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The Dissent and Its Change

A Thesis for the University Honors Program

Lee R. Hunt

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Abstract

The Dissent and Its Change is a historical look at a few of the men who have had an important impact on the United States Supreme Court. Justice Oliver Wendell Holmes is best known for his many dissenting opinions while on the Supreme Court. He was one of the first Justices to give the dissenting opinion legitimacy and to make it into a powerful force that can change the law. Justice Holmes spent much of his thirty-year term on the Supreme Court dissenting against the use of the Fourteenth Amendment to invalidate laws passed by state and federal legislatures. In the end, Holmes' view and his dissent prevailed.

Beginning in 1941, Justice Harlan Fisk Stone served as Chief Justice of the Supreme Court. Once in this position, Stone made the Court a body that encouraged individual Justices to express their opinions even when they were not the opinions of the majority. During Stone's five years as Chief Justice, the rate at which there was dissension more than doubled. Through the esteem placed on the dissent by these and other Justices, it has continued to be used with astounding frequency. The dissent has stood as an assurance that the Supreme Court remains a body open to disagreement. All of the men and women that serve in this powerful collegial court are insured the chance to let their deference with the majority be known to all. The dissent has been responsible for keeping the Supreme Court in check and assuring that our Court is run by the Constitution and laws of the country, not by the men and women that wear the black robes.

Preface

I have always admired men and women that were willing to stand on the outside of popular opinion. It is easy to make a stand against something when backed by throngs of supporters, but to do it with the same zeal when one is alone is the mark of a special person. It is this sense of admiration that led me to choose the dissenting opinion as the topic for my senior thesis.

I began the research with the goal of identifying why it was that there were so many justices expressing dissent on today's Supreme Court. First, I turned to the superb dissents of Justice Oliver Wendell Holmes. Justice Holmes was always able to keep the dissent in check. He used it with the utmost power but did not allow it to enter the personal realm. One of the most impressive qualities that Holmes possessed was humility. Many of his dissents contained apologies, and he was never afraid to admit his own short-comings. It was precisely this humility that made Justice Holmes reluctant to pass judgement on laws properly passed by the legislature.

Throughout the project, I continually found myself proud of the work done on the Supreme Court. It has always been fashionable to degrade the judiciary with cute lawyer jokes and intense critiques of the decisions handed down by the High Court. What many individuals forget is that through the words of men like Holmes, the Supreme Court has been the starting point of the freedoms that are taken for granted today. Although the Bill of Rights states that these freedoms are

guaranteed, it is the Court that has made sure no freedoms are taken away from the public. How soon we forget that the Supreme Court and the lawyers of this country are the people who insure that the United States remains a country ruled not by a dominating class, but by the people and by the laws.

The dissenting opinion has always been the part of the judicial opinion that drew my attention. It has been an edifying experience to read the words of the most prolific dissent writers our county has ever known. More than anything, I take from this project a renewed sense of faith that the United States Supreme Court is a body more than capable of keeping the law at the forefront of development. I am just as certain that it is the dissenting opinion that makes this a reality.

The Dissent and Its Change

In its earliest meaning, the term dissent was used when speaking of a person who challenged the norms of religion.[1] In this sense of the word, the United States was founded by a group of dissenters. These founders were known for their fight against oppression and praised for not succumbing to the majority. From this historical standpoint, it is no wonder that legal dissent has achieved such prominence in the courts of the nation.

Black's Law Dictionary defines a dissent as denoting "the explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them."[2] This definition fully describes all of the technical aspects of a dissent but does not cover the freedom it gives to judges. In appellate courts a panel composed of from three to nine judges hears a given case. There are nine Justices on the Supreme Court. When all nine do not agree on what the decision should be and how it is to be reached, there is a dissent. Not every time when there is a non-unanimous case decision does the Justice in the minority decide to write a dissenting opinion, but that freedom is present. The dissent is an opportunity for the individual judge to express his or her

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[1]Jackson E. Percival, Dissent in the Supreme Court: A Chronology (Norman: University of Oklahoma Press, 1969), 3.

[2]Black's Law Dictionary, (1994), s.v. "dissent."

discontent with the majority. The very nature of appellate work forces the judges to decide upon issues that others could not put to rest. By presenting judges with a proper forum to express disagreement, the dissent serves an invaluable purpose. It allows for judges to explain their reasons for disagreeing and propose a different outcome. The other critical function that the dissent serves is that by giving everyone a voice, it insures that no opinions of the law are quieted for the sake of presenting a court that appears united. If a Justice has a grievance with the majority, there is a proper place to let that be known.

Former Supreme Court Justice William O. Douglas thought so highly of dissents that he wrote, "the right to dissent is the only thing that makes like tolerable for a judge of an appellate court."[3] Although this feeling is not shared by all the men and women who have worn the black robe, the ability to express oneself is highly revered by all judges. Dissenting opinions are written to satisfy no one except the judge who is drafting it. Even when all others disagree, the dissent can command the kind of attention that enables the law to continually change with the society that it is designed to serve.

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when the later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[4] This is possibly the most eloquent defense of the dissent that has ever been put on paper. Former Supreme Court Chief Justice Charles

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[3]Antonin Scalia, "The Dissenting Opinion," *Journal of Supreme Court History* (1994), 42.

[4]Charles Evan Hughes, The Supreme Court of the United States (New York: Columbia University Press, 1966), 68.

Evans Hughes wrote this in his great treatise The Supreme Court of the United States. This came at a time when Chief Justices were staunch defenders of the idea that a united voice should speak for the Court. Justice Hughes rarely dissented and did not condone widespread use of such, yet he still saw the inherent value of allowing judges to speak as they saw fit. His defense of the minority opinion served as a reminder that in a country built on personal freedoms, no voice should be silenced. As Hughes wrote, the dissenter is indeed trying to appeal to future litigants and judges. The Justice writing the dissent often has no ability to change the decision of the present. The oral arguments are over and every voice has had a chance to be heard. This is when a dissent is written. By the time a dissent is put on paper and read by the other Justices, the vote has already been taken and the decision made. The dissent gives the Justice a chance to be heard and a chance to make it known that not all are in agreement with the decision rendered.

The dissent is at its best when it serves as an outlet for judges to express their discontent with the decision handed down by their brethren. This is an important function for it insures that the decision was not made in a perfunctory manner.[5] The public, above all else, expects the Supreme Court and all other courts to decide on the cases before them in the fairest manner possible. When a dissent is published, it is there for all the see that the decision was indeed satisfactorily argued. The fact that intelligent people do not agree on all things has certainly never been a problem in most arenas. The public expects for the diverse group of leaders in the Congress to disagree on many subjects. In the judicial branch the expectation is only slightly different. When a majority is reached,

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[5]Harlan Fisk Stone, "Dissenting Opinions are Not Without Value," *Journal of the American Judicature* 62 (Oct. 1942), 78.

the decision is made and the rule of law established. Stanley H. Fuld refuted the claim that dissents take away from the power of the Court when he said, "I am positive that disagreement among judges is as true to the character of democracy, and as vital, as freedom of speech itself."[6]

There are still many that claim dissents cause the Court to lose power because they break up the appearance of unanimity and, in the process, certainty of law. The Court does depend on the grant of power from the people to give it legitimacy. Although dissents do cause a degree of certainty about the law to be lost, this is small price to pay for the good they serve. If all decisions were reached and then the judges reported only the majority opinion, or if the losing judges acquiesced to the decision of the majority, there would be no guarantees of a proper debate. During the first one-hundred years of the Court, almost all decisions were reported as unanimous. The Justices wanted to portray a united front to insure that the public respected all of the decisions of the Court. This ideal of unanimity no longer serves as a deterrent to those that wish to write a separate opinion. Today's Court has consistently had more opinions with dissents than it has opinions that were unanimous.[7]

In this age of many dissents, the decisions that are reported as unanimous stand that much taller. The most famous story of unanimity serving the function of making a decision stronger is the episode in which Chief Justice Earl Warren fought hard to get a decision free from dissent in the 1953 case of Brown v. Board of Education. He achieved the impossible, and the case was reported as a

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[6]Stanley H. Fuld, "The Voice of Dissent," *Columbia Law Review,* 62 (1962), 926.

[7]Robert A. Carp and Ronald Stidham, Judicial Process in America (Washington: Congressional Quarterly Inc., 1995), 348.

unanimous decision. Chief Justice Warren knew the value of a unanimous Court and was willing to do whatever it took to have this crucial case reported to the American people with the full support of all the members on the Court. When this was achieved, he allowed the decision to be read to the people. It is certain that if all cases were reported as unanimous the Brown v. Board of Education decision would not have been so strong.[8]

Many times a dissent is written not to win over a colleague or influence a court, but because the individual judge cannot back down from a deeply held principle. When time proves that the judge was wise in his or her decision, it is a moment to celebrate the right to dissent. The Court is made up of mortals. These men and women are indeed very intelligent, but they still make mistakes. When a horrendous decision has been handed down by the High Court, even a lone dissent can help maintain the public's faith in the ability of the Court to interpret the laws of the land. One of the most famous of these instances occurred in the Plessy v. Ferguson case. In this 1896 decision, the Supreme Court approved the principle of "separate but equal." Time proved this to be one of the most notorious decisions ever written. Justice John Marshall Harlan wrote a very unpopular dissent that has become the most memorable part of the case. At a time when the majority was making a mistake, Harlan showed that not all of the members of the Court felt that this was the way the Constitution should be interpreted. With the famous words "Our constitution is color-blind," Justice Harlan managed to salvage a lost case and use it to suggest that the dissent is an invaluable tool.[9] Justice Harlan's minority opinion was able to show that even when the Court made a wrong decision, the

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[8]Scalia, "The Dissenting Opinion," 35.

[9]Plessy v. Ferguson, 163 U.S. 537 (1896).

dissent could be of immeasurable value. The Plessy dissent was later adopted by the advocates in the Brown case.

To place too much emphasis on the dissents that predict the future would be to deny the reality that many dissents never become the law of the land. One of the most famous dissent writers, Oliver Wendell Holmes, only achieved the ideal of changing the course of the law in about ten percent of his dissents.[10] If most judges know that their dissent is not going to become the law, then why is it that so many persist in dissenting? One reason is that Justices are used to being able to express their opinions and as Justice Jackson stated, "It's more fun to write dissenting opinions."[11] Although this may seem like a careless thing for a Supreme Court Justice to say, it does make sense. The dissenter is beholden to no one and is free to completely express him or herself as desired. A dissent is written in the manner and style of the individual and does not have to meet the expectation of other members of the Court. This freedom enables the Justice to express him or herself in a fashion that cannot be achieved when writing for the majority. For many Justices, the opportunity to show their superior knowledge of the law is not easily passed upon.

Finally, the dissent is important as a test for the majority decision. The argument against the rule of the present Court is right behind the majority decision for all to read. It is there for the bench and bar to find and use for later arguments. This effect has received very mixed reviews. The critics of the dissent assert that it opens the door for future litigation and gives the arguments to the

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[10]Scalia, "The Dissenting Opinion," 37.

[11]Allan Barth, Prophets with Honor: Great Dissents and Great Dissenters on the Supreme Court (New York: Random House, 1974), 5.

attorneys for such litigation. There is little question that they are correct in this assessment. Those on the opposite side of the debate reply that forcing the rule of the Court to stand up against counter arguments insures that the decision is proper. The dissent is an ever-present litmus test that the majority view must be able to pass again and again.[12]

By forcing the rule of law to stand strong, the dissent has kept the law from becoming stagnant and allowed for change to occur when necessary. The Courts of the United States are criticized for various decisions from time to time, but as a whole the judicial branch has been able to maintain the public's belief that it is upholding the Constitution. One of the major reasons for the Court's success at staying in touch with society is the dissenting opinion. For many years, the dissent was used sparingly and only in times of extreme disagreement. Beginning in 1902, however, Justice Oliver Wendell Holmes brought a new degree of legitimacy and force to the use of these opinions. Holmes was able to make the dissent a voice of reason and not a voice of division. He had a large influence upon the man who impacted the frequency of dissent usage more than any other person: Justice Harlan Fisk Stone, who joined the court in 1925. The two men were together in the minority on many occasions. Stone learned the value of the dissent from Holmes and never hesitated to employ it. In 1941, Stone became the Chief Justice of the Supreme Court. Soon after this, the members of the Court turned to the dissent with astounding frequency. The trend had changed; dissents have continued to be a strong force in the Supreme Court ever since. Today's Supreme Court is one in which dissents are commonplace. Unanimous decisions are no longer the rule; they are the exception.

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[12]Stone, "Dissenting Opinions," 78.

In the earliest days of the Court, there were no dissents because all Justices were given the chance to express their views in important cases. The Court followed the English method of delivering opinions *seriatim*. Under this method, in all important cases each of the Justices would write an opinion of his or her own. This gave each person the chance to express their ideas, and without a majority opinion there was nothing from which to dissent.[13] This practice may seem arcane to us today, but it served the important function of allowing all of the voices to be heard.

The present Court tradition had its origins in the early 1800's and the leadership of Chief Justice John Marshall. Under Marshall's leadership, the practice of writing opinions *seriatim* was abandoned. Marshall firmly believed in maintaining Court unity. Marshall placed such a premium on unity in part because of the role he was expected to play on the Court. Until Marshall's appointment in 1801, the Supreme Court and the judiciary had been the weakest of the three branches of government. President Adams appointed Marshall to save the Constitution from the Jeffersonian Republicans. Marshall was a prominent Federalist who believed in a strong federal judiciary. In an effort to strengthen the Supreme Court, Marshall did away with the old English practice. He felt that the Court needed to be more authoritative and speak with a single, strong voice. Many times this strong voice was his own. Marshall wrote and delivered nearly half of the one-thousand decisions during his tenure. Chief Justice Marshall helped mold the role of the Supreme Court, and for him this was to speak with unity and without dissent.[14]

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[13]Scalia, "The Dissenting Opinion," 34.

[14] Kermit L. Hall, James W. Ely, Jr., Joel Grossman, and William M. Wiecek, eds., <u>The Oxford Companion to the Supreme Court</u> (New York: Oxford University Press, 1992), 523-525.

From the days of Marshall until the end of the Charles Evans Hughes era, the Supreme Court remained an institution that embodied unanimity. The Justices many times accepted the majority view even when it was not their own.[15] Marshall showed this behavior in a case in which he had written an opinion only to find that he was in the minority. Instead of standing by his view, Marshall set an example that he wished other Justices to follow when they disagree with the majority. He spoke to the Court saying, "I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce to that of my brethren."[16] The precedents and norms of the Court were for the Justice that disagreed to acquiesce to the view of the majority unless such action simply could not be done in good conscience.[17]

This view prevailed during the early history of the Court, a Court which placed extreme importance on presenting the law as clearly as possible. An explanation for such a practice must consider both the norms of the Court and the men who were Chief Justices.[18] The standards of writing took a shift toward more frequent dissents beginning in the year 1941.

This shift in the manner that the Supreme Court writes its decisions has been the topic of many debates and articles. There is no perfect answer as to why this occurred, but the high esteem and almost reverence given to the dissents of Justice Oliver Wendell Holmes in the early twentieth

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[15] Percival, Dissent in the Supreme Court, 24.

[16] Ibid.

[17] Ibid.

[18] Thomas G. Walker, Lee Epstein, and William J. Dixon, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," *Journal of Politics* 50:2 (1988), 361-364.

century certainly have contributed to the high rate of dissents in the years following his success. His dissents were commended for their style and foresight. The campaign that he waged against the doctrines of substantive due process and laissez-faire constitutionalism was almost entirely a campaign of dissents. In the end, Holmes and the dissent prevailed. It was not entirely the fault or achievement of Holmes, but he played a large part in the fragmentation of the majority opinion.

Oliver Wendell Holmes Jr. was born in Boston, Massachusetts, on the eighth of March in 1841. His father was a doctor who also had an interest in literature. This love of literature was passed down to his son and proved to be one of the defining characteristics of the younger Holmes' judicial writing. Holmes Jr. was educated at the Harvard Law School. This was important, for in Holmes's day, law school was not a prerequisite to becoming a lawyer. He was greatly influenced by many of the intellectual theories of the day, including a belief in the pre-Darwinian doctrine of evolution. Holmes wrote extensively as a young attorney and formulated many of his life long-beliefs during his early years in the legal world.

Throughout his career as a legal scholar and judge, Holmes became one of the leading voices on the philosophy of law. Holmes wrote The Common Law in 1880. With the famous line "The life of the law has not been logic; it has been experience,"[19] Holmes began a legal treatise that became one of the most profound statements about the American legal system ever written. The book attempted to peer into the law and find what it is based on and where it will go. Throughout Holmes' career he showed an uncanny knack for predicting the future of the law. In The Common Law,

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[19]Oliver Wendell Holmes Jr., The Common Law (Cambridge, Mass: Harvard Press, 1881), quoted in The Essential Holmes, ed. Richard A. Posner (Chicago: University of Chicago Press, 1992), 237.

Holmes wrote, "In order to know what it is, we must know what it has been and what it tends to become."[20] Holmes showed his view of legal realism, a belief that the law changes with the circumstances and indeed changes over time. Holmes' view was powerful because of what it spoke against. The book was written at a time when the law was frequently regarded as an unchanging science. The adherents to legal science believed that the law could be formulated into a set of equations in which the judge simply inserts the facts. Holmes, on the other hand, saw the law as an ever-changing order that took into account a nation's development. Speaking directly against the legal-science approach, Holmes wrote, "(The law) cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[21] Justice Holmes saw the law as much more than a rigid set of guidelines. It was instead a system which moved with society and allowed justice to prevail. His work on the philosophy of law became a benchmark by which all other legal writings were judged.

The Common Law provided one more important clue into the judicial make-up of Justice Holmes. He believed that the history of the law was important as a predictor of the future, but he did not see the past as the only criterion to which judges should look. The course of the law corresponds with the changing nature of society. Holmes was not a strict adherent to *stare decisis,* the idea of using past precedents to decide how future judges should rule.[22] He felt that the growth of the law

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[20]Oliver Wendell Holmes Jr., The Common Law (Cambridge, Mass: Harvard Press, 1881), quoted in The Essential Holmes, ed. Richard A. Posner (Chicago: University of Chicago Press, 1992), 237.

[21]Ibid.

[22]Black's Law Dictionary, (1994), s.v. "*stare decisis.*"

depended on change. As he said, "The truth is, that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains the old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."[23] For this reason, Holmes was able to justify his many dissents as part of the process of change that the law must go through. He believed that, although he was in the minority at the time of the decisions, his view would eventually prevail.

Justice Holmes served on the Supreme Court bench during an era in which many of the finer aspects of the Constitution were under great debate. He had a large role in shaping how future generations were to look at the Constitution and how judges were to interpret it. During his thirty years on the Court, Holmes witnessed the rise and fall of substantive due process. Adopted by many of the members of the Court, substantive due process was the idea that the Constitution guaranteed freedom from government interaction in contracts and in the lawful pursuit of life. Inherent in the idea of substantive due process was laissez-faire constiutionalism. Many members of the Court saw the Constitution as calling for the marketplace to be free from government control. The argument was that if the government is allowed to control certain aspects of the market, then there would be no way to stop the government from controlling the entire economy. Both substantive due process and laissez-faire constitutionalism were used to invalidate many state laws that were designed to establish a set of labor standards that would improve the plight of the worker. Holmes dissented

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[23]Oliver Wendell Holmes Jr., The Common Law (Cambridge, Mass: Harvard Press, 1881), quoted in Kermit L. Hall, William M. Wiecek, and Paul Finkelman, American Legal History: Cases and Materials, (New York: Oxford University Press, 1991), 348.

against the rigid adherence to these doctrines on the grounds that the Court was not to decide on the wisdom of the legislation; instead, it should leave the job of legislating in the hands of the elected members of the government.[24]

Holmes also helped bring about the beginning of the era in which personal liberties such as free speech began to get a stronger foothold in the Constitution. Justice Holmes found himself in dissent so often because of his belief in judicial restraint. He was a firm believer in the power of the legislature both, state and federal, to enact laws that it felt the public demanded. So long as these laws did not directly interfere with the federally protected rights that were stated in the Constitution, Holmes believed the Court should refrain from judging these laws based on economic or moral criteria. Many of his dissents were an effort to keep the Court from striking down laws properly enacted by Congress or the states. In essence he used the dissent as a tool to further his view of the separate roles of the legislature and the judiciary. As soon as the Justices on the Court started to legislate from the bench or write economic theories into law, Holmes dissented.

Justice Holmes is remembered by his popular nickname, "The Great Dissenter." This nickname was not due to the frequency with which he dissented but rather to the force and foresight that were so characteristic of his dissents. It is not a surprise that Holmes is best remembered for the times when he stood against the majority. It was in the minority that Holmes was free to fully express his beliefs and so eloquently challenge the path chosen by the majority. In several issues, Holmes' dissents eventually became the blueprint for the majority opinion. For all the genius of Holmes' other writing, it is his dissenting opinions that are most remembered. The dissent had a champion, and it

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[24]Hall, ed., Oxford Companion to the Supreme Court, 237, 240.

was now a more powerful tool than ever in affecting the future of the law.[25]

In 1901, when Holmes first took his seat on the Supreme Court bench, the dissent was used sparingly. The year before Holmes came to the Court, the dissent rate was less than ten percent.[26] The members of the Court put much more emphasis on solidarity than individual expression. The main reason for this was that nearly all of the Chief Justices since Marshall placed a premium on unanimity. For 100 years, the Justices of the Court had all been conditioned to avoid dissents at all cost. The Supreme Court Chief Justice during Holmes' first eight years on the Court was Melville Fuller. He was a strong leader of the Court and took a very active role in keeping solidarity among the Justices. Fuller desired harmonious relations on the Court, and he achieved this because, "he was blessed with conciliatory and diplomatic traits."[27] Fuller was held in high regard by his fellow Justices. Holmes had such adoration for Fuller that he described him saying, "He had the business of the Court at his fingers' ends... Fuller was the greatest Chief Justice I have ever known."[28] This degree of respect helps explain why Holmes did not dissent a single times in his first two years on the Court.

Holmes also believed that dissents, as a rule, were of little value. He never wanted to stand in the way of progress. This aversion to dissent writing makes the fact that he became known as the

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[25]In all of the following cases Justice Holmes' dissent was ultimately adopted by the majority in a later decision: Lochner v. New York, 198 U.S. 45 (1905), Hammer v. Dagenhart, 247 U.S. 251 (1918), Abrams v. United States, 250 U.S. 616 (1919), Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[26]Appendix, table 3-2.

[27]Walker, "Mysterious Demise of Consensual Norms," 380.

[28]Ibid.

Great Dissenter all the more intriguing. Holmes had supreme confidence in the law and his ability to see the path of the law. Holmes only dissented when the vision of the majority could not be accepted.

In 1904, Holmes wrote his first dissent. Holmes showed that he did not enjoy being the voice that spoke out and expressed a different view. In a 5-4 decision that weighed the constitutionality of an executive order to break up the Northern Securities Company, Holmes dissented against Theodore Roosevelt, who had placed him on the Court. The case was especially important for its effect on the delicate role of federal regulation on commerce. The majority ruled that it was within the federal executive power to break up a combination of railroads if they interfered with the free flow of commerce. Holmes saw the action of the federal government as an infringement upon local control of commerce. This belief forced Holmes to read a dissent in open court for the first time. Speaking of the limits that are placed on federal actions infringing upon states, Holmes began his dissenting career with an apology: "I think it useless and undesirable as a rule to express dissent."[29] This early expression goes a long way in demonstrating how deeply Holmes felt about the issues from which he was dissenting. For a man who did not wish to break from the solidarity of the Court, however, Holmes was soon faced with an issue that would allow him no other choice.

After 1905, the Court began to use the due process clause of the Fourteenth Amendment to invalidate certain state laws. Many of these laws dealt with the issue of social experimentation and other economic affairs. The due process clause was said to grant a "liberty of contract" that served the purpose of keeping state regulation out of labor negotiations and labor contracts. The Court was placing into the Constitution a limitation that greatly restricted a state's ability to interfere with the

[29]Northern Securities v. U.S., 193 U.S. 197 (1904).

right of individuals to make contracts between themselves. The problem, as Holmes pointed out, was that the employee and employer were not on level ground when it came to negotiating. The Court's use of the Fourteenth Amendment to declare laws passed by state legislatures unconstitutional was to Holmes a reason to speak out. Holmes opposed using the Fourteenth Amendment in this manner, not because he was a great proponent of social legislation; rather, Holmes did not see that the Court should strike down laws legitimately passed by the states just because it did not agree with them. Many of Holmes' dissents were written defending his view of judicial restraint. The Court's duty was to decide upon the cases before them and to leave the job of making laws for the legislature. His only course of action was a direct appeal to future judges in the form of a dissent.

Holmes' first dissent against using the due process clause of the Fourteenth Amendment to invalidate state laws came in the famous 1905 case of Lochner v. New York.[30] The New York legislature had established a law limiting the number of hours per week a person could be required to work in bakeries. The legislature made this rule to help return decency to the work force, as some bakers were working nearly 100 hours a week.[31] There had been many reported cases of back problems and "white lung" disease, which is a respiratory condition related to inhaling excess quantities of flour. At the first conference Holmes was with the majority in voting to uphold the New York law. Justice Harlan wrote for the early majority, conceding that the New York legislature was granted the power to enact legislation designed to protect the health of its citizens by the

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[30]Lochner v. New York, 198 U.S. 45 (1905).

[31]Hall, ed., Oxford Companion to the Supreme Court, 509.

Constitution. Justice Rufus Peckham wrote a powerful dissent that caused a shift in the votes. Peckham's dissent became the majority opinion.

Speaking for the majority, Justice Peckham overturned the law. His opinion stated that the law interfered with the "liberty of contract" existing between the employer and employee. The state law thus did not give either party the ability to freely negotiate a contract and deprived the worker of making the most money possible. The opinion, most importantly, read the "liberty of contract" doctrine into the Fourteenth Amendment of the Constitution. With the new constitutional backing, the "liberty of contract" doctrine could more easily be used to overturn state laws that the majority did not agree with.[32]

Holmes began perhaps his most famous dissent with typical humility: "I regret sincerely that I am unable to agree with the judgement in this case, and that I think it my duty to express my dissent."[33] Holmes felt the majority of the Court was placing in the Constitution a right which he did not believe was there. The "liberty of contract" doctrine is never mentioned in the Constitution and was being placed in the Fourteenth Amendment by the majority. Holmes, always the stalwart of judicial self-restraint, raised his voice in opposition to the Court's striking down a law that was legitimately enacted to right a wrong the legislature observed.

An important part of the substantive due process debate was the standard of reasonableness. This standard asserted that if the regulation was a reasonable effort to correct the situation which it aimed to correct, then the Court should uphold it. Unlike Holmes, many of the Justices found that

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[32]Hall, ed., Oxford Companion to the Supreme Court, 509-511.

[33]Lochner v. New York, 198 U.S. 45 (1905).

the legislation was not directed in a reasonable way or interfered with the free market forces that kept the economy working. This was one issue that was never completely resolved and one which Holmes and the majority continually differed on.[34] Holmes' view was that unless a rational person would admit that the state action would infringe on fundamental rights, then the state law should be upheld.[35]

In the Lochner dissent, Holmes established several themes that would become common threads running through all of his dissents against substantive due process. The first of these was that judges are asked to decide matters based on the law and not on their opinions. Holmes recognized that intelligent people are going to disagree with each other on the maximum number of hours per week a person should work. This alone should not influence how judges vote. Holmes best expressed this by stating that the Constitution "is made for people of fundamentally different views." He added that this alone "ought not to conclude our judgement upon the question whether statutes embodying them conflict with the Constitution of the United States."[36]

The second theme of the dissent was that the majority, in this case the state legislature, had the right to put their opinions in the law, but the Supreme Court did not. Holmes had expressed long ago in The Common Law that it was not the judge's role to decide on the wisdom of legislation. The Court was to decide whether the legislature had the power to enact the regulations. Holmes wrote in The Common Law that the legislature was where the law changes: "In substance the growth of the law is legislative. And this in a deeper sense than what the courts declare to have been the law

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[34]Hall, ed., Oxford Companion to the Supreme Court, 238, 239.

[35]Ibid.

[36]Ibid.

is in fact new. [The law] is legislative in its grounds."[37] This idea of the sovereignty of the legislature to enact what it saw fit, became increasingly relevant as the Court shifted to a body more willing to assert its power of judicial review on acts passed by the legislature. Members of the Supreme Court were beginning to take a more active role in invalidating state laws on the grounds of unconstitutionality. By taking such an action, Holmes feared the Court was reading its opinion into the Constitution. This type of behavior by the Supreme Court was not part of the role Holmes was comfortable playing. In the end, it was just such action that he wish to avoid. Holmes' dissents came to be a voice against the Court becoming a "super legislature."

One of the most oft-quoted lines of any judicial decision ever appeared in the Lochner dissent. Holmes wrote, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[38] This was in reference to the current writing on the idea of Social Darwinism. Those that held to this view were opposed to any governmental control of the economy. The believed that the market was at its best when left completely alone. The losers in this philosophy were the masses that depended upon meager wages from manual labor jobs. The current Court was beginning to adhere to this strict policy of little government control. Holmes did not believe that it was the Court's role to judge the case based on its view of the particular legislative policy. Lochner was the first time that Holmes expressed this view, but it was certainly not the last.

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[37]Oliver Wendell Holmes Jr., The Common Law (Cambridge, Mass: Harvard Press, 1881), quoted in Kermit L. Hall, William M. Wiecek, and Paul Finkelman, American Legal History: Cases and Materials, (New York: Oxford University Press, 1991), 348.

[38]Lochner v. New York, 198 U.S. 45 (1905).

In the 1907 case of Adair v. US, Holmes dissented again. The 1898 Erdman Act prohibited employers from discriminating against union members. The act also prohibited the requirement of employees signing "yellow dog" contracts to get employment. These were used by employers to keep employees from joining labor unions. The "yellow dog" contract prevented a union member from getting a job and, more importantly, made union membership grounds for dismissal. In an effort to help the labor movement and improve the status of the worker, the federal government enacted laws to prohibit these types of contracts. The majority saw the Erdman Act's prohibition of these types of contracts as an infringement on the freedom of the worker to freely negotiate a contract. Justice Harlan, writing for the majority, stated that by prohibiting "yellow dog" contracts, Congress was interfering with the personal freedom of workers to choose a contract under which to work. The majority perceived that the Fifth Amendment guarantee of property rights and personal liberty were being infringed upon by the Erdman Act. Their justification was that the Erdman Act was an infringement upon the "liberty of contract."[39]

The Holmes dissent had a familiar ring to it. He expressed his belief that the Court was ignoring judicial restraint. It was usurping the right of the state legislature to govern in the best interest of the majority. The dissent was particularly directed to this point. Holmes observed, "I could not pronounce it unwarranted if Congress should decided that to foster a strong union was for the best interest, not only of men, but of... the country at large."[40] Holmes was adamant about the state's right to enact legislation as they saw fit. His colleagues on the bench were continuing to read into

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[39]Hall, ed., Oxford Companion to the Supreme Court, 8.

[40]Adair v. United States, 208 U.S. 161 (1908).

the Constitution things that Holmes felt were not there. He wrote, "I confess that I think the right to make contract at will has been derived from the word liberty in the Fifth and Fourteenth Amendments had been stretched to its extreme by the decisions."[41] Holmes was at his best when he used poetic language to make points that would otherwise seem unimportant, but in statements like this Holmes spoke to the matter as directly as possible. The main point was that the Court was using an Amendment meant to help former slaves to invalidate legislation aimed at improving the plight of the working man. To the pragmatist in Holmes, this was a travesty.

The 1915 case of Coppage v. Kansas[42] also focused on the issue of "yellow dog" contracts and union discrimination. The only difference between this case and the Adair case was that the Court was now striking down a state law instead of a federal law. The majority struck down a Kansas law prohibiting discrimination against union members. The importance of this case is that Holmes continued to dissent. It was obvious that he was not immediately going to win the support of his brethren, yet this did not deter him. In an earlier case, Holmes acquiesced after he saw that his dissent was not going to change the majority opinion.[43] Holmes spoke of dissents in the FTC v. Beechmont Hotel case, stating that persistent expressions of opinions that do not command the agreement of the Court "breach obvious limits of propriety."[44] In light of this and other statements of his, the Coppage dissent was a reminder of just how deeply Holmes believed that his views and his

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[41]Adair v. United States, 208 U.S. 161 (1908).

[42]Coppage v. Kansas, 236 U.S. 1 (1915).

[43]Evan a. Evans, "The Dissenting Opinion -- Its Use and Abuse -- Part II," *New Jersey Law Journal,* 161 (July 1938), 3.

[44]Federal Trade Commission v. Beechmont, 257 U.S. 441 446 (1922).

dissents would someday prevail.

The next case in the ever-lengthening line of Holmes' dissents against substantive due process was in the 1918 case of Hammer v. Dagenhart.[45] In this case the Supreme Court used the Commerce Clause to strike down a law prohibiting child labor. Holmes saw this as the ultimate extreme of laissez-faire constitutionalism. By adhering to a rule of invalidating state laws, the majority was passing up an obvious opportunity to improve the living conditions of children. He expressed his disbelief in the majority opinion saying, "It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."[46] This included state laws affecting labor.

Justice Holmes was growing increasingly weary of the Court's striking down laws that he believed were properly enacted by the states. The language of his dissents was becoming stronger. He was also aiming his dissents more at the majority opinion, and gone were the apologies for a differing view. In the Hammer dissent, Holmes went right to the heart of the matter and appealed to the Court, using the common-sense questions being asked by the public: "I should have thought if we were going to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States."[47]

Not only was the language becoming stronger, but Holmes was also dissenting at a much higher rate. During the first fifteen years of his Supreme Court career, Holmes dissented only 48 times. The second half of Justice Holmes' career began in 1917. During these second fifteen years

[45]Hammer v. Dagenhart, 247 U.S. 251 (1918).

[46]Ibid.

[47]Ibid.

Holmes dissented 130 times, 2.7 times more than during his earlier years. Holmes was no longer willing to allow the voice of the majority to speak without disagreement. He had seen his dissents have an effect and was now determined that if the dissent could change the law, then he would use it to its fullest. It is also noteworthy to mention that Holmes began the second half of his career at the ripe old age of seventy-five.[48]

At this point in the fight against substantive due process, Holmes had managed to win a few minor victories. In 1908 Justice Holmes was able to join the majority in a case that dealt with the state's ability to enact legislation aimed at correcting a social or economic condition. The case of Muller v. Oregon upheld a state law setting a maximum ten-hour work day for women. Justice David J. Brewer spoke for the Court and acknowledged that "Long hours of work took a toll on women and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care."[49] The ruling was important both for what it did and for what it failed to do. By directing the law only to women, the Court was not forced to reconsider Lochner. Holmes was beginning to bring the Court down from its rigid stance against state enacted legislation. There were now exceptions to the standard of "liberty of contract." It did not apply to women. Exceptions such as this would prove to be an important element leading to the down-fall of "liberty of contract." However, as the final paragraph noted, the Court was unwilling to completely break from the doctrine at present. The final paragraph read in part: "without questioning in any respect the decision in Lochner v. New York, we are of the opinion that it cannot be adjudged that the act

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[48]Evans, "The Dissenting Opinion," 245.

[49]Muller v. Oregon, 208 U.S. 412 (1908).

in question is in conflict with the Federal Constitution."[50]

Holmes' next major victory came in the 1917 case of Bunting v. Oregon.[51] In this case, the Court overruled the Lochner decision. Although the Court was badly split, they did approve an Oregon law establishing a ten-hour work day. The Oregon law also required an employer to pay time and a half for overtime. The opinion read like the earlier Lochner dissent. Justice McKenna indicated that the Court did not have to acknowledge the wisdom of the Oregon legislation. The Court only needed to recognize the legislature's authority to enact such measures for them to be found constitutional. It was a minor step forward, but it showed that Holmes was beginning to have some influence in changing the opinions of the men on the Court.

For every small victory, there was another defeat. Holmes was back in his familiar role as the dissenter in the 1923 case of Adkins v. Children's Hospital case.[52] This case raised the question of whether Congress had the right to establish a minimum-wage law. Not surprisingly, the majority again relied on the "liberty of contract" doctrine to invalidate the law.

Holmes wrote a stinging dissent in which he cautioned that it was not the Justices' role to decide cases on the basis of whether they agreed with the social or economic policy. This was a common theme but one from which Holmes never wavered. He also questioned the constitutionality of the "liberty of contract" doctrine that the majority had so often used. Holmes went to great lengths

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[50]Muller v. Oregon, 208 U.S. 412 (1908).

[51]Bunting v. Oregon, 243 U.S. 426 (1917).

[52]Adkins v. Children's Hospital, 261 U.S. 525 (1923).

to show that contracts were "no more exempt from the law than other acts."[53] He explained how the Supreme Court had regulated contracts in the past and thus "liberty of contract" was an arbitrary standard. He was referring to the Muller case and the Bunting case in which the Court had carved out exceptions to the "liberty of contract" doctrine. The Court was now relying on a set of precedents that were no longer absolute. Holmes completed the dissent by again questioning the majority's role in invalidating legislation. Holmes directed his opinion straight to this point: "To me notwithstanding the deference due to the prevailing judgement of the Court, the power of the Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of Constitutional legislation."[54] As the opinion said, the only thing that the Court had to rule on whether the Congress had the power to enact such legislation. The Court had no reason to look at the means with which the legislature acted; they only had to agree that the end in question was under the authority of the legislature.

The Adkins dissent was of historical importance for a number of reasons. When the Court started to shift toward Holmes' jurisprudence, it would be the overruling of Adkins in the 1937 case of West Coast Hotel v. Parrish that would signal the completion of the shift. Also, the Adkins dissent laid out in great detail the argument against laissez-faire constitutionalism. By establishing a step-by-step process by which Adkins could be reargued and over-turned, Holmes took his dissent a step further than any one previously written. Holmes did his own research and cited several foreign

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[53]Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[54]Ibid.

and national government precedents to validate the law.[55] Holmes had succeeded in writing a dissent that foreshadowed the impending doom of substantive due process.

In the late 1920's Holmes was nearing the end of his working career and needed a supporter on the Court who could continue the fight he had started. He found this ally in Harlan Fisk Stone. Stone had joined Holmes in several dissents, including the Adkins case. The two again were found dissenting in the 1927 case of Tyson Brothers v. Banton.[56] Holmes wrote the dissent expressing his view that the majority was in error by invalidating a state law. The case dealt with the ability of the state to enact legislation that was aimed at protecting theater goers from the inflated prices of licensed ticket sellers. The majority again found that the state law was unconstitutional because it infringed upon the Fourteenth Amendment rights of the ticket scalpers. Holmes made the issue in question and the reason for dissent very clear. He stated, "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless prohibited in the Constitution of the United States."[57] The simplicity and dryness of this statement showed that Holmes wanted there to be no mistaking how he felt on the issue. The legislature had the general right to regulate private businesses whenever it thought the public welfare was at stake. The dissent in Tyson Brothers had a different tone than some of his more eloquent and fluid decisions. Holmes was no longer trying to make a profound statement on the future of the law; instead, he was only trying to change the way the Court was presently going.

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[55]Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[56]Tyson Brothers v. Banton, 273 U.S. 445-447 (1927).

[57]Ibid.

Justice Holmes never wavered from his constitutional beliefs. Despite his dislike of dissents, Holmes wrote repeatedly against the use of the Fourteenth Amendment to strike down social experimentation. Holmes' view that the Court was not to stand as an obstacle to the legislatures' attempts to enact social reform never changed. He was not a social reformer in the mold of some of his liberal colleagues. Because of his adherence to judicial restraint, Holmes asserted that the federal judiciary should not decide cases based on whether or not they agreed with the legislative policies. He advocated a limited federal judiciary that decided cases upon the power of the state legislatures to enact such measures. If state legislatures wanted to try their hand at social legislation, and the people were willing to go along with them, the Supreme Court was not the one to tell them that their policy was not wise. The dissents, as used by Holmes, became a powerful force that was beginning to have an impact on how the Court was deciding cases.

The legitimacy was granted to the entire line of Holmes' dissents four years after his 1932 retirement. In the famed 1937 case of West Coast Hotel vs. Parrish, the "liberty of contract" doctrine was put to rest.[58] The case spoke directly to the issue of the Fourteenth Amendment being used to prevent social reform and stated that "the Constitution does not speak of freedom of contract."[59] The Court overruled Adkins vs Children's Hospital and adopted Holmes' idea of state supremacy and judicial restraint. The true mark of a great dissent is its ability to predict the future. Many of Holmes' dissents had done just that. He had also unknowingly opened, ever so slightly, Pandora's box. The dissent was never to be the same and neither was the idea of a unified court.

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[58]West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[59]Ibid.

During the thirty-years Holmes spent on the high court, he wrote dozens of dissents. His dissents against the substantive-due-process doctrine are among the most often quoted. In another area, Holmes wrote a dissent that became one of the most famous pieces of writing on the issue of free speech. This exemplary defense of free speech is a perfect example of the power that can be put behind a dissent. It is also a silencer to the critics that say dissents take away from the law. Holmes' dissent in the case of Abrams v. U.S. has been called "the most eloquent and moving defense of free speech since Milton's Aeropagitica."[60]

The Abrams case arose during the difficult times of the First World War. The Espionage and Sedition Act of 1918 made it a crime to utter, print, write, or publish any material that was deemed to be disloyal to the government of the United States. Abrams was a Russian immigrant and anarchist. He and a co-defendant distributed two leaflets by throwing them out of a New York City window. The pamphlets urged a general strike in protest of the war. Justice John H. Clarke wrote for a 7-2 majority and upheld the lower court's conviction of these two men under the Sedition Act. Clarke wrote that these pamphlets presented a danger to the United States because of their being distributed at the supreme crisis of the war.[61]

Justice Holmes wrote a dissenting opinion that did a great deal to influence how the Court has ever-since interpreted free speech. Just a few weeks prior to the Abrams dissent, Holmes had written the majority opinion in a case that upheld a conviction under the Espionage and Sedition

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[60]Kermit L. Hall, William M. Wiecek, Paul Finkelman, American Legal History: Cases and Materials (New York: Oxford University Press, 1991), 416.

[61]Abrams et al. v. United States, 250 U.S. 616 (1919).

Act. In the 1919 case of Schenck v. U.S., Holmes established that the constitutional right to free speech did not reach so far as to allow all speech at all times. In his opinion Holmes set forth the test that would become the standard by which free speech is judged. He wrote: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."[62] The "clear and present danger" test has dominated the Court's rulings on free speech ever since. In the wake of this majority opinion, Holmes' dissent in Abrams seemed a quick change of heart. On the contrary, the Court had simply interpreted the test laid out by Holmes in a more rigid fashion than he had intended. Holmes wrote that the leaflets which the men were convicted for publishing were not prohibited by the Sedition Act. Holmes did not back down from his Schenck opinion; he simply applied a different set of circumstances to the same test and found a different result. In the dissenting opinion Holmes stated that it is better to allow freedom to reign supreme than to prohibit ideas and thus coerce people into thinking in a particular way.[63]

Holmes outlined the famous framework of the clear-and-present danger test in his opinion. It basically stated that speech should be allowed unless it produces or is intended to produce a clear and present danger. The First Amendment and free speech are crucial to maintaining a democracy; Holmes felt the Court was out of line in deeming this type of speech to be a crime. Holmes completed the dissent with another example of his reluctance to dissents: "I regret that I cannot put into more impressive words my belief that the defendants were deprived of their rights under the

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[62]Abrams, et al. v. United States, 250 U.S. 616 (1919).

[63]Ibid.

Constitution."[64]

Dubbed by many as the greatest American legal thinker, Justice Holmes set in motion a trend that continues today. Holmes was able to bring about a great change with his dissents. He was never viewed as a loner or a thorn in the side of progress. Instead, Holmes used the dissent to speak out against a formalist approach to judging. He also was able to make the dissenting opinion a powerful method of changing the law. It should come as no surprise that many judges looked to the legacy left by Holmes and tried to emulate his success. The dissent was his method of changing the law, and it would also soon be the weapon of choice for many judges that followed.

The first few years after Holmes' resignation did not see a great increase in the number of dissents. Chief Justice Charles Evans Hughes was able to maintain the illusion of solidarity, or at least to discourage individual expression. From the 1933 term to the 1940 term, there was at least one dissenting opinion in only 14.25% of the cases per year.[65] This was about to be drastically altered.

In 1941, the Court saw two big changes. First, Harlan Fisk Stone was sworn in as Chief Justice. Second, the dissent rate jumped to a record high of 29.1%. This was nearly double the average and served notice that the use of the dissenting opinion had changed. The 1941 dissent rate of 29% was not a one-year occurrence. In the years that followed, the dissent rate never again dropped below 40%.[66]

There is no single answer as to why this shift occurred. As with so many historical changes,

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[64]Abrams, et al. v. United States, 250 U.S. 616 (1919).

[65]Appendix, table 3-2.

[66]Ibid.

the shift did not occur overnight. The best place to begin the explanation is with the new Chief Justice, Harlan F. Stone. From Stone's earliest days on the Court, he and Holmes viewed many issues in identical fashion. The phrase "Brandeis, Holmes, and Stone dissenting" was common beginning in 1925. Although Justice Louis Brandeis was a frequent dissenter and had a significant influence on the Court and the law, his impact on the overall method in which dissents are used has not been as pronounced as that of either Holmes or Stone. All three men are widely remembered for their dissent writing and all three had an impact on how it was used. Justice Stone was able to have the most effect on the use the dissent when he was appointed to the position of Chief Justice.

It is fitting that on January 12, 1932, Justice Oliver Wendell Holmes rode down from his position on the Supreme Court with Justice Stone. Chief Justice Hughes had accepted Holmes' resignation the day before, and it would be his companion Stone who would carry on the legacy of "The Great Dissenter." Stone and Holmes always had the greatest respect for each other. Stone came to the Court in the later years of Holmes' service, yet they held many of the same views. On the divisive issue of using the Fourteenth Amendment to invalidate state laws, the two jurists stood side by side. Both jurists were firm believers in judicial restraint and in expressing dissent when the Court attempted to step into the jurisdiction of the legislature. The names of Holmes and Stone were found together in the dissent fifteen times on this issue alone.[67] After Holmes stepped down from his position on the bench, Stone referred to him as "one of the greatest men who ever sat upon (the Supreme Court), and one of the greatest men and most beautiful characters it has been my privilege

[67]Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (London : Oxford University Press 1938), 122-131.

to know."[68]

The praise for Holmes was not reserved for a special salutary address. Stone time and again spoke of the Holmes tradition and the great understanding of the law that he felt Holmes possessed.[69] Stone's New England upbringing did not make him one to pour praise on those around him, but this did not hold him back from making his true feelings for Holmes known. On Holmes' ninetieth birthday Stone wrote, "You are a constant inspiration to me. When the task seems irksome and my best efforts futile, I recall the serenity with which you meet each day.... So I send myself to the task with renewed confidence, even though I know my best will never equal your worst."[70] The praise stemmed from the greatness of Holmes and the common threads that ran through both men. This commonality was most present in their views and jurisprudence as judges.

In a letter to Holmes, commenting on a decision, Stone wrote, "We are so seldom on opposite sides of the fence."[71] Both men had many of the same views about things from the Fourteenth Amendment to the issue of judicial restraint. Their common views were most recognizable in the divisive issue of the power of the state legislatures to enact social regulations. Both saw the need for the Court to allow these legislatures to have the freedom to enact measures that they saw fit as long as they were using the enumerated power granted them under the Constitution. This included not using the phrases such as "liberty of contract" and "police power" to find these laws unconstitutional.

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[68]Alpheus Thomas Mason, Harlan Fisk Stone: Pillar of the Law (New York: Viking Press 1956), 325.

[69]Ibid., 327.

[70]Ibid.

[71]Ibid., 328.

The duty of the Court to use restraint was paramount to both men when it came to finding laws unconstitutional. The men agreed the states had the power to experiment. Holmes said, "They can't do it, but let them try." Stone's remark was basically the same as his elder colleague's, "They should not do it, but judges are not the ones to oppose."[72]

Throughout the fight against substantive due process, Holmes and Stone saw things in similar light most of the time. They were both defenders of the right of states to enact legislation. From the early days with Holmes, Stone became a frequent dissenter. Most Supreme Court Justices had been conditioned in the "no dissent unless absolutely unavoidable" mentality. Because of his connection with Holmes, Stone was never conditioned in this manner. Stone's own view of the dissent was even more open than Holmes'. Whereas Holmes dissented only when he had no choice and even then often apologized for the dissent, Stone had no such qualms about expressing his personal views. Stone said the dissent's real influence is "often in shaping and sometimes in altering the course of the law."[73] He had seen the dissent have this effect and was ready to put it to the test whenever he felt the majority had erred.

Many of Stone's dissents eventually became adopted by the majority. For this and several other reasons, Stone was a staunch supporter of the dissent and a judge's right to do so whenever necessary. In a speech to a group of federal judges, Stone chose as his topic: "Dissenting Opinions are Not Without Value."[74] In the address Stone said, "a considered and well-stated dissent sounds

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[72]Mason, Harlan Fisk Stone, 322.

[73]Stone, "Dissenting Opinions," 78.

[74]Stone, "Dissenting Opinions," 78.

a warning note that legal doctrines are not to be pressed too far. It sometimes arrests a trend and sometimes reverses it."[75] In 1937 with West Coast Hotel, Stone had seen the offensive "liberty of contract" trend arrested and indeed knew the dissent was to be thanked. This experience made Stone a prolific dissenter, and not one to discourage others from doing the same.

In 1941 Stone was sworn in as Chief Justice of the Supreme Court. It was in this position that he would have his greatest impact on the method of decision writing by the Supreme Court. Stone was elevated to the position after sixteen years as an Associate Justice. The Chief Justice whom Stone first served under was William Howard Taft. Taft came to the Court after a highly successful political career that included a term as President of the United States. Taft used his great political skill to keep team spirit on the Court.[76] There is little question that he resented dissents. Taft not only refrained from dissenting, but he also greatly discouraged the Associate Justices from showing signs of division. During Taft's years in the Chief Justice position, he dissented in only sixteen cases out of over 1700. By rarely dissenting, Taft was in position to influence the lower members of the Court to adopt his anti-dissent approach to decision writing. In an analysis of the Supreme Court Chief Justices, David Danelski concluded that Taft "socialized new justices in the no dissent tradition."[77] He had the least amount of success with Justice Stone. In a letter to Stone, Taft wrote, "Dissents seldom aid in the right development of the law. They often do harm. For myself I say: lead

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[75]Ibid.

[76]Ibid.

[77]Walker, "The Mysterious Demise of Consensual Norms, " 387.

us not into temptation."[78]

After Taft stepped down in 1930, Charles Evans Hughes became Chief Justice. Hughes was from the same judicial mold as his predecessor. He was highly effective at keeping the members of the Court from dissenting. Owen Roberts wrote that Hughes' leadership resulted in a "feeling of personal cordiality and comradeship that ... was unique in a Court so seriously divided in its review on great matters."[79] Hughes and Taft shared the "no dissent unless absolutely necessary tradition."[80] Hughes was determined to present the Court to the public as a united body. He held that dissenting showed a judicial division that was not good for public confidence in the Court. Hughes once wrote to Stone about a decision he did not like but was supporting, "I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to expose my views."[81] This was an attempt to show Stone that one should not always dissent despite disagreements. The statement showed Hughes' view on the dissent but had little effect on Stone.

Despite this admonishment, Stone was a frequent dissenter. During six different terms Stone wrote more dissenting opinions than any other Justice.[82] In 1941 Stone was elevated to the position of Chief Justice of the Supreme Court, and in this position his view of the dissent and its place in the decisions of the Court did not change. Stone frequently dissented even as Chief Justice; this left him

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[78]Walker, "The Mysterious Demise of Consensual Norms, " 382.

[79]Ibid., 381.

[80]Ibid., 380.

[81]Ibid., 381.

[82]Ibid., 383.

in no position to discourage other Justices from expressing their views. The philosophy Stone held about dissenting opinions sharply contrasted that of the earlier Chief Justices. Stone did not believe that it was the Chief Justices duty to suppress the other Justices views. In response to an anonymous New York Herald Tribune letter that questioned the Court and the Chief Justice's "growing tendency to disagree,"[83] Stone wrote, "The right to dissent is an important one and has proved to be such in the history of the Supreme Court. I do not think it is the appropriate function of the Chief Justice to attempt to dissuade members of the Court from dissenting in individual cases."[84]

With the Chief Justice expressing views of this nature, the Associates now had free reign to individual expression. While the Court's membership did not change in the early days of Stone's leadership, the way the Justices voted did change. In 1942, the first term of Stone's Chief Justiceship, the percentage of cases with at least one dissenting opinion jumped to 29.1 %. The following year it went up to 42.9%, and in Stones's third term it crossed the fifty-percent mark at 52.3%.[85] These high numbers were in sharp contrast to the Court's previous norm of 14%. These new numbers proved not to be a reaction to the appointment of a new Chief Justice. The high number of the first term proved to be lower than that of any other one term since. The Justices had been given the freedom to do what Justice Douglas had called "the only thing that made the job of an appellate judge bearable."[86] The firm belief in unanimity had changed, and the dissent was now accepted.

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[83]Mason, Harlan Fisk Stone, 607.

[84]Ibid., 608.

[85]Appendix, table 3-2.

[86]Barth, Prophets with Honor, 28.

Stone was at the head of the Court and was leading it into a trend of more dissenting opinions than any other Court before them. All of the sitting members of the Court had read and studied the great dissents of Justice Holmes, and many of those had indeed already become famous for their foresight. The men that were now sitting under Chief Justice Stone had been given full permission to try their hands at predicting the course of the law. This proved to be a temptation that few were willing to resist. As one final example of Stone's full acceptance of dissents, he spoke of the recent criticisms of the Court under his rule, and responded by saying that the only problem he saw was too many separate concurrences.[87]

On April 22, 1946, Justice Stone was struck with a cerebral hemorrhage and died later that day. It is only fitting that Stone had in his hand an opinion that he was about to read before the Court. The opinion was a dissent. It was a sudden but fitting end to an extremely short tenure of five years as Chief Justice. During this brief time, Stone managed to change the way in which decisions were written. Stone made it a priority to ensure that all of the Justices were given the freedom to write a separate opinion whenever they felt their consciences demanded such action. As Chief Justice, he opened the door for many subsequent generations of judges to have all the freedom that he saw as a self-imposed check on the power of the majority. The role of the Chief Justice was transformed under the leadership of Stone. The Chief Justice was no longer expected to refrain from dissenting, nor was the Chief Justice to discourage dissents from his or her fellow members of the bench. Stone did not serve long, but his legacy of a Court free to dissent continues.

The use of dissents that began during Stone's brief tenure as Chief Justice soon established

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[87]Mason, Harlan Fisk Stone, 609.

itself as a trend that was not going to change. Chief Justice Fred Vinson succeeded Stone in 1946, and it was immediately apparent that there was going to be no greater degree of harmony under his leadership than there was under his predecessor. In his first term, the rate of dissents actually jumped to 64%.[88] The dissent had proven itself to be a strong force that could alter the law. The task of trying to revert back to the days of unity proved to be futile. In the first five years after Stone, the dissent rate remained high. In 1951 the rate of cases in which there was at least one dissenting opinion stood at an all-time high of 83%.[89] The standard had been firmly established that when a Justice wished to express disagreement with the Court, he or she had free rein to do so.

Today's Supreme Court has shown an equal willingness to use the dissent. Over the last five years, there has been at least one dissent in over 50% of all cases decided.[90] Many of the criticisms that have been directed at the dissent over time have proven to be somewhat true. One of the points generally made by the defenders of unity on the Court has always been that publicly expressed division would cause Justices to be unwilling to agree with each other when prudence would call for such an action.

In particular the vehement dissents of Justice Antonin Scalia have caused many to question the useful effect of the dissent. In the 1996 decision on the rights of women to attend the state-supported Virginia Military Institute, Scalia's lone dissent brought a flow of criticism. The 7-1 majority held that a woman's equal protection rights were violated when she was denied entrance

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[88]Carp, Judicial Process in America, 345-350.

[89]Ibid., 350.

[90]Ibid.

strictly because of gender. Scalia lashed out at the majority claiming their equal protection analysis was irresponsible. His strong words were directed at Chief Justice Rehnquist. Scalia asserted that any lawyer giving the advice that Rehnquist did should "have either been disbarred or committed."[91] This was the first time in memory that an Associate had called for the Chief Justice's commitment to a non-legal institution. These stinging remarks seemed a prime example of the dissent used at its worst. Scalia was not only a lone voice crying against the voice of reason; but, he was also showing disrespect for the most senior member of the Court. If Scalia's object was to show that when a good thing is taken to its ultimate extreme, it too can become a detriment to the Court, then he accomplished this goal on all counts. Such disregard for civility has caused Scalia to receive much criticism, and in the process so has the dissent.

In a similar case, Scalia used a separate opinion in the form of a concurrence to show his willingness to attack his colleagues. The 1988 case of Webster v. Reproductive Health Services re-examined the right to abortion. The majority opinion accepted substantially more restrictive regulations on the rights of a woman to have an abortion than had previously been deemed acceptable. The decision, however, did not go so far as to overrule the Roe holding that abortions are upheld as part of the rights protected by the Constitution. This point was where Scalia attacked. In the concurrence, Scalia wrote that Justice Sandra Day O'Connor's opinion "could not be taken seriously."[92] A former Scalia clerk said that he "completely alienated O'Connor and lost her

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[91]United States v. Virginia et al. 116 U.S. 694 (1996).

[92]Webster v. Reproductive Health Services 492 U.S. 490 (1989).

forever."[93] The long-noted fear of the separate opinion being used in such a way as to cause divisions among members of the Court had come true.

Although the dissent has received strong criticism, it remains a valuable tool for Justices to shape the law. Former Supreme Court Justice Benjamin N. Cardozo once wrote: "The voice of the majority may be that of force triumphant, content with the plaudits of the hour and recking little of the morrow. The dissenter speaks of the future, and his voice is pitched to a key that will carry through the years."[94] There have been many times in the Court's history in which this was the role played by the dissents. Despite its sometimes exaggerated use, the good it can bring about is worth the wrong into which it seldom falls.

The ability of the judge that disagrees with the majority to voice his or her opinion has always been a part of the American court system. Justice Holmes used this outlet to its fullest potential. With his many forceful dissents, Justice Holmes was able to change the law when the majority had fallen down on its job of properly interpreting the Constitution. In particular, Holmes' dissenting battle against substantive due process proved that the right to dissent was one that should forever remain available to all judges.

During the difficult times in which Chief Justice Stone presided over the Court, a new sense of freedom was introduced to all Associate Justices. Stone never saw his job as one that required him to impose unanimity. Stone challenged the Court frequently and thus showed the other Justices that

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[93]David J. Garrow, "The Rehnquist Reins," *The New York Times Magazine*, (Oct. 6, 1996), 68-69.

[94]Jackson, Dissent in the Supreme Court, 17.

dissenting opinions were perfectly permissible. He had seen the dissent change the law when he dissented with Holmes and was a stern advocate for the other Justices to have that same opportunity. Stone's biographer put it best when he said: "He might seek unanimity by removing doubts and misunderstandings so far as that could be accomplished by exposition and discussion at conference. But unanimity purchased at the cost, either for himself or others, of strongly held convictions was not worth the price."[95] In a final example of Stone's belief in the power and beauty of the dissent, he once wrote to a friend: "In the history of Constitutional interpretation dissenting opinions have often ultimately become the law of the Court, and in other instances have served as a check upon doctrines adopted by the Court."[96] Stone not only believed in the sanctity of the dissent, but he also opened the door for all to use it for the betterment of the Court and country.

There is little question that the dissent has been able to stand up to all of the criticism that has come its way. In many of the most heated legal debates, a dissent has been the voice of principle that helped the Court correct a temporary wrong. From Justice Harlan's prophetic 1896 dissent against the doctrine of separate but equal in Plessy v. Ferguson, to the ill-received dissent of Justice Antonin Scalia in the U.S. v Virginia case in 1996, the dissent has insured that every decision of the all-powerful Supreme Court has been properly considered. Not only have cases been properly considered, but the opposition has had a voice, a voice which has been reported alongside the official holding. The strength of the dissent is that no matter the influence of any political faction or over-bearing Chief Justice, there is always a podium from which any Justice can deliver his or her message.

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[95]Mason, Harlan Fisk Stone, 575.

[96]Ibid.

Justice Scalia addressed a meeting of the Supreme Court History Society in 1994. The title of his address was simply "The Dissenting Opinion." He said: "By enabling, indeed compelling, the Justices of the Supreme Court, through their personally signed majority, dissenting, and concurring opinions, to set forth clear and consistent positions on both sides of the major legal issues of the day, it has kept the Court in the forefront of the intellectual development of the law."[97] Even if such freedom only accomplished half of this task, it would be invaluable in improving the Court and therefore the nation as a whole.

To conclude an assessment of the dissent without once more remembering the words of "The Great Dissenter" himself would involve slighting a Justice that helped frame how all judges look at cases. The words of Justice Holmes' famous dissent on free speech apply as much to members of the Supreme Court as they do to average citizens on the street. He wrote: "The ultimate good desired is better reached by a free trade in ideas--that the best test of truth is the power of thought to get itself accepted in the competition of the market.... That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."[98] If the experiment were to see if the dissent could be used as a measure to forever insure the status of the Court, it was successful.

[97]Scalia, "The Dissenting Opinion," 39.

[98]Abrams et al. v. U.S., 250 U.S. 616, 630 (1919).

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West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

Appendix

Table 3-2 Dissenting Opinions, 1800-1991 Terms

Term[a]	*Number of cases with dissenting opinions*	*Total number of cases*[b]	*Proportion of cases with at least one dissenting opinion*[c]
1800	0	0	.000
1801	0	4	.000
1803	0	11	.000
1804	0	15	.000
1805	1	10	.100
1806	0	17	.000
1807	0	10	.000
1808	4	21	.190
1809	4	37	.108
1810	1	27	.037
1812	1	31	.032
1813	3	39	.077
1814	5	46	.109
1815	2	39	.051
1816	3	40	.075
1817	1	40	.025
1818	2	36	.056
1819	0	32	.000
1820	3	26	.115
1821	1	33	.030
1822	1	29	.034
1823	2	27	.074
1824	4	39	.103
1825	0	27	.000
1826	0	29	.000
1827	1	45	.022
1828	3	53	.057
1829	2	42	.048
1830	7	51	.137
1831	7	40	.175
1832	5	50	.100
1833	2	38	.053
1834	2	59	.034
1835	3	38	.079
1836	1	48	.021
1837	5	19	.263
1838	5	40	.125
1839	5	51	.098
1840	3	41	.073
1841	0	31	.000
1842	2	42	.048
1843	4	26	.154
1844	3	39	.077

(Table continues)

Table 3-2 *(Continued)*

Term[a]	*Number of cases with dissenting opinions*	*Total number of cases*[b]	*Proportion of cases with at least one dissenting opinion*[c]
1845	13	49	.265
1846	2	46	.043
1847	5	35	.143
1848	3	35	.086
1849	8	40	.200
1850	25	156	.160
1851	10	94	.106
1852	12	53	.226
1853	16	80	.200
1854	15	71	.211
1855	14	90	.156
1856	8	63	.127
1857	9	70	.129
1858	6	69	.087
1859	4	115	.035
1860	3	64	.047
1861	2	74	.027
1862	7	41	.171
1863	4	75	.053
1864	5	55	.091
1865	7	70	.100
1866	6	128	.047
1867	7	96	.073
1868	13	114	.114
1869	14	169	.083
1870	15	151	.099
1871	21	148	.142
1872	23	157	.146
1873	21	193	.109
1874	17	186	.091
1875	23	200	.115
1876	16	219	.073
1877	21	248	.085
1878	23	198	.116
1879	18	205	.088
1880	9	221	.041
1881	11	232	.047
1882	17	267	.064
1883	14	277	.051
1884	11	271	.041
1885	18	280	.064
1886	12	298	.040
1887	13	287	.045
1888	6	242	.025
1889	16	282	.057

Table 3-2 *(Continued)*

Term[a]	*Number of cases with dissenting opinions*	*Total number of cases*[b]	*Proportion cases with at least on dissenting opi*
1890	14	297	.047
1891	20	252	.115
1892	22	231	.095
1893	23	280	.082
1894	23	225	.102
1895	25	257	.097
1896	12	228	.053
1897	16	184	.087
1898	14	173	.081
1899	15	214	.070
1900	22	197	.112
1901	12	179	.067
1902	18	213	.085
1903	20	208	.096
1904	17	194	.088
1905	22	168	.131
1906	12	205	.059
1907	15	176	.085
1908	14	181	.077
1909	9	175	.051
1910	13	168	.077
1911	9	230	.039
1912	10	271	.037
1913	5	285	.018
1914	16	257	.062
1915	5	235	.021
1916	16	207	.077
1917	13	208	.062
1918	14	213	.066
1919	23	168	.137
1920	16	217	.074
1921	24	171	.140
1922	15	223	.067
1923	12	212	.057
1924	10	232	.043
1925	12	210	.057
1926	24	199	.121
1927	32	175	.183
1928	14	129	.109
1929	14	134	.104
1930	13	166	.078
1931	16	150	.107
1932	17	168	.101

(Table con

Table 3-2 *(Continued)*

Term[a]	Number of cases with dissenting opinions	Total number of cases[b]	Proportion of cases with at least one dissenting opinion[c]
1933	18	158	.114
1934	11	156	.071
1935	20	145	.138
1936	17	149	.114
1937	26	152	.171
1938	35	139	.252
1939	20	137	.146
1940	27	165	.164
1941	44	151	.291
1942	63	147	.429
1943	68	130	.523
1944	79	156	.506
1945	67	134	.500
1946	80	142	.563
1947	70	110	.636
1948	86	114	.754
1949	56	87	.644
1950	56	91	.615
1951	69	83	.831
1952	90	104	.865
1953	47	84	.560
1954	43	93	.462
1955	49	98	.500
1956	82	121	.678
1957	84	127	.661
1958	63	118	.534
1959	83	115	.722
1960	84	128	.656
1961	60	101	.594
1962	71	125	.568
1963	70	130	.538
1964	58	106	.547
1965	57	102	.559
1966	75	112	.670
1967	74	122	.607
1968	69	111	.622
1969	64	107	.598
1970	81	125	.648
1971	92	147	.626
1972	107	153	.699
1973	101	148	.682
1974	81	139	.583
1975	91	151	.603
1976	94	143	.657
1977	89	135	.659

Table 3-2 *(Continued)*

Term[a]	Number of cases with dissenting opinions	Total number of cases[b]	Proportion of cases with at least one dissenting opinion
1978	83	134	.619
1979	105	141	.745
1980	83	128	.648
1981	94	148	.635
1982	94	155	.606
1983	85	155	.548
1984	79	142	.556
1985	101	153	.660
1986	106	153	.693
1987	80	144	.556
1988	84	140	.600
1989	84	131	.641
1990	70	114	.614
1991	65	109	.596

[a] Court did not meet during 1802 or 1811.
[b] For 1953-1991, total number of cases includes those with signed opinions and orall argued per curiams; for earlier terms, includes signed opinions of the Court only.
[c] Due to ambiguity in the description of data prior to the 1953 term, we cannot determin whether data represent the number of dissenting opinions or the number of cases wit dissenting opinions. Hence, the proportion may not be comparable across all terms.

Sources: Number of dissenting opinions, 1800-1952: Albert P. Blaustein and Roy M. Mersky *The First One Hundred Justices* (Hamden, Conn.: Shoe String Press, 1978), 137-140; 1953-1992 U.S. Supreme Court Judicial Database, with orally argued citation as unit of analysis. Tota number of cases and proportions therefrom, 1800-1926: Albert P. Blaustein and Roy M Mersky, *The First One Hundred Justices* (Hamden, Conn.: Shoe String Press, 1978), 137-140 1927-1952: Gerhard Casper and Richard A. Posner, *The Workload of the Supreme Cour* (Chicago: American Bar Foundation, 1976), 76; 1953-1991: U.S. Supreme Court Judicia Database, with citation as unit of analysis.

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