

The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts

THE HONORABLE BERNICE B. DONALD*

I. INTRODUCTION: THE PROBLEM OF DISSENT IN A MULTI-MEMBER COURT	1123
II. THE DECISION TO DISSENT (OR NOT): THE INSTITUTIONAL CALCULUS	1129
III. THE DECISION TO DISSENT (OR NOT): THE INDIVIDUAL CALCULUS	1133
IV. THE UNIQUE NATURE OF JUDICIAL DISSENT AS AN OUTPUT	1141
V. COLLEGIALLY “VERSUS” DISSENT: RETHINKING THE BINARY	1144

I. INTRODUCTION: THE PROBLEM OF DISSENT IN A MULTI-MEMBER COURT

Judicial independence has an often overlooked component, one internal to the court. It is far more common for observers to approach the topic as institutional (“branch independence”) or individual (“decisional independence”), the concern being with influence or pressures external to the court.¹ Branch independence is most often examined in the separation of powers framework; there, it is a matter of the attributions of a particular branch of government as against those of the

* United States Circuit Judge, United States Court of Appeals for the Sixth Circuit.

1. EDWARD W. MADEIRA, JR. ET AL., THE AMERICAN BAR ASSOCIATION COMMISSION ON SEPARATION OF POWERS & JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY 11–14 (1997).

other, co-equal branches.² Decisional independence is frequently viewed as a matter of an individual judge's exercise of judicial authority free from improper external threats or inducements.³ The institutional and decisional facets of judicial independence can be thought of together as structural—as contrasted with the behavioral, which refers to the actual conduct of real judges.⁴ The concern of the behavioral approach is the extent to which individual judges exercise their legal reasoning and judgment independently of illegitimate constraints.⁵

This essay focuses on the behavioral side—the exercise of judicial authority by individual judges. It is concerned, however, with the influence brought to bear on individual judges by the internal institutional context⁶ in which they function. For United States Circuit Judges, that means the fact that they serve on a multi-member court, hearing appeals typically as part of a three-member panel and less frequently as an entire circuit court sitting en banc. In its orientation towards the immediate institutional context of judges' judicial conduct,

2. *Id.* at 12–14; Charles Gardner Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. & SOC. SCI. 185, 192 (2014). Arguably, the institutional variant is what is most often meant by “judicial independence.” The federal constitutional supports for branch independence include lifetime judicial tenure and salary protection. Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1447 (2012) (citing U.S. CONST. art. III, § 1).

3. Geyh, *supra* note 2, at 192. Examples of such improper influences include the offering of a bribe in return for a particular ruling on a matter before a court, or (what might be thought of as its converse) an impeachment threat by a legislator against a judge if the judge rules in a particular way hostile to the legislator's preference. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 SO. CAL. L. REV. 315, 316–17, 341–42 (1999), for a discussion of the impeachment threat.

4. Geyh, *supra* note 2, at 191.

5. *Id.*

6. A thoroughgoing analysis of the “institutional context” in which a judge operates, of course, must take account of more than just the colleagues who sit beside the judge on a particular panel. All of one's fellow judges on a circuit court, for example, are a relevant part of the institutional environment within which a judge operates. The judges above and below (the Supreme Court justices and the district court judges, respectively, in the case of a federal appellate judge) can also be thought of meaningfully as part of the institutional context, as well. This essay, however, focuses on the more immediate context: the colleagues alongside whom a judge participates in reaching a decision about a particular case.

this essay is aligned with the recent trend in scholarship identified by Prof. Quinn: rather than viewing the group decision-making process as “a series of individual, independent decisions,” this inquiry aims to grapple with “the more complicated interdependent decisions” faced by judges on multi-member courts.⁷

“Judicial independence,” seen as an absolute value, paramount over all other values—what Professor Geyh calls “unqualified judicial independence”—bears little resemblance to the real world, where judges face all manner of legitimate constraints. Normative assertions of unqualified judicial independence are a dead-end street jurisprudentially and politically.⁸

Clearly, judges are properly limited in multiple ways as they consider the questions and cases that come before them. The fundamental, common-law ordering principle of *stare decisis*, and more specifically by controlling authority as found in the law of the judge’s circuit and as handed down by the U.S. Supreme Court, form a powerful constraint. Judges are, of course, bound by the Constitution and by statute (although the actual meaning of such constraints forms a large part of what appellate and other judges are called upon to interpret).

7. Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CAL. L. REV. 1493, 1494 (2012). Along similar lines, Ethan Bueno de Mesquita and Matthew Stephenson have observed that “while an extensive literature examines the judiciary’s strategic interaction with the other branches of government, less attention has been paid to the effects of the institutional structure of the courts themselves on patterns of judicial decision-making.” Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755 (2002) (citation omitted).

8. “Judicial independence” is widely seen as counterposed to “judicial accountability”—the former lauded as a safeguard, for instance, of minority rights, but the lack of the latter attacked as enabling judges to defeat the will of the democratic majority. Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571 (1988). The main, but not sole, mechanism of accountability for federal judges is, of course, judicial review. Professor Geyh has noted that “judicial independence” seems to stand, in the public eye, as the opposite of “judicial accountability” and therefore engenders popular fear and mistrust; “fair [and] impartial courts,” in contrast, is a phrase that appears to play much better to public opinion. Geyh, *supra* note 2, at 187. The broad term for the problem (and there are differing views as to whether, or to what extent, it really is one) of federal and other unelected judges “flouting majoritarian preferences by exercising judicial review” is the “counter-majoritarian difficulty.” *Id.* at 192.

Another constraint arguably forms the most important structuring framework of all: “Appellate courts have to decide what the ‘standard of review’ is, and that standard more often than not determines the outcome.”⁹ Of course, the choice of standard of review can sometimes be disputed, and judges have considerable latitude in how they express a given standard in their written opinions.¹⁰

Rules are not the sole boundaries around the exercise of judges’ authority, however. Among the other constraints affecting a judge on a multi-member court is the judge’s relationships with colleagues. This essay is concerned with constraints that spring from the institutional framework in which judges operate. In particular, we examine what considerations constrain a judge on a multi-member court who differs with the majority in a case and is considering whether to write

9. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391–94 (1995); Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 259 (2003). To take just two examples of these numerous, greatly varying, and highly context-specific rules: (1) An appeal from a district court’s sentencing determination is judged on a “substantive reasonableness” standard: “A sentence is substantively unreasonable if the district court ‘selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.’” *United States v. Zobel*, 696 F.3d 558, 569 (6th Cir. 2012) (quoting *United States v. Hall*, 632 F.3d 331, 335 (6th Cir. 2011)); (2) An appeal of a district court’s denial of a sentence-reduction motion pursuant to 18 U.S.C. § 3582(c)(2), in contrast, is reviewed for abuse of discretion. *United States v. Metcalfe*, 581 F.3d 456, 459 (6th Cir. 2009) (citing *United States v. Ursery*, 109 F.3d 1129, 1137 (6th Cir. 1997)). Abuse of discretion occurs when a district court “relies on clearly erroneous findings of fact, applies the law improperly, or applies the incorrect legal standard.” *United States v. Watkins*, 625 F.3d 277, 281 (6th Cir. 2010) (citing *United States v. Washington*, 584 F.3d 693, 695 (6th Cir. 2009)).

10. See Wald, *supra* note 9, at 1391. Judge Wald provides contrasting statements of the same standard (review of an administrative agency decision) by the same judge in two different cases about one year apart; one begins, “The courts accord a very high degree of deference to administrative adjudications by the NLRB,” *Id.* at 1392 (quoting *United Steelworkers of America Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993)), and the other, “This Court will not disturb an order of the NLRB unless, reviewing the record as a whole, it appears that the Board’s factual findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue,” *Id.* (quoting *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 651 (D.C. Cir. 1994)).

a dissenting opinion. This can be a difficult decision indeed. For one former associate justice of the New York State Court of Appeals, “deciding when to dissent, or, more precisely, deciding when not to dissent, despite [his] disagreement with the position reached by the majority” was possibly the most “troublesome” part of his judicial service.¹¹

The very existence of this dilemma is historically bounded. In early national history, the English common law tradition of seriatim opinions, with each judge (or justice) writing separately, prevailed.¹² The accession of John Marshall as Chief Justice in 1801 brought a major change: Marshall believed issuance of a single opinion for the Court would best enhance the Court’s authority.¹³ Dissents would not become commonplace for at least another century. Well into the twentieth century, nine in ten Supreme Court decisions took the form of a single “opinion of the Court.”¹⁴ Moreover, even where a dissenting vote was cast, it was long common for Supreme Court justices (and

11. Hon. Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 35th Benjamin N. Cardozo Lecture, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (Nov. 28, 1979), https://www.nycourts.gov/history/legal-history-new-york/documents/History_Jones-Appellate-Decision-Making.pdf (last visited Apr. 12, 2017). An Eleventh Circuit judge gave voice in a 2012 dissent to the difficulties and cost of writing a dissenting opinion: “Writing this dissenting opinion has been a very distasteful undertaking. I have written it because I am concerned about the integrity of the court as an institution.” Colin A. McRae et al., *Eleventh Circuit Survey: January 1, 2012—December 21, 2012: Admiralty*, 64 MERCER L. REV. 829, 836–37 (2013) (quoting *Rosenfeld v. Oceania Cruises, Inc.*, 682 F.3d 1320, 1341 (11th Cir. 2012) (Tjoflat, J., dissenting)). Judge Tjoflat’s *Rosenfeld* dissent was twenty-one pages in length; the majority opinion, an order denying rehearing en banc, consisted of a single paragraph. *Id.* at 836.

12. DONALD E. LIVELY, *FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT* xxii (1992).

13. *Id.* Justice Robert H. Jackson described the process of seeking to unite a majority of a court around an opinion, something often attributed to Chief Justice Marshall, as “oftentimes requir[ing] that you temper down your opinion to suit someone who isn’t quite as convinced as you are or has somewhat different grounds. That oftentimes presents great difficulty.” Barth, *infra* note 21, at 5 (quoting Philip B. Kurland, 4 Justices of the United States Supreme Court 2563–64 (1969)).

14. Urofsky, *infra* note 23, at 6.

presumably appellate judges) simply to note a dissent, without “writ[ing] an opinion explaining their disagreement.”¹⁵

Since 1925, however, when Congress through the Judiciary Act gave the Supreme Court control of its own docket, the Court became more the specialized constitutional court it so largely is today.¹⁶ Professor Urofsky has rightly observed that, “[g]iven that only the hardest cases reach the high court” and that each case involves “a multitude of precedents, rules, facts,” and other elements, “it is little wonder” justices would not always agree.¹⁷ Dissent, in light of these long-term changes in American law, has become more common, and Justice Jones’s “troublesome” choice is one faced by many judges.¹⁸

This essay will consider whether an individual judge’s calculus in deciding whether to dissent imports into the judge’s decision-making considerations inimical to his or her behavioral independence. The essay will proceed in four parts. Sections II and III examine, respectively, institutional and individual considerations affecting the decision whether to dissent. Section IV examines some unique and often unremarked characteristics of the judicial dissent as a type of text. Finally, Section V ventures some preliminary conclusions about dissent

15. Associate Justice Pierce Butler’s was famously the lone dissenting vote, though perhaps it could not be characterized as a dissenting voice, in *Buck v. Bell*, the 1927 U.S. Supreme Court case brought by a “feeble-minded white woman” challenging the constitutionality of a 1924 Virginia statute mandating the sterilization of “mental defectives,” upheld as a legitimate means for society to “prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” 274 U.S. 200, 207 (1927). The record of the Court’s opinion ends with two sentences, each comprising a separate paragraph: “Judgment affirmed.” and “Mr. Justice Butler dissents.” *Id.* at 208. See Brendan Wolfe, *Buck v. Bell* (1927), Encyclopedia Virginia, http://www.encyclopediavirginia.org/buck_v_bell_1927#start_entry (last accessed Apr. 12, 2017), for more information about the Buck case and the statute ultimately upheld by the Court. See also Ashley K. Fernandes, *The Power of Dissent: Pierce Butler and Buck v. Bell*, 12 J. FOR PEACE & JUST. STUD. 115 (2002), for an exploration of the possible legal reasoning and convictions underlying Butler’s dissent, in the absence of any accompanying opinion. Justice Butler has been quoted as saying, “I shall in silence acquiesce. Dissent rarely aids in the right development of statement of the law. They often do harm. For myself I say: ‘Lead us not into temptation.’” Urofsky, *infra* note 23, at 6.

16. Urofsky, *infra* note 23, at 6.

17. *Id.* at 9.

18. Jones, *supra* note 11.

and collegiality on multi-member courts. The essay argues that dissent and collegiality should not be seen as binary opposites; that the decision to dissent can have crucial consequences both for the court and for the dissenter, and as such should certainly not be entered into lightly; and that, paradoxically, safeguarding the extraordinarily valuable right to dissent requires moderation in its exercise, both in the interests of the court and in the professional self-interest of the individual judge.

Table 1 maps key drawbacks and benefits of dissent on a multi-member court, both for the individual judge and for the court. Crucially, though, it is possible that at least some benefits (marked with an asterisk) accrue from the mere fact of the right to dissent—that the institution or individual benefits from judges’ right to dissent even when that right is not exercised.

II. THE DECISION TO DISSENT (OR NOT): THE INSTITUTIONAL CALCULUS

Not only the individual but also the institutional costs of dissent (and, to a somewhat lesser degree, of concurrence) likewise militate in favor of careful weighing of the advisability of writing separately.¹⁹ The chief institutional costs appear to be two: (1) where a dissent is written, the length of the majority opinion increases, which may mean that the majority must work harder,²⁰ and (2) the public credibility or prestige of the particular court (and conceivably of the judiciary as a whole) may be impaired.²¹

19. *Id.*

20. A statistical analysis has determined that, in cases where a dissent is written, the majority opinion is longer by 20%. Epstein et al., *infra* note 39, at 2–4. A possible alternative explanation is that such cases are more complex or difficult and/or that the legal issue in play is a closer question, factors tending to make it more likely that there will be a dissent. Of course, a dissenting judge also must work harder than he otherwise would (assuming that, had he held with the majority, he would not have written for the majority), so the cost in effort occasioned by a dissent is borne in part by the dissenter himself: “A dissent . . . means extra, self-assigned work.” Wald, *supra* note 9, at 1412.

21. In the words of Alan Barth, “[A] dissenting opinion . . . casts a certain shadow on the majority opinion, which is, after all, at least for the time being, the authoritative view of the issue that the Court has considered. A dissent makes it plain

TABLE 1. POSSIBLE NEGATIVE AND POSITIVE EFFECTS OF A WRITTEN DISSENT

	NEGATIVE	POSITIVE
INSTITUTIONAL	<ul style="list-style-type: none"> ▪ Undermine public confidence in the court ▪ Weaken the court's authority ▪ Create tension/undermines collegiality ▪ Undermine the majority opinion ▪ Create uncertainty about the law ▪ Cause more work for the majority/writer of opinion 	<ul style="list-style-type: none"> ▪ Flag error to draw attention of court above ▪ Point out error to correct/future paths of change in the law ▪ Challenge majority to strengthen its reasoning ▪ Underscore importance of/call attention to the majority opinion ▪ Give hope to losing side ▪ Strengthen democratic value of dissent, dialogue* ▪ Demonstrate the court's security in airing differences* ▪ Avoid giving impression of greater unanimity or certainty on the court's part than is actually the case*
INDIVIDUAL	<ul style="list-style-type: none"> ▪ Create tensions/undermine collegiality ▪ Spring from motivations of ego or ambition ▪ Damage own credibility with colleagues/ own future ability to dissent if needed 	<ul style="list-style-type: none"> ▪ Safeguard judge's individual dignity and conscience* ▪ Allow judge to discharge individual obligation (as expressed in oath of office)* ▪ Safeguard individual judicial independence*

that one more jurists, as eminent as those who constitute a majority of the Court, think the matter has been wrongly decided. But this is unavoidable in a Supreme Court. Only difficult and troubling questions come before it.” ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* 5 (1974).

A common criticism of dissents is that they amount to a public display of weakness and lack of certainty that tends to reduce the authority and prestige of the courts.²² Judge Learned Hand memorably warned that dissent could be “disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”²³ On the other hand, dissents can be seen as a confident show of strength by the court.²⁴

The majority, however, may share some responsibility for dissent. In the words of a historian of the Supreme Court,

The judge who writes for the Court must not roam the fields; on the contrary, he must weigh his words within an ambit of discretion so that he may secure agreement from his fellows. He must avoid confusion and uncertainty not only to obtain unanimity but also to command respect from the bar and the public for the decision of the Court.²⁵

Put somewhat differently, the strength of the collegiality on a court may inspire the majority’s taking minority reservations or objections into account such that a dissent is avoided.

The need for certainty, that is, for courts to decide cases in such a way that the law is clear and persons may adjust their behavior according to predictable rules, is one of the factors weighing against dissent. Justice Brandeis’s oft-quoted words from the bench convey this view memorably: “*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be

22. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1190 (1992).

23. MELVIN I. UROFSKY, *DISSSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE CONSTITUTIONAL DIALOGUE* 9 (2017).

24. Ginsburg, *supra* note 22, at 1995–98.

25. PERCIVAL E. JACKSON, *DISSSENT IN THE SUPREME COURT: A CHRONOLOGY* 15 (1969); *see also supra* note 13 (describing Chief Justice Marshall’s desire to reach a compromise in order to secure unanimous agreement with decisions).

settled than that it be settled right.”²⁶ Less often considered is that Brandeis wrote those words as part of a dissent. Indeed, the rarely-cited words that follow, in which Brandeis quotes the Court from two decades earlier, widen rather than narrow the scope of judicial discretion—and, implicitly, for dissent: “The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court”²⁷

Dissents, of course, do not solely impose costs. A common rationale is to “flag” an error in order to draw the attention of the court above.²⁸ They can also signal necessary shifts in jurisprudence that it may fall to a future generation to undertake and serve the important function of safeguarding a (not only judicial but also societal) minority’s dignity and capacity to register deeply-held views for the record. Dissents like those of Justice Curtis in *Dred Scott*,²⁹ Justice Harlan in *Plessy*,³⁰ and Justice Jackson in *Korematsu*³¹ add nobility to both legal and national history, perhaps salvaging, by their note of moral and legal clarity, hope for the future. In this vein we have Justice Cardozo’s famous, idealistic description of the dissenter as one who “speaks to the future, . . . his voice . . . pitched to a key that will carry through the years.”³² The calculus of dissent surely must include the possibility

26. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J. dissenting). A literal reading of Justice Brandeis’s words here is difficult to sustain—surely he did not mean that an incorrect decision is satisfactory as long as a controversy is resolved. Rather, we may infer that Justice Brandeis meant that on very close questions, some resolution is preferable to none.

27. *Id.* at 406–07 (quoting *Hertz v. Woodman*, 218 U.S. 205, 212 (1910)). What the *Hertz* Court placed in the discretion of the court, Justice Douglas located within the purview of each judge individually: “This re-examination of precedent in constitutional law is a personal matter for each judge who comes along.” JACKSON, *supra* note 25, at 11 (quoting WILLIAM O. DOUGLAS, *WE THE JUDGES* 431 (1956)).

28. *Wood*, *supra* note 2, at 1454.

29. *Dred Scott v. Sandford*, 60 U.S. 393, 564–633 (1857) (Curtis, J., dissenting).

30. *Plessy v. Ferguson*, 163 U.S. 537, 552–62 (1896) (Harlan, J., dissenting).

31. *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

32. *United States v. Cornwell*, 49 M.J. 491, 494 n.2 (C.A.A.F. 1998) (Sullivan, J., dissenting) (quoting BENJAMIN CARDOZO, *LAW AND LITERATURE* 36 (1931)).

that some dissents may rise to such a level of importance, even (overwrought as the word may sound) prophecy.

III. THE DECISION TO DISSENT (OR NOT): THE INDIVIDUAL CALCULUS

The imagery in two striking phrases, each derived from the writings of a federal appellate judge, hints at the sort of influences with which this essay is concerned. Judge Diane Wood, Chief Judge of the Seventh Circuit, draws from a popular country-music lyric of the 1970s that used the game of poker as a metaphor, in her study of the dynamics of the decision whether to write a dissent (“hold”), go along with the majority (“fold”), or reframe the issue via a concurrence (“re-shuffle”).³³ The other image comes from the observation by Judge Patricia Wald, formerly Chief Judge of the D.C. Circuit, that, “[t]hough certainly not as threatening as dissents, concurrences raise more collegial eyebrows, for in writing separately on a matter where the judge thinks the majority got the result right, she may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way.”³⁴ This observation is interestingly counter-intuitive, for one would think a dissent is a more extreme departure from one’s colleagues and therefore more fraught in terms of the collegial relationship.

In their vividness, these metaphors raise fascinating questions. When Chief Judge Wood invokes the decision-making of the poker

33. Wood, *supra* note 2, at 1448. The reference is to the song “The Gambler,” written by Don Schlitz and a number-one country hit for Kenny Rogers in 1978. KENNY ROGERS, *THE GAMBLER* (United Artist Records 1978); *Artists: Kenny Rogers*, BILLBOARD, <http://www.billboard.com/artist/305733/Kenny%20Rogers/chart?page=1&f=357> (last visited Apr. 17, 2017) (showing the chart history where “The Gambler” was ranked number one); *Don Schlitz - The Gambler Lyrics*, SONGLYRICS, <http://www.songlyrics.com/don-schlitz/the-gambler-lyrics/> (last visited Apr. 17, 2017). The chorus contains the advice of an old card player the narrator befriends during a train journey:

You got to know when to hold ’em, know when to fold ’em
 Know when to walk away, and know when to run
 You never count your money when you’re sittin’ at the table
 There’ll be time enough for countin’ when the dealin’s done[.]

Don Schlitz - The Gambler Lyrics, supra.

34. Wald, *supra* note 9, at 1413.

player to help explain the choices faced by an appellate judge, what is it that the judge is staking?³⁵ What is the judge's equivalent of the gambler's wager? When Judge Wald refers to "raise[d] . . . eyebrows" among a judge's colleagues,³⁶ what cost of dissent is she depicting? Judge Wood describes a series of costs of "separate writing" on a court, including time and energy, decreased public legitimacy of the court, compromising the clarity of legal rules, and sowing tension among members, among others.³⁷ As to the individual judge's choice of how to act, the answer—the "currency" in play, to extend the card-game metaphor—would appear to be the judge's rhetorical (persuasive) standing with her colleagues—not only on a particular panel, but also among all of her colleagues on the circuit court of appeals; we might use "credibility" in a particular, judicial sense. Indeed, Judge Wood included among the costs of dissent the "los[s of] credibility" that may be suffered by a "dissenter [who] becomes branded as a frequent complainer about one or more issues."³⁸ Such branding tends to lessen (and might even destroy) a judge's future ability to persuade his or her colleagues.³⁹ Chief Justice Harlan Stone hinted at this anxiety once in

35. Wood, *supra* note 2, at 1465.

36. Wald, *supra* note 9, at 1413.

37. Wood, *supra* note 2, at 1461–63. There is another angle of view on the relationship between collegiality and dissents: rather than thinking of dissents as erosions of collegiality, we may also think of collegiality as potentially leading to changes of emphasis and wording by the majority in ways that take into account the reservations of the minority and may actually make it less likely that a dissent is actually written.

38. *Id.* at 1463. One instance of collegiality strained past the breaking point, it appears, was the attitude of Justice Felix Frankfurter towards his colleagues on the U.S. Supreme Court, manifested in an "unrelenting effort to teach all his colleagues how to decide every case. [He] wrote his colleagues countless memos—often pretentious or patronizing—trying to persuade them to change their minds. . . . And he routinely lobbied the justices through their law clerks." JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 277 (2004).

39. Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis* 3–4, (John M. Olin Law & Econ. Working Paper No. 510, 2010), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1625&context=law_and_economics. Even worse, Epstein et al. also suggest that a dissenter may believe that members of the majority from which he is dissenting in a particular case may actually punish the dissenter "[b]y withholding or reducing collegiality in

a letter to legal scholar Karl Llewellyn: “[I]f I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading my separate opinions.”⁴⁰

These and other considerations lead to what Judge Richard A. Posner has referred to as “dissent aversion.”⁴¹ To explain why judges avoid dissenting, he opines: “Most judges do not like to dissent (Supreme Court Justices are an exception. . .). Not only is it a bother and frays collegiality, and usually has no effect on the law, but it also tends to magnify the significance of the majority opinion.”⁴² Judge Posner also states that the reasons why judges dislike being dissented from are that judges do not enjoy criticism, dislike having to revise a draft opinion to take a dissent into account, and “worst of all, [do not like] to lose the third judge to the dissenter.”⁴³ All of these factors point to potential costs to the individual dissenter in terms of that judge’s relationships with colleagues on the panel or in the circuit as a whole.

In the very way we state the problem of dissent, however, we should avoid assuming too much. This essay considers the narrowly circumscribed question of what a judge does, or should do, when a majority has already formed around a conclusion different from that reached by the judge—and what is at stake in the judge’s decision. Framing the question this way presupposes that the judge’s viewpoint is in the minority. But where one or both of the judge’s panel colleagues are still uncertain, the problem the judge faces cannot be said to be whether to dissent; rather, very simply, it is the problem of how

the future,” and that awareness of this reality or possibility may also deter some would-be dissenters. *Id.* at 4.

40. Ginsburg, *supra* note 22, at 1191 (quoting Letter from Justice Stone to Karl Llewellyn dated February 4, 1935 in WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 62 (1964)).

41. Epstein et al., *supra* note 39, at 1–2. The term appears to have been introduced by Judge Posner. *Id.* at 2 n.2 (citing RICHARD A. POSNER, *HOW JUDGES THINK* 32 (2008)).

42. POSNER, *supra* note 41, at 32.

43. *Id.* Judge Posner’s contention that “[j]udges also do not like dissents from their decisions” seems, however, possibly at odds with the idea that dissents magnify the importance of the majority decision. *Id.*

to decide the case. This point underscores the relational or, in Professor Quinn's term, interdependent,⁴⁴ nature of dissent: substantively, a judge can be said to come to a particular view of a case, but whether that view be a dissent depends on what the views of the other judges on the court turn out to be. Judge Wood's comment on the risk of "becom[ing] branded as a frequent complainer" points to the time element: the judge's experience with the particular panel colleagues, and his reputation on the circuit more broadly, form an additional context in which the decision about dissenting plays out.⁴⁵

In light of one's individual standing among panel and circuit colleagues, then, "[m]ost judges will . . . think carefully before writing separately, even if they sincerely disagree with some or all of the proposed opinion."⁴⁶ Much can be at stake for the judge in the decision.

Clearly, the imperative of self-restraint and prudence, counseling careful weighing of reasons for and against writing in dissent, cannot be thought of solely as a negative constraint external to the judge himself. That imperative is also in the judge's self-interest. The voice that sounds in dissent repeatedly can undermine its own effectiveness—like the boy who cried "Wolf!" too often, or perhaps like the guard dog whose barking is so constant that its owners pay no heed when it signals an actual armed intruder. That said, it is vitally important for the individual judge to be true to her view of legal principles in each case.⁴⁷ This will often result in dissents, which serve a mean-

44. Quinn, *supra*, note 7, at 1494.

45. Wood, *supra* note 2, at 1463.

46. *Id.*

47. International legal scholar Julia Laffranque has expressed the significance of dissent as, first of all:

[A]n expression of mutual independence of the judges, i.e. "independence of a judge from other judges[.]" The dissenting opinion is important for the judge who remained in the minority, because the dissenting opinion also expresses the judge's "mental independence" which surfaces thanks to the fact that both the results of the voting as well as different opinions are made public. The dissenting opinion guarantees dignity to the judge who remained in the minority and enables him to decide by his conscience, and not by the majority.

Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT'L 162, 169 (2003), http://www.juridicainternational.eu/public/pdf/ji_2003_1_162.pdf.

ingful purpose. I well remember my mixed emotions at being introduced to a young lawyer at a national convention who exclaimed, upon hearing my name, “Oh, you are the dissenting judge!” I am still pondering the import of the remark.

A multi-member court functions in part like a legislative body, both in the sense that it deliberates (although actual, formal deliberations by the members of an appellate panel appear to be quite infrequent),⁴⁸ and in the sense that it can be said to “vote”—that is, that it reaches its decisions by majority or plurality. There is, however, one particular, very important, and perhaps not often noted regard in which the output of a court is utterly unlike that of a legislature: its remarkable visibility. This aspect, explored in Part IV below, lends further weight to the idea that a judge out of alignment with the majority in a case ought to weigh carefully whether to write a dissent, knowing that such a writing will become a permanent, highly visible, and accessible, part of the opinion. Of course, in cases such as *Dred Scott*, *Plessy*, and *Korematsu*, history makes a compelling argument for those extraordinary situations.⁴⁹

A troubling question arises as to whether the sort of pragmatic calculus noted by Chief Judge Wood, involving considerations of collegiality and the currency of individual judicial credibility, constitute a double-edged sword. The multi-member court is a social environment, and judges are not exempt from the pressure to conform that other human beings experience—though certain characteristics of judges’ professional status likely diminish that pressure somewhat.⁵⁰ Clearly a prudent attention to the interpersonal environment in which one conducts one’s work is laudable and necessary. All of us are called to exercise our judgment in every setting in which we operate, professional, personal, political, deciding on uncountable occasions whether to speak or hold our tongues. However, could it be that this calculus also imports into a judge’s decision-making considerations inimical to his or her behavioral independence?

The logic of judicial choices in the collegial environment seems

48. Judge Posner notes, “Remember that judges do not engage in much collective deliberation over a case (in fact less than most juries do).” POSNER, *supra* note 41, at 34.

49. See *supra* notes 29–31 and accompanying text.

50. POSNER, *supra* note 41, at 34.

to lead, inexorably, to judges voting against their own “legal conscience”⁵¹ in some proportion of cases—perhaps a very small proportion, but in some cases at any rate.⁵² It could be that this outcome is inevitable in the appellate judicial context, and not different in kind from what sometimes occurs in a legislature; but it is also possible that this outcome means that the people are not always getting from judges what they have a right to expect, and what judges are best equipped to give: their judgment as to what the law says and requires. Justice Sutherland stated “that every judge had taken an individual oath and that [the judge] could not satisfy it ‘by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in his mind.’”⁵³ Then Associate (later Chief) Justice Charles Evans Hughes gave voice to a similar view when he acknowledged in 1928 that “[u]ndoubtedly” published dissents “detract from the force of the judgment” and that unanimity promoted public confidence in the judgment, but went on to note:

[U]nanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect on public opinion [W]hat must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.⁵⁴

51. The term is borrowed from the title of FELIX S. COHEN, *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* (1970).

52. As a preliminary hypothesis, it would seem that this might occur more often in the situation of a judge aligned with the minority viewpoint in a circuit heavily skewed to one or the other extreme of the ideological spectrum.

53. JACKSON, *supra* note 25, at 17 (quoting *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401–02 (1937)).

54. BARTH, *supra* note 21, at 5–6 (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67–68 (1928)).

It seems strained to imagine that the “merely formal” unanimity Chief Justice Hughes finds so detrimental on a supreme court, should somehow be acceptable at the appellate level.

An important point in the literature, of course, supports the notion that dissents not only impose costs but also contribute value—at times pointing the way to future correction of costly mistakes.⁵⁵ One scholar poetically refers to Supreme Court dissents, in particular, as “foreshadows of the law.”⁵⁶ Along those lines, Justice Frankfurter famously praised Justice Holmes’s dissents as “record[ing] prophecy and shap[ing] history[,]”⁵⁷ and Justice Cardozo expressed the prophetic role of dissent this way: “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.”⁵⁸ Dissent can also challenge a majority to strengthen its reasoning: “[w]hen majorities are obligated to offer reasons to dissenting minorities, they expose their position to criticism”—which not only offers the minority the chance to persuade the majority but also helps “to achieve better outcomes through meaningful accountability.”⁵⁹ On this view, dissent serves the interests of justice.

A judge led by the careful calculus alluded to above to withhold a dissent or concurrence may thus be depriving the legal system, and the people, of something of great value. The question can thus be stated in slightly different terms: Is it possible that the internal institutional context of multi-member courts is, in part, inimical to judicial independence—that it has effects deleterious to the fair and impartial administration of justice? And, if so, what, if anything, might be done about it? Or is the phenomenon inherent in the logic of collegial

55. See MELVIN I. UROFSKY, *DISSSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE NATION’S CONSTITUTIONAL DIALOGUE* (2015); Wald, *supra* note 9.

56. LIVELY, *supra* note 12.

57. JACKSON, *supra* note 25, at 17 (quoting *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 528 (1957)).

58. *Id.* (quoting BENJAMIN N. CARDOZO, *LAW AND LITERATURE* 36 (1931)).

58. Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 40 (2006).

59. *Id.*

courts? Conversely, we must also consider the possibility that the sorts of calculations with which this Essay will be concerned are actually a positive feature of multi-judge adjudication—that there is a policy interest in enhancing the public credibility of the judiciary, and therefore it is salutary that a would-be dissenter consider carefully the individual and collective costs of writing a dissenting opinion. On the latter view, “dissent aversion” would not be an impediment to judicial independence but rather a healthy set of considerations leading would-be dissenters to prioritize in which cases it seems most important to enter a dissent, or on which of their dissenting views they have the highest degree of certainty.

It seems clear, in any event, that dissent aversion can impose costs on the law and society. For instance, what is the effect when a “minority suppress[es] their different view in obeisance to judicial decorum and the interests of consequent certainty”?⁶⁰ It is worth noting, too, that the burden of deciding whether to dissent is borne disproportionately by those jurists who happen, through the vagaries of judicial philosophy and political change, to find themselves more often in the minority within their circuit. Those more often in step with the majority tend to be spared these sometimes agonizing decisions.

A few jurists, of course, seem to experience little agony in dissenting. Justice Douglas is quoted as saying, surely hyperbolically, “The right to dissent is the only thing that makes life tolerable for a judge of an appellate court.”⁶¹ This view is likely not shared by most judges today. Justice Robert H. Jackson, more modestly, once said it was “more fun” to write a dissent than to write for the court, “because you can just go off and express your own view without regard to anybody else. When you’re writing for the Court, you try to bring your view within the limits of the views of all those who are supporting you.”⁶² Judge Wald, also modestly, calls writing a dissent “liberating. No other judge need agree or even be consulted.”⁶³

60. JACKSON, *supra* note 25, at 8.

61. WILLIAM O. DOUGLAS, AMERICA CHALLENGED 4 (1960).

62. BARTH, *supra* note 21, at 5 (quoting Philip B. Kurland, 4 Justices of the United States Supreme Court 2563–64 (1969)).

63. Wald, *supra* note 9, at 1413.

The decision whether to dissent, it seems clear, must spring from more than the release or enjoyment its writing affords the dissenter. A great deal is at stake for the court and for the individual judge in the decision. Another consideration is worth noting: the very nature of a judicial dissent, and its place in relationship to the opinion of the court, is unique and deserves to be weighed carefully by the would-be dissenter. The section that follows explores this important, yet often unremarked, factor as it bears on the decision whether or not to dissent.

IV. THE UNIQUE NATURE OF JUDICIAL DISSSENT AS AN OUTPUT

There is a view of dissents that we might characterize as skeptical and impatient—even irascible. In his review of Prof. Urofsky’s study of dissent at the U.S. Supreme Court, Michael O’Donnell states that “[a] dissenting opinion is not law and serves no official function; at times, it can seem like petty ankle-biting.”⁶⁴ The lack of legal force behind dissents was underscored by a district court, dismissing a claim that had invoked the authority of a dissent:

Plaintiffs’ entire case . . . rests upon Justices Stevens’ and Brennan’s dissent in *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 (1976). But a dissent is not law. This Court will not recognize a new Constitutional right that seven Supreme Court justices declined to accept and that the Second Circuit has never supported. Plaintiffs are, of course, welcome to pursue their novel Constitutional argument should this case reach the appellate level.⁶⁵

64. Michael O’Donnell, *What’s the Point of a Supreme Court Dissent?*, THE NATION (Jan. 21, 2016), <https://www.thenation.com/article/whats-the-point-of-a-supreme-court-dissent/>. It may be worth noting that the author’s point came in the context of a highly critical discussion of Justice Scalia’s dissents and their pernicious effect (in the author’s view) on the Court and the law. One’s attitude towards dissent can certainly shift according to one’s sympathy, or lack of it, to the judicial philosophy or ideology underlying a particular dissenting opinion—or, to put it colloquially, one’s view may depend on whose ox is being gored.

65. *Catcove Corp. v. Heaney*, 685 F. Supp. 2d 328, 336 (E.D.N.Y. 2010). The district court in the 1990 case of *Sellin v. Rx Plus, Inc.* similarly admonished plaintiffs for their reliance on a dissent:

Bluntly, the court characterized the dissent as a legal nullity, bereft of legal authority. There is no tip of the cap to “prophecy with honor” or any of the other idealistic paeans to dissent. As Judge Posner reminds us, dissents “usually ha[ve] no effect on the law,”⁶⁶ a point Judge Wald makes more mildly when she says, “A dissent makes no new law.”⁶⁷ Surely, however, a dissent can and sometimes does have a form of authority—persuasive authority. Clearly, the court was not persuaded by the dissent and therefore refused to recognize that the dissent had any sort of authority. In stating that “a dissent is not law,” the court drew perhaps too bright a line.

Asserting what a dissent is not—clearly, it is not a controlling statement of “the law”—raises the even more interesting question of what a dissent is. In this regard, it may be useful to consider how an appellate court’s output is like, and unlike, that of a legislative body. One key difference is that a minority has a potentially much greater voice on the court. After all, when a bill is enacted by a legislature, the principal output of that process is legislation—the text of the act. Dissent is silent in a statute—the losing side does not, as a matter of right and custom, have the ability to enter its reservations or objections into the legislation. An outvoted minority states its dissent with a mere number, the votes cast against the bill; granted, legislative history contains the minority’s voice, but it requires separate research to uncover.

Even the closest legislative analogue to a judicial dissent, the minority report out of committee, turns out to be not very close at all. It is authored, not by legislators, but by committee staff, and, as with

Plaintiffs also attempt to undermine the clear impact of the *Pinter* and *Wilson* opinions on the legal standing of this case. However, the only decision plaintiffs can point to in support of their position is Judge Timbers’ dissent in *Wilson*. Regardless of the logic and forcefulness of Judge Timbers’ opinion, it is elemental that a dissent is not law. This Court is bound to follow the law of this Circuit, and that law is delineated in Judge Winter’s majority opinion in *Wilson*.

730 F. Supp. 1289, 1292 n.2 (S.D.N.Y. 1990). An even more stark assertion of the obviousness of the point was made by the appellate court in *General Construction Co. v. Public Utility District No. 2 of Grant County* stated that “it should go without saying that a dissenting opinion is not law.” *Gen. Constr. Co. v. Pub. Util. Dist. No. 2 of Grant Cty.*, 380 P.3d 636, 641 (Wash. Ct. App. 2016).

66. RICHARD A. POSNER, *HOW JUDGES THINK* 32 (2008).

67. Wald, *supra* note 9, at 1412.

legislative history generally, is not readily accessible to the public. The striking visibility and accessibility of a judicial dissent stand in stark contrast, and are significant components of its power. It is as if the act of a legislature included an official expression of the minority's reservations or even outright indignation or horror towards the legislation—and that expression was included with the statute upon its incorporation into the United States Code.⁶⁸

So the judicial dissent is a direct, accessible part of the public record of a court's decision. This gives dissenting judges a highly visible forum, with wide reach and potentially great influence. For those unsympathetic to the dissent, one can almost imagine an effect like that of someone who holds up mocking twin fingers behind the head of someone being photographed—the difference, of course, being that the majority knows all about the dissent, and indeed, may well enter into dialogue with it within its own written opinion. More sympathetically, one can look to a dissent as an act of courage or, along the lines memorably expressed by such jurists as Justices Cardozo and Brandeis, one of prophecy.

These characteristics point to the unique qualities of a judicial dissent and suggest the importance of the stakes when it comes to a judge's decision of whether to vote with the majority or against, and if

68. The comparison with executive branch outputs is somewhat different but certainly not in kind. The executive, of course, has a unitary character lacking in both legislatures and judicial bodies. In some respects, the executive branch can be thought of as speaking "in unison." Presidents ultimately have something approaching direct command authority over other officers in the Executive Branch of the federal government through presidential decrees, proclamations, executive orders, and presidential statements. Presidential signing statements have something of the character of a judicial dissent, though of course the objection is made across the boundaries of separate and distinct branches or powers. Regulations of executive agencies and operational rules also have a dispositive, authoritative quality, both in terms of the presidential authority from which they emanate and in terms of the directives they issue. There is no institutionalized place for a dissenting view. (The mechanisms of public comment, as well as the input from members of the regulated class of persons via "participatory rulemaking," are significant but do not add *internal* dissenting voices, in the formal sense.) So in this comparison, too, the judicial dissent assumes distinct, even unique, contours.

doing the latter, whether, to what extent, and with what degree of vehemence (or with what attitude towards the majority), to memorialize her differences with the majority.

V. COLLEGIALITY “VERSUS” DISSENT: RETHINKING THE BINARY

The notion of dissent as being opposed to collegiality deserves to be rethought in the era of modern courts. It would be a mistake to regard a judge who happens to be in the minority in deciding a case as having some sort of absolute duty of silent deference to the majority, whether to make the lives of the judges in the majority easier or to enhance “the majesty of the law.” The premium placed on adherence and uniformity may be overly exalted.

Rather than thinking of collegiality and dissent as binary, mutually exclusive opposites, it is possible to regard collegiality as a quality that may be present or absent—even in a dissent. The sharp wording of some dissents seems not only to testify to the existence of badly frayed relationships on the relevant courts but also to the power of some dissents to further fray those relationships. One state supreme court chief justice opened a dissent by quoting Justice Douglas on the right of dissent making a judge’s life “tolerable” and then proceeded to say:

As is evident from the numerous separate opinions I have authored this term, I find ever more frequently the need to exercise my right to dissent, and to urge my brethren to refrain from torturing the law of this state, and/or usurping the role of the legislature, to achieve their desired result *du jour*.⁶⁹

There may be no bright line separating forthright statements of jurisprudential disagreement from expressions of pique, rancor, or even outright hostility, but language that strays far across that line can often be recognized, as in the dissent that includes the phrase: “I am deeply troubled by the majority’s deplorable disregard for fundamental

69. State ex rel. McKenzie v. Smith, 569 S.E.2d 809, 828 (W. Va. 2002) (Davis, C.J., dissenting).

fairness.”⁷⁰ “Deeply troubled” conveys strong unease, but the alliterative phrases that follow are truly cutting; the adjective “deplorable,” in particular, carries a real barb. As does the adjective in a dissent on the D.C. Circuit which took the majority to task for “distorting” a particular legal standard and for its “outlandish refusal” to treat the relevant authority as the dissenter felt proper.⁷¹

“Respectfully” is a term much used in dissents as a gesture of collegiality,⁷² yet by itself it exerts no magical power. The use of that adverb earlier in the quoted paragraph does little to soften the tone of the dissent: “Respectfully, reliance on Anderson and Green exemplifies the majority’s confusion.”⁷³ It is plain that a dissent can be expressed collegially, with genuine respect for the majority or, more broadly, for the court as an institution—and that a dissent can be expressed in quite the opposite way. Not only in the decision of whether, but also in how, to dissent, does a judge exercise important discretion.

If a judge has no absolute duty or obligation to silence dissent, a judge clearly does have a duty to reflect carefully on her motivations to dissent, the effect of doing so, and if the judge decides that writing a dissent is necessary, the way she chooses to express that dissent. That is true because of both institutional considerations and personal ones.

In the personal and institutional realms, dissent can manifestly have costs—potentially considerable ones. Yet the right to dissent is precious and the reason often compelling! It may seem paradoxical, but perhaps the deep value of that right is such that to safeguard it requires extreme prudence and moderation in its exercise. It may be in the interests of the individual judge to protect the ability to dissent effectively on a future occasion, and in the interests of the court and of

70. *Nixon v. Kent County*, 76 F.3d 1381, 1403 (6th Cir. 1996) (Keith, J., dissenting).

71. *Tavoulareas v. Piro*, 817 F.2d 762, 840 (D.C. Cir. 1987) (ordered not published) (MacKinnon, J., dissenting). Another example of extremely blunt language in a dissent comes from a California appellate case where the dissenter railed against “the majority’s wrongheaded approach to this issue.” *People v. Harrison*, 70 Cal. Rptr. 2d 185, 193 (Cal. App. 1997) (Huffman, J., concurring and dissenting).

72. See Note, *From Consensus to Collegiality: The Origins of the ‘Respectful’ Dissent*, 124 HARV. L. REV. 1305 (2011), for a discussion of the origins and rise of “respectfully” as a customary marker of collegiality in dissents.

73. *Harrison*, 70 Cal. Rptr. 2d at 193.

the law as a whole, that a judge may decide in a given case that differences with the majority do not warrant being memorialized in a dissent.

These are clearly hard decisions, requiring an exercise of the most difficult imaginable judgment. It is akin to but distinct from the legal judgment as to the rights and wrongs of fact and law that go into deciding a case. We might call it a judgment upon one's own judgment—a sort of “meta-judgment.” It is this higher judgment, exercised with a long view to the best interests of individual and court, that judges on multi-member courts must often make.

As judicial officers and members of our local, state, and national legal communities, we do well when we exercise this judgment carefully and responsibly and respect the corresponding judgments by our colleagues. The greater the behavioral independence of each judge, the more meaningful a judge's agreement when it occurs. Acquiescence to the majority out of obligation, or a felt pressure to conform, ill serves justice. Genuine assent, drawn from the wellsprings of legal conscience and freely given, is a wholly different matter. The right to dissent, reinforcing as it does the value of assent, emerges in this light as a pillar of judicial independence.