
NOTE

FROM CONSENSUS TO COLLEGIALLY:
THE ORIGINS OF THE “RESPECTFUL” DISSENT

I. INTRODUCTION

There is a discrete statement — a speech act¹ — found in nearly all Supreme Court dissents in which the protesting Justice formally registers his disagreement with the majority.² In its modern, canonical form, it includes the phrase, “I respectfully dissent” or some variation thereof,³ found at the beginning or end of the opinion. Approximately seventy percent of all principal dissenting opinions handed down by Justices of the Roberts Court employ this decidedly personal rhetoric.⁴ But this was not always the case. For the first century of the Court’s history, a typical dissenting speech act read as a long, prolix apologetic justifying the dissent’s deviation from the majority opinion. At the turn of the twentieth century, however, Justices instead dissented with brief, pro forma statements. By the 1940s the speech act had devolved altogether into a dispassionate procedural order. It was not until the Warren Court that the modern “respectful” dissent first appeared.

This dynamic history suggests that the development of language and rhetoric in judicial dissents is not arbitrary. Rather, there exists a demonstrable nexus between institutional *practice* — here, the speech act — and institutional *purpose*, which includes the Court’s political and jurisprudential ends. Recast as such, the historical narrative unfolds in four periods, representing a shift from “consensus” to “collegiality” as the Court’s guiding institutional purpose.

In the first period, the Court strictly enforced Chief Justice Marshall’s consensus norm in an attempt to consolidate political power. As reflected in the overtly apologetic rhetoric of the rare dissenter, this

¹ The term “speech act” implicates various strands of linguistic philosophy, *see generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962), but this Note does not intend for all the philosophical nuance to carry over.

² The practice is in no way limited to Supreme Court opinions, but consideration of the dissenting practices of other courts is beyond the scope of this Note.

³ For example, Justice Kennedy’s respectful dissents are often passive. *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2544 (2009) (Kennedy, J., dissenting) (“[T]he Court’s opinion elicits my respectful dissent.”).

⁴ The first person singular is a relative rarity in judicial opinions, yet it is commonplace in dissenting speech acts. Significantly, Justices do not abandon the first person singular when other Justices join their dissent. *But see* Day v. McDonough, 547 U.S. 198, 212 (2006) (Stevens, J., dissenting) (“Accordingly, we respectfully dissent from the entry of the Court’s judgment at this time.”). A Westlaw search for <we dissent!> and <we respect! dissent!> in the Supreme Court database returns a total of just 41 entries in various contexts.

norm shunned separate opinions. Although the norm persisted into the twentieth century, it was obvious by 1905, the year of *Lochner v. New York*,⁵ that it had weakened substantially. After a century of steady but infrequent dissenting, Justices had normalized the decision to write separately. They could thus dissent in the second period with cursory, pro forma speech acts that lacked overtly apologetic rhetoric.

In the third period, watershed developments of the 1930s and 1940s radically transformed the Court. The frequency of dissenting opinions quickly reached unprecedented heights, obliterating what remained of the consensus norm. Guided neither by consensus nor collegiality in this transitional moment, the Court defaulted to procedural, outcome-oriented speech. It was only under Chief Justice Warren, whose tenure marked the beginning of the fourth period, that the Court struck its current balance. Recognizing that an activist Court produced substantial institutional costs, the Justices came to embrace a norm of collegiality. This institutional practice manifested in the respectful dissent, which subsequent Justices adopted and entrenched. So dominant is this speech act on the Roberts Court that to appreciate its value, one must consider the rare situation in which the dissenting Justice consciously chooses to forego this respectful rhetoric.

This Note proceeds as follows. Part II sets forth the above history in greater detail. Each section, representing a different historical period, considers the nexus between contemporary institutional practices and the Court's evolving institutional purposes. Part III attempts to ground these historical observations with a closer empirical study of dissenting practices on the Roberts Court. Part IV concludes.

II. THE PRAXIS AND RHETORIC OF DISSENT

A. *The First Century: Marshall and the Consensus Norm*

From 1790 until the ascension of John Marshall to the position of Chief Justice in 1801, “the Court used no set form in presenting its opinions.”⁶ In this period of unsettled practices, the earliest Justices alternated between opinions “issued ‘By the Court,’ without any attribution,” and those delivered seriatim.⁷ Culled from the British common law,⁸ seriatim opinions required each Justice to write and deliver

⁵ 198 U.S. 45 (1905).

⁶ John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140 (1999).

⁷ *Id.*

⁸ See M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292–308.

his own opinion.⁹ While this atomized conception of jurisprudence promoted transparency and fostered the analytical development of law, it invited open disagreement on the Court.¹⁰ By denying the Court the ability to speak with a single voice, seriatim opinions threatened to undercut the Court as a political actor. Chief Justice Marshall, a shrewd statesman, recognized these shortcomings and acted. “In an expression of raw political power,” Chief Justice Marshall effectively abandoned seriatim opinions¹¹ and introduced the “Opinion of the Court,” which, often under the Chief Justice’s imprimatur, “would speak for all Justices through a single voice.”¹²

This new discursive regime did not, on its face, proscribe dissent. In practice, however, concurring or dissenting opinions were exceedingly rare in the early Marshall Court. Indeed, the first deviation from unanimity came a full three years into Chief Justice Marshall’s tenure, in 1804, with a brief, one-sentence concurrence.¹³ It would be another year before an Associate Justice registered the first dissent.¹⁴ But dissent, once introduced, could not be cabined; in time, the number of dissenting opinions slowly increased.¹⁵ Justice William Johnson, the first Jeffersonian Republican to sit on the Federalist-dominated Court and a figure known to history primarily as “The First Dissenter,”¹⁶ was largely responsible for their proliferation. Along with Justice Brockholst Livingston, another Jefferson appointee, Justice Johnson authored almost sixty percent of the Marshall Court’s dissents.¹⁷ But this is not to say that dissents were frequent. For over a hundred years, from 1805 well into the first decades of the twentieth century,

⁹ Kelsh, *supra* note 6, at 140. Evidence suggests that the Justices delivered seriatim opinions either when they “were in disagreement,” *id.*, or faced a constitutional issue, *id.* at 141.

¹⁰ See Henderson, *supra* note 8, at 304–07; Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2072–73 (1995).

¹¹ Henderson, *supra* note 8, at 313–14. The seriatim dissent did not immediately disappear. Significantly, the Chief Justice was “either absent or had recused himself” in each of the five cases from 1801 to 1806 in which the Court delivered its opinion seriatim. Kelsh, *supra* note 6, at 144. By 1814, however, Marshall’s practice of a Justice-delivered opinion of the court had fully established itself. *See id.* at 145.

¹² Henderson, *supra* note 8, at 313. It was “one of those acts of audacity that later marked the assumption of power which rendered his career historic.” Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 193 (1959) (quoting 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 16 (1919)).

¹³ See Kelsh, *supra* note 6, at 146; ZoBell, *supra* note 12, at 194; Kolsky, *supra* note 10, at 2074.

¹⁴ See Kelsh, *supra* note 6, at 146. Meredith Kolsky, however, places the first dissent a year later, in 1806. *See* Kolsky, *supra* note 10, at 2074.

¹⁵ See Kelsh, *supra* note 6, at 146–47.

¹⁶ Henderson, *supra* note 8, at 317.

¹⁷ *See id.* at 318. Nor was Marshall above dissenting. He authored his first dissent in 1810. *See* Kelsh, *supra* note 6, at 147 & n.60.

approximately ten percent of all Court opinions were accompanied by dissents.¹⁸ How did the Court strike such a consistent balance?

Crucially, Chief Justice Marshall encouraged judicial compromise. “[I]f any part of the reasoning [of a draft opinion] be disapproved,” Chief Justice Marshall wrote under a penname in the *Union of Philadelphia*, a Federalist paper, “it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.”¹⁹ Political scientists have referred to this practice as a “consensual norm.”²⁰ That is, whether their goal was to put forward a united front or to minimize uncertainty in the law, the Justices of this period were willing either to compromise on legal points to win adherents or — if their cause quixotic — to consent tacitly.²¹

Operating against this powerful consensus norm, dissents tended to be particularly apologetic in tone,²² as dissenting Justices felt obligated to justify their deviation from the status quo.²³ Consequently, these speech acts tended toward the defensive, if not the penitential. Justice Washington’s early dissent in *United States v. Fisher*²⁴ is representative. Writing in a graceful but diffuse style, Justice Washington began: “In any instance where I am so unfortunate as to differ with this Court, I cannot fail to doubt the correctness of my own opinion. But

¹⁸ See ZoBell, *supra* note 12, at 196. Judge Evan A. Evans, analyzing volumes 5 through 279 of the U.S. Reports (a period covering the years 1801 through 1928), calculated this value at 12.65%. Evan A. Evans, *The Dissenting Opinion — Its Use and Abuse*, 3 MO. L. REV. 120, 138–39 (1938). Broken down by Chief Justice, dissenting rates never exceeded 9% in the period between 1801 and 1940. Henderson, *supra* note 8, at 323 tbl.2.

¹⁹ PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 22 (1969) (quoting 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 320 (1919)).

²⁰ See, e.g., Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988). This Note will use the term “consensus norm.”

²¹ Historian C. Herman Pritchett famously attributed this shift to a weakening of the Court’s “institutional ethos.” *Id.* at 362. As commentators and law professors eagerly note, even Chief Justice Marshall was known to “acquiesce silently” or to “write opinions with which he did not agree.” Kelsh, *supra* note 6, at 149. Chief Justice Marshall was not alone among the Chief Justices in this respect. Chief Justice William Howard Taft, for one, struggled mightily to achieve consensus — or, as Professor Robert Post termed it, “the norm of acquiescence.” Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1382 (2001). Decades later, President Truman appointed the affable Chief Justice Fred Vinson in order to promote collegiality and consensus on the Court. Henderson, *supra* note 8, at 330–31. That effort, however, failed. *Id.* at 331.

²² Certainly, judges outside the Supreme Court also felt compelled to explain or justify their dissents. Justice Rush of the Pennsylvania Supreme Court issued one of America’s earliest dissents in *Purviance v. Angus*, 1 Dall. 180 (Pa. 1786), writing: “However disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment.” Kolsky, *supra* note 10, at 2073.

²³ See Kelsh, *supra* note 6, at 150–54.

²⁴ 6 U.S. (2 Cranch) 358 (1805).

if I cannot feel convinced of the error, I [must show] . . . that the opinion was not hastily or inconsiderately given.”²⁵

Future Justices would embrace these themes of dutiful consideration, honest disagreement, personal duty, and precedential effect.²⁶ This justificatory rhetoric, increasing in frequency toward the end of the Marshall Court,²⁷ would become “entrenched during the early Taney years.”²⁸ So strong was this internal norm that when Justice Curtis dissented in *Dred Scott v. Sandford*,²⁹ the divisive case over which he resigned from the Court, he nonetheless felt obligated to justify his separate opinion, explaining: “These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. . . . To have done either more or less, would have been inconsistent with my views of duty.”³⁰ As this example suggests, the consensus norm still held sway into the nineteenth century, effectively cabining the number of dissents.

This norm did not, however, quiet the staunchest critics of dissent. The propriety of the dissenting opinion — indeed, its very existence — was one of the longest and “liveliest”³¹ institutional debates in American legal history. Commentators like Walter Stager thought dissents “entertaining” but ultimately “as useless as ‘sassing’ the umpire of a baseball game.”³² Judge Evan Evans, quoting anonymously from “thoughtful” jurists and practitioners, noted that dissenters who “open-

²⁵ *Id.* at 397–98 (Washington, J., dissenting). Note the profuse, if not casual, use of the first person.

²⁶ See Kelsh, *supra* note 6, at 146 n.55. So it was when Justice Story, dissenting twenty-five years later in *Inglis v. Trustees of the Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830), solemnly declared:

It is not without reluctance that I deviate from my usual practice of submitting in silence to the decisions of my brethren, when I dissent from them; and I trust, that the deep interest of the questions, and the novelty of the aspect under which some of them are presented, will furnish an apology for my occupying so much time.

Id. at 145 (Story, J., dissenting).

²⁷ See Kelsh, *supra* note 6, at 146 n.55.

²⁸ *Id.* at 152 n.89. The practice had “bec[ome] almost pro forma.” *Id.* Explanations also evolved in this period. In part, new Justices began to preface their dissents with promises of succinctness, likely “embarrassed at registering dissent at all.” *Id.* at 153 n.93.

²⁹ 60 U.S. (19 How.) 393 (1857).

³⁰ *Id.* at 633 (Curtis, J., dissenting). Before concluding on a procedural word, Justice McLean’s *Dred Scott* dissent asked: “If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford?” See *id.* at 564 (McLean, J., dissenting). Inasmuch as this statement represents a deviation from respectful practice, it also reflects the Justice McLean’s unique, somewhat rigid dissenting style. See, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 437 (1856) (McLean, J., dissenting); *Ex parte Wells*, 59 U.S. (18 How.) 307, 316 (1856) (McLean, J., dissenting).

³¹ Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307, 307 (1988). See also *Books and Periodicals — Dissenting Opinions*, 19 HARV. L. REV. 309, 309 (1906).

³² Walter Stager, *Dissenting Opinions — Their Purpose and Results*, 19 ILL. L. REV. 604, 607 (1925).

ly and emphatically protest the incorrectness of the decision” set a bad example for the “citizenry,” while at the same time discouraging “confidence and trust . . . in the tribunals.”³³ Even Justice Holmes had referred to dissenting opinions as “useless and undesirable.”³⁴ All told, however, those favoring the abolition of dissents made only minimal gains. Only Louisiana, in its 1898 constitution, banned the publication of separate opinions.³⁵ More sophisticated critics adopted a moderated call for restraint propounded by the American Bar Association.³⁶ Although a functioning consensus norm provided such restraint, that norm began to weaken as the Court entered the next era.

B. 1905: *The Decline of the Consensus Norm*

By the turn of the century, speech acts had largely assumed a new form, one that would predominate well into the 1930s and 1940s. Gone were the Justices’ overtly justificatory attempts to explain their deviation from the consensus norm. Many dissenting opinions opted for shorter, more cursory speech acts better defined by their succinctness than their apologetics.³⁷ In 1905 alone, the year of *Lochner*, six of the eight dissenting Justices embraced some form of the new speech act in at least one dissent.³⁸ In that year, most Justices began or con-

³³ Evans, *supra* note 18, at 125.

³⁴ Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 405 (1999) (quoting *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting)).

³⁵ See Hunter Smith, *Individual and Institutional Authority: The Turn-of-the-Century Quest to Abolish the Dissenting Opinion 19–21* (2010) (unpublished article) (on file with the Harvard Law School Library), available at http://digitalcommons.law.yale.edu/student_papers/100. Louisiana lifted the bar on dissents in its 1921 constitution. *Id.* at 21.

³⁶ See Evans, *supra* note 18, at 124–26; Alex Simpson Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 217 (1923). Published in 1924, the ABA standard required that a “judge should not yield to pride of opinion or value more highly his individual reputation than that of the court Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.” See ZoBell, *supra* note 12, at 210. For an in-depth review of the period debate and its jurisprudential implications, see generally Smith, *supra* note 35.

³⁷ To reiterate, this conclusion is not to suggest that all dissents abandoned apologetic and justificatory rhetoric. Dissenting still remained a bold act reserved for less than one-tenth of cases, with even fewer of those dissents eliciting a written opinion. Dissenters like Justice Brewer seem to have struck a balance. See, e.g., *United States v. Ju Toy*, 198 U.S. 253, 264 (1905) (Brewer, J., dissenting) (“I am unable to concur in the views expressed in the foregoing opinion, and, believing the matter of most profound importance, I give my reasons therefor.”).

³⁸ *Trono v. United States*, 199 U.S. 521, 536 (1905) (Harlan, J., dissenting) (“I dissent from the opinion and judgment of the court in the present case upon the broader ground that”); *id.* at 537 (McKenna, J., dissenting) (“I am unable to concur in the judgment of the court.”); *Hartman v. Butterfield Lumber Co.*, 199 U.S. 335, 341 (1905) (White, J., dissenting) (“I therefore dissent.”); *Hyde v. Shine*, 199 U.S. 62, 85–86 (1905) (Peckham, J., dissenting) (“I dissent from the opinion . . . in this case, and wish simply to state the grounds of my dissent, without any attempt to do more.”); *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 385–86 (1905) (Day, J., dissenting) (“I cannot agree with this construction, and therefore dissent from the judgment and reasoning of the major-

cluded their dissents by noting that they were simply “unable to concur”³⁹ with the majority. Others, however, opted for a lone concluding sentence set apart from the body of the argument, stating only, “I therefore dissent.”⁴⁰ And where Justices did offer a brief explanation in the speech act, it was less an apology for the dissent than a clarification as to why, having predominately concurred in others’ dissents or dissented without expressing their views, they decided to write in this particular case.⁴¹ Notably, the chief exception to this general trend was Justice Holmes, who began his famed *Lochner* dissent with a juxtaposition of lament and obligation familiar to mid-nineteenth-century dissents.⁴² Although an iconic formulation, it was, by 1905, a largely idiosyncratic one.⁴³

The Justices of 1905 could, with minimal compunction, register their dissents with brief, pro forma speech acts. This break from established practice suggests a weakening of the consensus norm. Two specific and interrelated developments help explain the declining force of this institutional purpose. First, and most intuitively, a century’s worth of recurring use had greatly normalized the practice of dissent. Second, in the intervening years, the Court had grown significantly as an institutional actor. As the political powerlessness that characterized — and influenced — the early Court under Chief Justice Marshall faded, the chief rationale for the consensus norm grew weaker.

ity of the court.”); *United States v. United Verde Copper Co.*, 196 U.S. 207, 217 (1905) (Brown, J., dissenting) (“For these reasons I am constrained to dissent from the opinion of the court.”).

The missing Justice, Chief Justice Fuller, was a fairly infrequent dissenter who did not appear to register a dissenting opinion in 1905. Five years earlier, however, he used almost the exact language of his dissenting Brethren. See *Dewey v. United States*, 178 U.S. 510, 524 (1900) (Fuller, C.J., dissenting) (“I am unable to concur in the opinion and judgment of the court, and am authorized to say that Mr. Justice White and Mr. Justice McKenna concur in this dissent.”).

³⁹ See, e.g., *Trono*, 199 U.S. at 537 (McKenna, J., dissenting).

⁴⁰ See, e.g., *Hartman*, 199 U.S. at 341 (White, J., dissenting).

⁴¹ The choice not to write at length was standard practice. Justice Peckham registered twelve of his thirteen dissents in 1905 without “expressing” his views. See Westlaw search, <“Peckham” /3 “dissent!” & da(1905)> in the Supreme Court database. In the previous year, Justice Peckham had written none. See Westlaw search, <“Peckham” /3 “dissent!” & da(1904)> in the Supreme Court database.

⁴² See *Lochner v. New York*, 198 U.S. 45, 74–75 (1905) (Holmes, J., dissenting) (“I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.”). In the second of only a handful of cases from which he dissented in 1905, Justice Holmes invoked another classical expression of apology, “important principles.” See *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 571 (1905) (Holmes, J., dissenting). His third dissent, though not providing rationales, began just like the others. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 257 (1905) (Holmes, J., dissenting) (“I regret that I am unable to agree with the decision of the court.”).

⁴³ This reluctance to deviate from the consensus norm might be a byproduct of Justice Holmes’s twenty years on the Supreme Judicial Court of Massachusetts. See generally Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977).

Considered against this backdrop, the Justices of 1905 were not tepidly defining institutional practice when they bucked unanimity to register dissent, as they once had been. Rather, they were conforming to a well-established convention of dissenting in approximately ten percent of cases per year. Because the need for the Justices to justify their initial decision to dissent had diminished, those loquacious speech acts lost much of their utility.⁴⁴ Arguably, such acts had been rendered mere formalities. The Justices were thus free, given the minimal costs of doing so, to replace the lengthy apologies of old with more cursory, pro forma speech acts. In short, the dissenting tradition was now too old — and the Court too stable — for the Justices' choice of rhetoric to be strictly bound by the consensus norm.

C. 1948: A Court in Transition

In 1932, the Supreme Court handed down twenty-seven nonunanimous decisions accounting for 16% of all full opinions. Justices that year cast, on average, 0.36 dissenting votes per case.⁴⁵ These statistics reflected the consensus jurisprudence of the previous hundred years of practice.⁴⁶ But by 1942, just ten years later, the figures had increased threefold: 44% of the Court's decisions were nonunanimous and Justices cast an average of 1.03 dissents per case.⁴⁷ By 1952, 78% of the Court's full opinions were accompanied by concurrences or dissents. On average, cases were met with 1.80 dissenting votes.⁴⁸ Something profound had occurred in this brief twenty-year span: the Court came to embrace the individual judicial voice. Many Justices no longer felt constrained or inhibited in concurring or dissenting. The ultimate collapse of the consensus norm ushered in the modern discursive regime.

Then-Judge Ruth Bader Ginsburg appropriately termed this new practice a "middle way."⁴⁹ As under Chief Justice Marshall, one Justice writes and delivers the "Opinion of the Court." Yet, freedom from the consensus norm permits Justices to publish their individual views in the style of early seriatim decisions. The truly revolutionary aspect of the transformation, then, was less the delivery practice itself, but the

⁴⁴ To think about the speech act as a signaling tool buttresses the point. Initially, speech acts signaled to the majority as well as the world at large a dissenting Justice's rationalization for departing from Chief Justice Marshall's unanimity norm. But as the practice normalized and the debate faded, robust signaling lost much of its value. After a century, *all* Justices were actively participating in the consensus building required to constrain dissent to its historical levels. *See* Post, *supra* note 21, at 1344–45. In this regime, the speech act did very little institutional "work."

⁴⁵ ZoBell, *supra* note 12, at 205 tbl.1.

⁴⁶ *See* Walker et al., *supra* note 20, at 363 fig.1.

⁴⁷ ZoBell, *supra* note 12, at 205 tbl.1.

⁴⁸ *Id.*

⁴⁹ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1189–90 (1992).

speed, energy, and completeness with which the change transpired. And as jurists and commentators rushed to debate the new paradigm,⁵⁰ scholars set out to determine its cause. The literature is expansive, but the most likely variables fall roughly under five thematic headings: composition, evolving procedure, canonization, audience, and democratic legitimation.

Composition. — Political scientists attempting to isolate causation have tested various hypotheses relating to the Court's personnel. One leading study considered, among other factors, the Stone Court's composition — including idiosyncratic voting habits, youth and inexperience, ideological preference, and the Chief Justice's leadership skills.⁵¹ A few interrelated factors merit special mention. The Justices of the Stone Court had an "extremely low level of judicial service at any level."⁵² Presidents Roosevelt and Truman nominated politicians like Justice Black, academics like Justice Frankfurter, and New Deal bureaucrats like Justice Reed. As a result, the Court "had almost no exposure to the 'no dissent' traditions common to appellate tribunals."⁵³ Further, given this sudden influx of institutionally inexperienced Justices, there were few voices to assure the "transition of decision-making values" and institutional practices.⁵⁴

Aggravating the cumulative effects of this institutional inexperience was the Court's shift in focus toward issues of "individual rights and liberties" once "the New Deal transition took hold."⁵⁵ Because Demo-

⁵⁰ See, e.g., Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1953); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC. 97 (1948); Michael A. Musmanno, *Dissenting Opinions*, 60 DICK. L. REV. 139 (1956); Ben W. Palmer, *Causes of Dissents: Judicial Self-Restraint or Abdication?*, 34 A.B.A. J. 761 (1948); Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952); Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC. 78 (1942). More recently, two Justices reinvigorated the dissent discussion. See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Antonin Scalia, Lecture: *Dissenting Opinions*, J. SUP. CT. HIST. 33 (1994).

⁵¹ Walker et al., *supra* note 20, at 373–74. The authors focused on the Stone Court (1941–1946) because this was the period in which dissent and concurrence rates began their meteoric rise. See *id.* at 364. The authors ultimately concluded "that much of the responsibility for changing the operational norms of the Court . . . can be attributed to the leadership of Harlan Fiske Stone." *Id.* at 384. A more recent study rejects that conclusion as overly simplistic, arguing instead that "patterns of dissent are primarily related to the types of issues before the Court and the balance of ideological preferences." Marcus E. Hendershot et al., *Revisiting the Mysterious Demise of Consensual Norms in the U.S. Supreme Court* 30 (W. Political Sci. Ass'n 2010 Annual Meeting Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580529.

⁵² Walker et al., *supra* note 20, at 374. Only one Justice, Wiley Rutledge, had sat on an appellate court, and only for a term of three years. *Id.*

⁵³ *Id.*

⁵⁴ *Id.* From 1937 to 1941, President Roosevelt had appointed a majority of the Court.

⁵⁵ Hendershot et al., *supra* note 51, at 32. As a political matter, distance from Lochnerism and the court-packing controversy might have also facilitated the rise of separate opinions. Because

cratic presidents appointed Justices largely for their views on federalism and economic regulation, they shared no unified judicial philosophy on the great questions of liberty that would soon come before the Court.⁵⁶ Roosevelt's politicization of the judiciary had, perhaps unintentionally, helped facilitate the end of consensus jurisprudence.

Evolving Procedure. — The Judiciary Act of 1925 “represented a fundamental transformation of the role of the Supreme Court.”⁵⁷ In giving the Justices discretionary control over the Court's docket through grants of writs of certiorari, the Act drastically limited the Court's mandatory appellate jurisdiction. If prior to the Act the Court was “primarily a tribunal of ultimate resort,”⁵⁸ it became “a ministry of justice.”⁵⁹ With the discretion to choose both the number and nature of the cases it wished to decide, the Court could choose to hear the hard, more contentious questions that naturally engendered dissent.

Canonization. — Further compounding the dissenting impulse was the canonization of earlier dissents.⁶⁰ Indeed, the “New Deal . . . forever changed the landscape against which dissenting opinions operated.”⁶¹ It was in this period that the legal establishment came to embrace Justice Holmes's dissent in *Lochner* and Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*⁶² as rejections of the Court's classically liberal jurisprudence.⁶³ Consequently, canonical dissents produced canonical dissenters.⁶⁴ This demonstrated that dissents need not produce reputational costs for individual Justices.

Audience. — By the mid-twentieth century, the Court's audience had undergone “a dramatic shift . . . from litigants to the legal public,

there were no major threats to the Court's institutional power, Justices need not have worried about a showing of weakness through fragmentation.

⁵⁶ Justices Frankfurter and Black, for example, held opposing views on the incorporation of the Bill of Rights, a constitutional question “that would create a wealth of civil liberties and civil rights cases.” *Id.* at 32.

⁵⁷ Post, *supra* note 21, at 1272. Chief Justice Taft, a farsighted thinker, “conceived and pushed through Congress the Judiciary Act.” *Id.* For a detailed account of the congressional debates, legislative history, and the Act's initial application, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1660–1712 (2000). A landmark empirical study conducted in 1977 suggested that the Judges' Bill, as the Act became known, precipitated the rise of dissents and the institutional disunity that followed. See Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, The Judges' Bill and the Role of the U.S. Supreme Court*, 30 POL. RES. Q. 471, 483 (1977).

⁵⁸ Post, *supra* note 21, at 1272.

⁵⁹ *Id.* at 1273.

⁶⁰ Among others, the legal establishment now recognizes Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), as canonical. See, e.g., Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244–50 (1998).

⁶¹ Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 788 (2000).

⁶² 285 U.S. 262 (1932); see *id.* at 280 (Brandeis, J., dissenting).

⁶³ Krishnakumar, *supra* note 61, at 788–92.

⁶⁴ See *id.* at 792–801.

including law professors.”⁶⁵ Legal scholars had long been more willing than practitioners to embrace dissenting opinions,⁶⁶ but the Court “struggle[d]” well into the 1920s to “establish a relationship with legal scholarship.”⁶⁷ Two trends, however, prompted a change in the Court’s disposition: the emergence of legal realism⁶⁸ and the appointment of three prominent professors to the bench.⁶⁹ The shift was not insignificant. An academy engaged with the Court assured Justices that their dissents would not fall on deaf ears. A well-reasoned dissent could spur the research and analysis necessary to change the state of the law. Finally, improved communications coupled with an increasingly political caseload ensured that a Justice could, in an act of demosprudential dissent, appeal directly to the people impacted by the majority’s opinion.⁷⁰ The takeaway is clear: Justices in this period were increasingly able — and willing — to engage law through multiple conversations. Dissents were no longer passive appeals; dissents could, through nontraditional channels, shape the future.

Democratic Legitimation. — In 1948, Justice William O. Douglas delivered an impassioned defense of courts “severely criticized for tolerating” individual opinions.⁷¹ His speech was one of comparative juxtaposition. In the meek courts of the totalitarian world, “[c]ertainty and unanimity” were “not only possible . . . [they were] indispensable.”⁷² In contrast stood the courts of a free people for whom legal uncertainty was a necessary condition of democracy.⁷³ That “judges do not agree . . . is a sign that they are dealing with problems on which

⁶⁵ Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 129 (2008).

⁶⁶ See Evans, *supra* note 18, at 127–28. Judge Evans’s anonymous survey captured some of the most colorful responses from law professors. One wrote, for example: “Strike out the dissenting opinions and you strike out 90% of the intelligent contribution of the courts.” *Id.* at 127. Another commented: “[D]issenting opinions are extremely valuable, often vastly more valuable than the majority opinion in the same case, practically always more helpful than hurtful . . .” *Id.* at 128.

⁶⁷ See Post, *supra* note 21, at 1360. In this period the legal academy “emerge[d] . . . as a potential threat to the status of the Court.” *Id.*

⁶⁸ Insofar as dissenting opinions and academic critiques suggest reasonable disagreement over the application of law, they stand in some tension with the basic tenets of legal formalism. The legal realist jurist, however, with his “skeptical take on the role of law in judging,” Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 737 (2009), was better positioned to embrace the dissenting tradition.

⁶⁹ Justices Douglas, Frankfurter, and Stone had taught at Yale, Harvard, and Columbia, respectively.

⁷⁰ For a discussion of demosprudence on today’s Court, see Guinier, *supra* note 65, at 47–115.

⁷¹ See Douglas, *supra* note 50, at 104.

⁷² *Id.* at 105; see also *id.* (“One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Fuehrer [sic], with a minority of one or four deploring or denouncing the principles themselves.”).

⁷³ See *id.* at 106. Justice Douglas added that “[d]isagreement among judges is as true to the character of democracy as freedom of speech itself.” *Id.* at 105.

society itself is divided. It is the democratic way to express dissident views.⁷⁴ Later legal theorists would argue — somewhat counter-intuitively — that the proliferation of dissent provides political legitimacy by assuring the public of a reasoned discourse and “argumentative interchange.”⁷⁵ Justice Douglas painted with broader and bolder strokes, but the underlying notion was functionally the same: free people dissent because dissent is dialogical. Certainty and unanimity are illusory — or worse, arbitrary and coerced.⁷⁶

The above discussion, though brief, suggests that there was not one, but a multitude of factors underlying the rise of the modern discursive regime. This Note makes no grand claim about causation, but focuses instead on the primary effects of these watershed changes: the unprecedented rise of dissenting opinions and the resulting demise of the consensus norm.⁷⁷ Left without a guiding institutional principle for the first time since Chief Justice Marshall, the Court entered a period of transition in which a new rhetorical form came temporarily to dominate Court practice. An analysis of the over eighty dissenting opinions handed down in 1948 is illustrative.⁷⁸

Justices in this transitional period rarely apologized or expressed regret for their dissentient proclivities, and only on occasion did they propose an explanation for their lengthy opinions.⁷⁹ The terms “dissent” and “concur” all but vanished from the lexicon of dissent.⁸⁰ Freed from the burden of having to limit or otherwise justify their dis-

⁷⁴ *Id.* at 106.

⁷⁵ Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2256–57 (1996).

⁷⁶ Embracing legal realism, Justice Douglas conceived of law “in the lawyer’s sense” as nothing more than “the prediction of what decree will be written by designated judges on specified facts.” Douglas, *supra* note 50, at 104. One might fairly criticize Justice Douglas for romanticizing the issue, but the argument cannot be dismissed entirely: the emergence of judicial dissent too neatly tracks broader historical struggles that defined the period.

⁷⁷ Causation was most likely nuanced and multidirectional. Operating as a feedback loop, every marginal decrease in the efficacy of the consensus norm precipitated a marginal increase in the number of dissents. That increase further undermined the norm and encouraged more dissent. This process, left unchecked, can explain both the speed and completeness of the Court’s break from established practice.

⁷⁸ The year 1948, covering Volumes 332–335 of the U.S. Reports, captures the transitional period between the earliest spike in dissent levels and their high-water mark in the early 1950s.

⁷⁹ See, e.g., *Comstock v. Grp. of Institutional Investors*, 335 U.S. 211, 231 (1948) (Murphy, J., dissenting) (“And since this error is not sufficiently illuminated . . . I deem it essential to make an independent statement of the relevant facts as found by the District Court.”); *Sherrer v. Sherrer*, 334 U.S. 343, 356–57 (1948) (Frankfurter, J., dissenting) (“But, believing as I do that the decision just announced is calculated . . . [incorrectly,] I deem it appropriate to state my views.”).

⁸⁰ There are a handful of examples to the contrary. See, e.g., *Saia v. New York*, 334 U.S. 558, 566 (1948) (Jackson, J., dissenting) (“I dissent from this decision, which seems to me neither judicious nor sound . . .”); *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 313 (1948) (Rutledge, J., dissenting) (“But I dissent from the refusal to decide it now. The question is of considerable importance . . .”).

sents, the speech acts assumed a procedural character. Justices now concluded their dissents with: “I would reverse,”⁸¹ “I would affirm,”⁸² or “I would dismiss.”⁸³ The act retained its individual voice, but the tone and purpose had changed: remorseful language, like apologetic language, had largely disappeared. Nor was there a hint of the collegial rhetoric that was to come. No longer required to engage the “dissent debate,” Justices simply chose to speak in terms of outcomes.

This unadorned procedural rhetoric, striking in its simplicity, may simply reflect the regularization of dissent.⁸⁴ In this view, it is the reemergence of ceremonial speech that should give one pause. Recognizing, however, that several other explanations may plausibly account for the outcome-oriented language,⁸⁵ this Note makes no authoritative claims. And it need not. Indeed, the true character of this third period is that it offers no clear answers. This underlying uncertainty is demonstrative of a Court in transition; as such, it brings into bold relief both the temporal and theoretical disconnect between the norm of consensus, which dominated judicial practice for over a century, and the norm of collegiality so prevalent today.

D. 1957–2010: Collegiality and the Respectful Dissent

Justices Brennan and Clark, writing independently in 1957, were the first dissenters of consequence to “respectfully” dissent.⁸⁶ But it was Justice Whittaker, joining the Court in mid-1957, who was the first truly to embrace its usage. Justice Whittaker was responsible for seven of the eleven respectful dissenting speech acts heard during his

⁸¹ See, e.g., *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 409 (1948) (Jackson, J., dissenting).

⁸² See, e.g., *Upshaw v. United States*, 335 U.S. 410, 437 (1948) (Reed, J., dissenting).

⁸³ See, e.g., *Uveges v. Pennsylvania*, 335 U.S. 437, 450 (1948) (Frankfurter, J., dissenting).

⁸⁴ Dissenting Justices had long incorporated procedural statements into their dissents, see, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 564 (1857) (McLean, J., dissenting); *id.* at 633 (Curtis, J., dissenting), but those were overshadowed by more apologetic and personal statements.

⁸⁵ For example, this procedural rhetoric may have reflected a first attempt to define a new institutional purpose. That is, insofar as this rhetoric conveyed to the public the view that the Court was not actively “making” law on its own initiative, but ensuring a functioning system through discretionary case selection, it served a new guiding — and legitimating — purpose: Article III administrator. For a Court positioned in the age between *Lochner* and the Warren Court, the hypothesis that the Justices sought to project judicial restraint by casting outcomes in such a light is reasonable. But it is certainly not the only plausible theory.

⁸⁶ *Roviaro v. United States*, 353 U.S. 53, 71 (1957) (Clark, J., dissenting) (“Feeling as I do that the opinion of the Court seriously . . . undermines a long-standing policy[,] . . . I respectfully dissent.”); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 269 (1957) (Brennan, J., dissenting) (“Insofar as the Court approves this error, I must respectfully dissent.”).

As Figure 1 demonstrates, there was one isolated instance of a “respectful” dissent between 1930 and 1957. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 170 (1945) (Jackson, J., dissenting) (“The CHIEF JUSTICE . . . and I are constrained respectfully to dissent . . .”).

brief five years of service.⁸⁷ As Figure 1 indicates, usage only increased after his departure. Equally significant, this language of respect did not carry on as the idiosyncrasy of a single Justice. From 1961 to 1964, a total of six additional Justices, including the Chief Justice, adopted the supplicative speech act in a dissenting opinion.⁸⁸ The practice was quickly, though not uniformly, emerging as an institutional standard. For contemporary jurists, it is a practice without equal. What appears as a downward trend in Figure 1 is simply the result of the Court's decision in the early 1990s to hear fewer cases.⁸⁹ The question thus becomes: What happened? What precipitated — and ultimately sustained — the rhetoric of respect on the Warren Court?

If the tectonic changes of the previous period had displaced the consensus norm, they failed to put forward a viable replacement. It would take a decade — and the reimagining of the Court under Chief Justice Warren — for the Justices to uncover a new institutional purpose. Central to this narrative was the Warren Court's willingness to bring to bear Article III power to resolve its generation's most contentious issues⁹⁰ and carve for itself a radical new role in political society with landmark assertions of judicial supremacy in *Brown v. Board of*

⁸⁷ See *James v. United States*, 366 U.S. 213, 249 (1961) (Whittaker, J., dissenting) (“Since the prevailing opinion reaches an opposite conclusion, I must respectfully dissent from that holding . . .”); *Mich. Nat’l Bank v. Michigan*, 365 U.S. 467, 483 (1961) (Whittaker, J., dissenting) (“I respectfully but resolutely dissent.”); *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 477 (1959) (Whittaker, J., dissenting) (“I respectfully dissent.”); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 551 (1958) (Whittaker, J., dissenting) (“I therefore respectfully dissent from part II of the opinion . . .”); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass’n*, 356 U.S. 282, 293 (1958) (Whittaker, J., dissenting) (“I respectfully dissent.”); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 511 (1958) (Whittaker, J., dissenting) (“I respectfully dissent.”); *United States v. City of Detroit*, 355 U.S. 466, 475 (1958) (Whittaker, J., dissenting) (“I respectfully dissent.”).

Arguably, one might also include Justice Whittaker's dissent in *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 230 (1958) (Whittaker, J., dissenting) (“With all respect, I feel compelled to express my disagreement with the Court's holding . . .”), raising the count to eight of twelve.

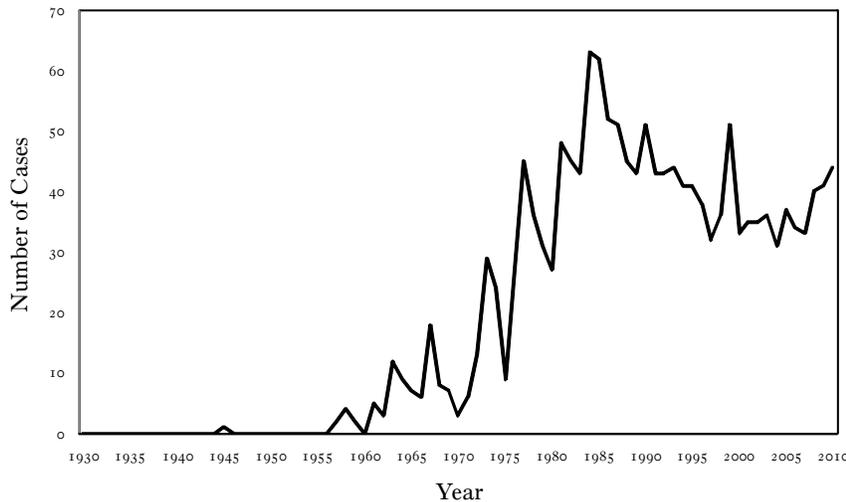
⁸⁸ See, e.g., *Meyer v. United States*, 375 U.S. 233, 247 (1963) (White, J., dissenting) (“For the foregoing reasons, I respectfully dissent.”); *Shenker v. Balt. & Ohio R.R. Co.*, 374 U.S. 1, 11 (1963) (Goldberg, J., dissenting) (“With all deference, I must respectfully dissent.”); *Schlude v. Comm’r*, 372 U.S. 128, 143 (1963) (Stewart, J., dissenting) (“I respectfully dissent.”); *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (“I am compelled, with all respect, to dissent from the dismissal . . .”); *Lott v. United States*, 367 U.S. 421, 428 (1961) (Clark, J., dissenting) (“I must respectfully dissent.”); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 119 (1961) (Warren, C.J., dissenting) (“With due respect, I must dissent from this holding . . .”).

⁸⁹ Compare *The Supreme Court, 1987 Term — The Statistics*, 102 HARV. L. REV. 350, 350 (1988) (142 opinions of the Court), with *The Supreme Court, 1993 Term — The Statistics*, 108 HARV. L. REV. 372, 372 (1994) (87 opinions of the Court).

⁹⁰ This is not to suggest that prior Courts were in any sense apolitical or did not adjudicate cases of great social and political import. Rather, it is to say that taken together, the breadth, consistency, and scope of the “Warren Court revolution,” MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998), was unmatched.

Education,⁹¹ *Baker v. Carr*,⁹² and others. Crucially, this interventionist — or “activist” — model was not without costs: it polarized both Court and country.

FIGURE 1: CASES WITH RESPECTFUL SPEECH ACTS,
FROM 1930 TO 2010⁹³



Considered in these terms, two relationships, or dialogues, threatened to undermine the Court’s interventionist model. Either the Court lost the support of the public at large, leaving it susceptible to the political branches, or tensions among the Justices frustrated institutional coherence. To mitigate these effects, the Court sought legitimacy in the former relationship and civility in the latter. A norm of collegiality, which operated through the respectful dissent — an institutional practice — was best positioned to resolve both dialogues favorably. This Note considers collegiality’s effect on legitimation and civility in turn.

On the question of public legitimation, Professor Kevin Stack has argued that because dissenting opinions conflict with the ideal of the rule of law, dissents must be justified another way: as demonstrative of the deliberative process.⁹⁴ The weak form of this argument is almost certainly true. Insofar as the public believes that the Justices act more legitimately, or law-like, when they “apply” law unanimously than when they “make” law in contentious decisions, the mere presence of

⁹¹ 347 U.S. 483 (1954).

⁹² 369 U.S. 186 (1962).

⁹³ Data were compiled from a series of Westlaw searches, <(respect! /15 dissent!) & da(n-Year)>, in the Supreme Court database, which were reviewed for accuracy. Authorial discretion, though necessary for borderline phrases, is unlikely to have meaningfully altered the results.

⁹⁴ See Stack, *supra* note 75, at 2236–47.

dissenting opinions injects a political and doctrinal uncertainty into the deliberations. But this, Stack argues, is beneficial in that dissents not only bring to the forefront of debate what would have been resigned to “the secrecy of the Court’s decisionmaking process,”⁹⁵ but they also “promot[e] the quality of that deliberation.”⁹⁶ To make the public aware of the robustness of the deliberative process is to assure that the Court’s politically divisive decisions are the product of reasoned discourse.⁹⁷

Justice Douglas, writing in 1948, advanced similar arguments in support of dissents generally, but neither he nor Stack have considered the role of rhetoric in this process of legitimation. This oversight was significant, as rhetoric plays a substantial role. For an individual Justice to “respectfully dissent” from his peers is to reinforce the view of the Court as an impartial and professional adjudicative body capable of exercising “neither Force nor Will, but merely judgment.”⁹⁸ Considered as such, collegial dissents are a necessary part of a larger, truth-seeking institutional dialogue, and less of a bitter adversarial conflict unworthy of public respect. This was particularly so when the Justices’ very public involvement in contentious social issues placed the Court’s interventionist vision at great risk.

To put the point conclusively: rhetoric has the potential to confer additional legitimacy on the dissenting dialogue; the respectful dialogue in turn legitimates the Court. In this way, the respectful dissent offered a “second best” alternative to consensus on the Warren Court. To put the point historically: The hard-fought unanimity of the *Brown* decision⁹⁹ conferred a certain degree of legitimacy on the Court’s contentious decision.¹⁰⁰ But perpetual unanimity in an age of dissents was impossible. Collegial dissenting thus proved a practicable and immensely attractive alternative to consensus jurisprudence. At a time when the threats to the Court’s legitimacy were particularly acute, the

⁹⁵ *Id.* at 2257.

⁹⁶ *Id.*

⁹⁷ See Douglas, *supra* note 50, at 104–07. As Justice Brennan said of Supreme Court opinions, they “are the exposition, not just to lawyers, legal scholars and other judges, but to our whole society, of the bases upon which a particular result rests — why a problem . . . is answered as it is.” William J. Brennan, Jr., *Inside View of the High Court, in THE SUPREME COURT UNDER EARL WARREN* 38, 45 (Leonard W. Levy ed., 1972).

⁹⁸ THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁹⁹ See RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 683–707 (1975).

¹⁰⁰ See Ruth Bader Ginsburg, Remarks at the 20th Annual Leo and Berry Eizenstat Memorial Lecture, The Role of Dissenting Opinions (Oct. 21, 2007), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_10-21-07.html.

collegial dissent offered a potentially great reward — increasing public legitimation — at a marginal cost.¹⁰¹

The discourse between Justices also militated in favor of collegial language. Two points on this interpersonal dialogue merit attention. First, the Court's polarizing docket had personal effects on individual Justices.¹⁰² Given that Justices were regularly presented with timely questions of great political concern, to dissent was to make a stand for closely held views.¹⁰³ But the opposite also held true: Justices in the majority were often equally — and sincerely — committed to their views. The Justices, often finding each other on both sides of majority opinions, certainly knew this fact to be the case. From this understanding emerged a default practice of mutual respect, or collegiality.¹⁰⁴ Likely, Justice Whittaker's repeated use of respectful rhetoric alerted the other Justices to the fact that their existing speech acts were not — or were no longer — sufficiently collegial. Recognizing that, the Justices fairly swiftly adjusted their norms.

Second, the diversity of ideologies on the Court ensured constantly shifting voting blocks on polarizing questions of law.¹⁰⁵ Because an adversary in one high-stakes case might become an ally in the next, Justices had powerful incentives to mitigate the human costs of disagreement — particularly after Justice Whittaker introduced the respectful dissent. The Justices, in other words, sought to avoid uncivil behavior that frustrated coalition-building in both the short and long terms.¹⁰⁶ This hyperrealist explanation might account not only for the emergence of the collegial rhetoric, but also for its entrenchment during the Burger, Rehnquist, and Roberts Courts. All told, considered in terms of either external or internal audiences, the need to legitimate an interventionist Court weighed heavily on the development of new institutional practices.

¹⁰¹ No doubt the inverse is true. Vituperative language, if abused, may delegitimize the dissent as well as the dialogue. For one commentator's critical view, see Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y.L. SCH. L. REV. 906 (2006–2007).

¹⁰² Poor Justice Whittaker, the respectful dissenter, is said to have suffered a nervous breakdown caused in part by his agonizing over his vote in *Baker v. Carr*, 369 U.S. 186 (1961). See Owen M. Fiss, *Objectivity and Interpretation*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 229, 244 (Sanford Levinson & Steven Mailloux eds., 1988).

¹⁰³ Perpetual dissents, including Justices Brennan and Marshall's crusade against the death penalty, are representative. See Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 450–51 (2008).

¹⁰⁴ For a powerful argument made on behalf of a collegial norm in multi-judge adjudication, see Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1356–70 (1998).

¹⁰⁵ See generally Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).

¹⁰⁶ Justice Scalia has been criticized by some for failing to do just that in his dissents. See generally Newman, *supra* note 101.

Of course, the cynical view is not without merit. Perhaps the adoption of respectful rhetoric is simply an accident of history and language. Perhaps the Justices adopted the rhetoric of dissent not because it conveyed anything of importance, but because it read well and appealed to a classical judicial sensibility. Alternatively, perhaps the choice was not made by the Justices, but by law clerks who, through mere repetition, entrenched the arbitrary.

There is no way to disprove conclusively any of these critiques. (Admittedly, there is some degree of path dependency acting in the background.¹⁰⁷) But the cynical view is ultimately unsatisfying and incomplete where the appeals to historical contingency overlook the fairly strong nexus between language and institutional purpose. Although these institutional matters cannot explain why Justices came to embrace “I respectfully dissent” over some other formulation, they do suggest why this phrase — if not necessary given the Court’s development — was enthusiastically adopted.

III. DISSENT ON THE ROBERTS COURT: A CLOSER LOOK

The respectful dissent is the dominant speech act of the Roberts Court. According to Figure 2, this rhetoric manifested in nearly 70% of the individual principal dissenting opinions handed down during the 2005 to 2009 Terms, at one point rising to an impressive 83.7%. To give a more complete view of dissenting practice, however, this section focuses not on the default practice, but on those dissents that deviate from the norm. Ultimately, this discussion of minority dissenting practices will add an important — and otherwise unseen — nuance to the legitimation rationale underlying the Court’s collegial dissents.

As Figure 2 demonstrates, there are two exceptions to the respectful dissent. First, there are the “assertive dissents” in which the protesting Justice writes only, “I dissent.”¹⁰⁸ Here the Justice appropriates the traditional dissenting structure, but foregoes the respectful rhetoric.

¹⁰⁷ In an attempt to explain the various names and tales accompanying game theory models, one commentator explained path dependence thusly: “[A]fter someone thinks up a name, others can just latch on.” Carol Rose, *Game Stories*, 22 *YALE J.L. & HUMAN.* 369, 380 (2010).

It is worth mentioning here that the institutional argument and the path dependency argument are not mutually exclusive. Even assuming that Justice Whittaker’s initial decision to adopt the respectful rhetoric was arbitrary, the reasons for its subsequent entrenchment and perpetuation need not be.

¹⁰⁸ One example is Justice Ginsburg’s strongly worded dissent in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), in which she concluded briskly: “Because today’s judgment radically departs from that course, I dissent.” *Id.* at 1460 (Ginsburg, J., dissenting). “Assertive dissents” also include alternative wordings, such as “I must dissent.”

FIGURE 2: PRINCIPAL DISSENTS¹⁰⁹ ON THE ROBERTS COURT¹¹⁰
BY YEAR & JUSTICE

| Term | Total | Respectful | % | Assertive | Other |
|----------------|--------------|-------------------|-------------|------------------|--------------|
| 2005 | 50 | 34 | 68.0 | 2 | 14 |
| 2006 | 56 | 30 | 53.6 | 4 | 22 |
| 2007 | 55 | 38 | 69.1 | 5 | 12 |
| 2008 | 67 | 43 | 67.2 | 3 | 21 |
| 2009 | 49 | 41 | 83.7 | 2 | 6 |
| Totals | 278 | 187 | 67.3 | 16 | 75 |
| Justice | Total | Respectful | % | Assertive | Other |
| Sotomayor | 5 | 5 | 100.0 | 0 | 0 |
| Souter | 24 | 22 | 91.7 | 0 | 2 |
| Kennedy | 12 | 10 | 83.0 | 1 | 1 |
| Thomas | 34 | 27 | 79.4 | 0 | 7 |
| Roberts | 18 | 14 | 77.8 | 1 | 3 |
| Alito | 22 | 17 | 77.3 | 0 | 5 |
| Stevens | 68 | 52 | 76.5 | 1 | 15 |
| Breyer | 44 | 30 | 68.2 | 4 | 10 |
| Scalia | 26 | 9 | 34.6 | 4 | 13 |
| Ginsburg | 24 | 0 | 0.0 | 5 | 19 |

Second, there is a broad category of “other,” which includes procedural statements,¹¹¹ rhetorical variations on the speech act not couched in

¹⁰⁹ The category of “Principal Dissents” does not account for every dissent published during the Roberts Court. It excludes two categories of cases: First, dissents from summary per curiam grants or denials of certiorari as well as of stays. *See, e.g.*, *Presley v. Georgia*, 130 S. Ct. 721, 725 (2010). Second, dissents shorter than three slip opinion pages, provided that 1) the Justice wrote alone and 2) it was not the lone dissenting opinion in the case. This jurisprudential “me-too-ism” produces brief opinions setting out small, very technical points, *see, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 308 (2006) (Souter, J., dissenting), or simply noting a Justice’s historical position on the issue at hand, *see, e.g.*, *Washington v. Recuenco*, 548 U.S. 212, 223 (2006) (Stevens, J., dissenting). These short, functional dissents are reminiscent of the informal, one-paragraph dissents used with some frequency in 1948, *see, e.g.*, *United States v. Urbuteit*, 335 U.S. 355, 358 (1948). Because the Justices do not treat these brief notes as rising to the level of full dissents, they do not merit inclusion here. Noteworthy, however, is the fact that their inclusion would not significantly impact the data.

¹¹⁰ A brief note on methodology: in compiling the dissents handed down during the Roberts Court, the author of this Note coded for multiple variables, including the author of the majority opinion, the final vote tally, the Justices concurring in the dissent, its status as either a dissent or concurrence in part and dissent in part, the location of the speech act(s), and the subject matter. Authorial discretion was used in the rare cases where the use of “I dissent” could be considered as either a speech act or a simple declarative statement (for example: “I dissented in that previous case because . . .”).

¹¹¹ *See, e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 393 (2008) (Ginsburg, J., dissenting) (“For the reasons stated, I would affirm the judgment of the Ninth Circuit.”).

the language of dissent,¹¹² and — as is sometimes the case — no speech act at all.¹¹³ As a threshold matter, the very existence and use of these alternative speech acts does not detract from — but rather adds to — the robustness of the respectful default. A dissenting regime without alternatives would be not only artificial, but also impractical and unwise — impractical because not every conflict between dissenter and majority need elicit a personal statement of disagreement¹¹⁴ and unwise because sustained, unthinking usage of the rhetoric of respect might obviate the effect of that speech act.¹¹⁵

Furthermore, the use of alternative speech acts is a frank acknowledgment that idiosyncratic behavior is inevitable where the act is so personal. Telling, then, is that of the ten justices on the Roberts Court who have authored a dissent, an impressive eight invoke the rhetoric of respect approximately 70% or more of the time. Of the two outliers, Justices Ginsburg and Scalia, only Justice Ginsburg refuses entirely to engage the rhetoric of respect.¹¹⁶ Like the Justices of 1948, Justice Ginsburg primarily employs the outcome-oriented language of procedure. This nonconforming behavior is crucial to our understanding of dissenting practice because it establishes quite clearly that there is judicial discretion in the choice of language. In other words, the Justices do not unthinkingly employ the rhetoric of dissent. Nor are their choices determined completely by institutional forces. Rather, they are free to embrace alternatives both on a dissent-by-dissent basis or categorically, as part of their judicial style.¹¹⁷ The fact that they so rarely deviate is noteworthy. For a majority of the court, the practice of the

¹¹² See, e.g., *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2011 (2007) (Scalia, J., concurring in the judgment in part and dissenting in part) (“I agree with the Court that they may proceed *pro se* with respect to the first two claims, but I disagree that they may do so with respect to the third.” (emphasis added)).

¹¹³ See, e.g., *Oregon v. Ice*, 129 S. Ct. 711 (2009). The dissenting opinion concluded: “Today’s opinion muddies the waters, and gives cause to doubt whether the Court is willing to stand by *Apprendi*’s interpretation of the Sixth Amendment’s jury-trial guarantee.” *Id.* at 723 (Scalia, J., dissenting).

¹¹⁴ Justices today publish a number of short and cursory dissents that are functionally analogous to the brief and impersonal practice of earlier Justices to dissent in name only, choosing not to write — a rarity today. See, e.g., *Townsend v. Burke*, 334 U.S. 736, 741 (1948). The Justices, it follows, have deemed a formal speech act unnecessary for such dispassionate, often technical, expressions of dissent. See, e.g., *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2407–08 (2008) (Thomas, J., concurring in part and dissenting in part).

¹¹⁵ Cf. Post, *supra* note 21, at 1349–51 (noting that Justice Holmes limited the number of his dissents so that those published retained their force and effect).

¹¹⁶ If one were to replace Justice Ginsburg with a Justice predisposed to dissent respectfully in 75% of her cases, the Roberts Court’s cumulative average for principal dissents would rise over six percentage points to 73.7%, nearly three-fourths of all principal dissents.

¹¹⁷ In this light, Justice Sotomayor’s choice as a first-year Justice to respectfully dissent in *each* of her dissenting opinions is telling.

respectful dissent must still serve some greater purpose, including collegiality's dual aims of legitimacy and civility.

By that logic, the choice to dissent *assertively* — to withhold respect where convention requires it — is a particularly significant act. Of the hundreds of principal dissents recorded during the first five years of the Roberts Court, approximately 16, or just 5.8%, qualify as “assertive.” With few exceptions, they appear in the most polarizing of cases, those that elicit a powerful personal response from the dissenting Justice.¹¹⁸ This omission is a conscious choice.¹¹⁹ A Justice who desires a respectful discourse will find a way to incorporate the rhetoric. An example is revealing. In *Crawford v. Marion County Election Board*,¹²⁰ a hotly debated election law case concerning identification requirements for voting, an impassioned Justice Breyer concluded his dissenting opinion by boldly stating: “For these reasons, I dissent.”¹²¹ Yet in *Wallace v. Kato*,¹²² a fairly mundane statute of limitation dispute decided just one year earlier, Justice Breyer’s speech act read: “For these reasons, I *respectfully* dissent.”¹²³ There can be little question that the nature of the case — and the strength of Justice Breyer’s opinions — influenced his rhetoric and, in turn, the larger institutional dialogue.

The implications for the collegial norm and the respectful dissent as legitimating tools are twofold. First, the choice to dissent assertively — to appropriate the form, but not the respectful rhetoric, of the dominant speech act — implicitly recognizes the respectful dissent’s ability to legitimate the majority decision. This idea rests on the intuitive claim that an assertive dissent is ultimately an act of protest, a signal from one Justice to the world at large that the majority opinion does not deserve legitimation — that the majority has acted impermissibly and produced significant costs for political society.¹²⁴ It follows that if

¹¹⁸ See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 931 (2010) (Stevens, J., concurring in part and dissenting in part) (“I emphatically dissent from its principal holding.”); *Boumediene v. Bush*, 128 S. Ct. 2229, 2307 (2008) (Scalia, J., dissenting) (“The Nation will live to regret what the Court has done today. I dissent.”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2837 (2007) (Breyer, J., dissenting) (“This is a decision that the Court and the Nation will come to regret. I must dissent.”); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (“And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health. I dissent from the Court’s disposition.”).

¹¹⁹ One jurist has commented about this decision, but only in passing. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–13 (1995) (noting that “it has traditionally been the custom to end with ‘I respectfully dissent,’ [but] occasionally the writer is so upset that she drops the ‘respectfully,’” *id.* at 1413).

¹²⁰ 128 S. Ct. 1610 (2008).

¹²¹ *Id.* at 1645 (Breyer, J., dissenting).

¹²² 127 S. Ct. 1091 (2007).

¹²³ *Id.* at 1105 (Breyer, J., dissenting) (emphasis added).

¹²⁴ Often the perceived costs are made quite clear. The dissenters in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), feared that the majority opinion “threaten[ed] to undermine the integrity of

the dissenter believes that the use of “I dissent” is to deny or weaken the majority’s legitimacy, the inverse must also be true: to say “I respectfully dissent” is to convey legitimacy. In other words, the assertive dissenter has engaged — and therefore embraced — the positive benefits of collegial norms and the respectful dialogue through his choice of form and language. Second, this observation further suggests that the dissenting Justice believes that the Court’s legitimacy is, when he writes, relatively secure. If it were otherwise, the Court would not be able to sustain the occasional, vigorous criticism.

IV. CONCLUSION

Consider the unprecedented challenge that faced the Warren Court as it sought to aggrandize Article III power against the background of a vibrant, unchecked practice of frequent — and vigorous — dissent. Collegiality, which served the dual purposes of internal civility and external legitimization, emerged as the dominant institutional practice because it promised to resolve this tension favorably. That is, so long as collegiality contributed to the stability of the interventionist model, the Justices had powerful incentives to employ the respectful dissent. Many decades have passed since Chief Justice Warren, like Chief Justice Marshall, reinvented the Court, but the underlying tensions have not abated. The respectful dissent thus endures.

In one important sense, these are old, not unfamiliar themes: political pressures shape institutional responses, a Justice’s personal views influence his opinion writing, and so on. Novel, however, is the understanding that Justices appropriate language in different ways and at different times to advance institutional ends. This simple declarative line — one read by many, but considered at length by few — is in practice a generative act that contains not only the seed of demosprudential protest,¹²⁵ but also the lens through which observers can track the Court’s evolving conception of itself as both an institutional and a political actor.

elected institutions across the Nation.” *Id.* at 931 (Stevens, J., concurring in part and dissenting in part). In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), an impassioned dissent cautioned against undermining the political branches and endangering American troops. *Id.* at 2294–96 (Scalia, J., dissenting). These are not minor disagreements over policy; they are internal, and quite conscious, attacks against the Court.

¹²⁵ “In the context of dissents,” writes Professor Lani Guinier, “demosprudence is a democracy-enhancing jurisprudence.” Guinier, *supra* note 65, at 47. Although her work focuses on oral dissents, those delivered “from the bench,” *id.*, the logic of demosprudence reaches written dissenting speech acts as well. This powerful act, with its intimate and public face, is ultimately an expressive one. To make one’s dissent known is, in Chief Justice Hughes’s words, to appeal “to the brooding spirit of the law, to the intelligence of a future day.” JACKSON, *supra* note 19, at 17 (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928)).