissenting members of the Supreme Court themselves comment upon the action of the majority of the court in these cases"); *Latest Anti-Labor Decision of the United States Supreme Court*, 58 BROTHERHOOD LOCOMOTIVE FIREMEN & ENGINEERS' MAG. 571, 573-75 (1915) (quoting at length from dissenting opinions to criticize a Supreme Court ruling as no more than "the result of the personal views influenced, as we have said, by training and temperament"); Jackson Harvey Ralston, *Shall We Curb the Supreme Court?*, 71 FORUM 561, 565 (1924) ("point[ing] to the repeated dissents" and observing that "[s]urely if the majority had based their action upon definitely understood constitutional principles, no differences of moment need have arisen"); *cf. Dissenting Opinions Once More*, HARTFORD COURANT, Oct. 23, 1911, at 8 (noting how ex-President Theodore Roosevelt had invoked arguments of dissenting judges to criticize the courts and arguing that the "publishing of dissenting opinions should cease").

In 1937 President Franklin D. Roosevelt would draw on dissenting opinions as he announced his court-packing plan to the nation:

> In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people. In the face of such dissenting opinions, it is perfectly clear that, as Chief Justice Hughes has said, "We are under a Constitution, but the Constitution is what the judges say it is."

FDR'S FIRESIDE CHATS 89 (Russell D. Buhite & David W. Levy eds., 1992).

Though the critics of the judiciary drew upon dissenting opinions as a weapon for their assault, dissent may have actually entrenched the judiciary's centrality in the longer term. William Forbath has explored how the American labor movement, in the course of its sustained confrontation with a hostile judiciary, eventually "began to speak and think more and more in the language of the law," abandoning "radical republican claims upon government" to adopt anti-statist "rights" and "freedom-of-contract" rhetoric. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1205 (1989). The ability of the judiciary to transform a political dispute into a "legal" discourse—that is, one had in terms closer to those accepted by the courts—may have been aided in no small measure by the resource of dissenting opinions: dissents provided labor and progressive leaders with a set of arguments that would have supported outcomes similar to those they desired, in a language and conceptual framework that was able to persuade judges.

172. John W. Davis, *Present Day Problems*, 9 A.B.A. J. 553, 557 (1923).

173. John K. Shields, *Senator Condemns Legislative Efforts to Curb Supreme Court*, N.Y. TIMES,

Unlike earlier, dissatisfaction with dissenting opinions aligned clearly with desired substantive political outcomes. But members of the bar did not advocate a total prohibition on dissent,[174] perhaps out of unwillingness to draw further attention to judicial fallibility or to the indeterminate nature of law at the time of political assault on the judiciary.[175]

Throughout this Article, I have emphasized that dissents' turn-of-the-century opponents not only expressed an anxiety that the publication of dissent suggested that law was indeterminate, but also a concern that it was inconsistent with the nature of courts and of the judicial role for judges to express their disagreement in law reports. But, of course, courts and judges are symbols of the law, and one of law's most fundamental sources of legitimacy is its claim to impersonality—an ideal that its rules should be the same no matter to whom they are applied or who is charged with applying them. The turn-of-the-century lawyers' attraction to a vision of courts as impersonal institutions thus flows from an ancient understanding of the nature of law's authority. But what can be said of lawyers' attraction, at both ends of the twentieth century, to an ideal of personality in structuring the judicial role? Why have lawyers been attracted to a seemingly paradoxical and perhaps anachronistic vision of "a personalized judiciary that applies impersonalized rules?"[176]

I would venture that imagining the judgeship as personal has allowed lawyers to temper what they perceive as the deficiencies in law's impersonality. The subtle nuances in lawyers' appeals to the personal authority of judges suggest that they have imagined those deficiencies in different ways. At the beginning of the century, judicial hero worship may have tempered lawyers' disquiet over the monotony of their practice or their unease over the ends to which their clients' employed law.[177]

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Apr. 15, 1923.

174. Canon 19 of the 1924 ABA Code of Judicial Conduct took what seemed to have been the consensus position among lawyers during this period: dissents, while permissible, were not desirable. It exhorted judges to "use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision . . . . Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort." LISA MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 137 (1992).

175. William Jennings Bryan used dissenting opinions to express dissatisfaction with majority decisions during the period the bar was debating the propriety of dissent. *See, e.g.*, *Character Sketch: The Presidential Candidates: Mr. McKinley and Mr. Bryan*, 14 REV. REV. 113, 125 (1896) (quoting Bryan at rally as saying, "They criticize us for our criticisms of the supreme court of the United States. My friends we have not criticized. . . . If you want criticisms read the dissenting opinions of court."). But Bryan's insistence that he was not criticizing the courts could hardly put lawyers, and courts, on the defensive in the same way the assault that was to begin a decade later would. *See* ROSS, *supra* note 170, at 35-37 (recounting how in his nomination acceptance speech, Bryan insisted that the Democratic platform "contained no suggestion of an attempt to dispute the authority of the Supreme Court" and went to great lengths in his campaign not to be seen as hostile to the judiciary).

176. Wald, *supra* note 108, at 769.

177. *See* sources cited *supra* note 103 and accompanying text.

Towards the end of the century, Patricia Wald's aspiration to infuse decisionmaking with personal values and common sense, like Owen Fiss's insistence that a judge engage with each case as a matter of personal conscience, suggested a desire for judges to temper the harsh results to which impersonal law interpreted and applied merely in an official capacity might lead. Joseph Vining's desire to hear a person "speaking through" judicial opinions bespoke a longing to imagine a mind ordering the legal universe, the possibility of which Vining felt necessary to sustain faith in law.[178] His ambition was not to temper the harshness of impersonal law in individual cases, but to understand law as rational and just, not cold, chaotic, and arbitrary. In sum, law's impersonality may be at tension with many of lawyers' other ideals, not least among them, justice. Imagining "a personalized judiciary that applies impersonalized rules"[179] helps lawyers to believe those tensions can be reconciled.

In the years since the concerns over bureaucratization occupied a central role in discussions of the projection of federal judicial authority, a conservative legal movement has appealed to law's impersonality in positioning its constitutional vision as the only alternative to "judicial personalization of the law";[180] at the same time, leading conservative jurists have played up the professional expertise possessed by judges.[181] The social imagination of the judiciary is no doubt an unstable and contested terrain. One of the forces shaping it is law's aspiration to impersonality. Another appears to be the desire for a personal, non-institutional face to judicial power.

178. *See* VINING, *supra* note 114, at 5 (suggesting law and theology are sister disciplines).

179. Wald, *supra* note 108, at 769.

180. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (contending that originalism helps prevent "judges . . . [from] mistak[ing] their own predilections for the law").

181. *See, e.g.*, Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, N.Y. TIMES, Feb. 19, 2009, at A14.