

Spring 1999

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*Rhode Island Supreme Court*

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### Recommended Citation

Flanders, Robert G. Jr. (1999) "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable," *Roger Williams University Law Review*: Vol. 4: Iss. 2, Article 2.  
Available at: [http://docs.rwu.edu/rwu\\_LR/vol4/iss2/2](http://docs.rwu.edu/rwu_LR/vol4/iss2/2)

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## Articles

# The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable

Robert G. Flanders, Jr.\*

### I.

The poet Marianne Moore, writing about poetry, claimed that "I, too, dislike it: there are things that are important beyond all this fiddle. Reading it, however, with a perfect contempt for it, one discovers in it after all, a place for the genuine."<sup>1</sup> By and large, appellate judges feel the same way about the filing of dissenting opinions<sup>2</sup> in their courts. They, too, dislike it. Instead of having to prepare and file a dissent, they would much prefer to join the majority and thus be on the prevailing side of an appeal. If an appellate judge's views about a case do not conform to those of his or her colleagues, then most such judges are amenable to reexamining their position to determine whether they should reconsider their initial judgments in light of their colleagues' contrary opinions. Thus, joining the majority is the best way for an appellate judge to avoid having to take on the burden and the risk of writing a dissent that may not, after all, represent the best resolution to any given case. And as for their colleagues filing dissents to the opin-

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1. Marianne Moore, *Poetry*, in *Collected Poems* 40, 40 (1951).

2. By a dissent, I mean any opinion which is filed separately from the majority's opinion and which disagrees with any aspect of its reasoning and/or with the result it reaches. Thus, I include concurring opinions that agree with the result of the majority's opinion, but not with all aspects of its reasoning, as a type of dissent.

ions that appellate judges have been assigned to prepare on behalf of the court, their attitude, not infrequently, can be summed up in one word: FAGEDDABOWDIT!<sup>3</sup>

Nevertheless, when pressed, most appellate judges will admit that "one discovers in [dissents] after all, a place for the genuine." Still, when they are on the prevailing side of an appeal, and especially when they are responsible for preparing a draft opinion on behalf of the court, most judges would much prefer to write for a unanimous court rather than have to deal with one or more dissenting opinions. Among the reasons for this is that the author of a unanimous appellate opinion enjoys the comparative luxury of framing the losing side's arguments in whatever way he or she believes will best illustrate why the court has rejected this point of view. Thus, unless a dissenter decides to take issue with the manner in which the majority casts its opinion, the victors in the case get to write its history. Indeed, a unanimous majority opinion need not deal at all with the losing side's arguments, or it can pick and choose which ones it wishes to refute, which ones it wishes to ignore, and which ones it wishes to dismiss out of hand without extended discussion of the opposition's position on the various issues decided by the court. Although most judges who write for a unanimous court make a good-faith effort to state the losing side's arguments as fairly as possible, the disinterested reader of such an opinion never knows if the court has done so or if some of the other side's best points were left on the cutting-room floor or were not expressed as cogently as they otherwise might be stated (or as they were argued in the losing side's legal briefs).

But all this changes once the possibility of a dissenting opinion surfaces. Indeed, whether a judge sides with the majority or with a dissenting colleague, or sits on the fence, the existence of a possible dissenting opinion usually means more work for all of the judges on the court, especially for the designated author of the majority opinion. Having to confront the arguments and any factual emphases contained in a dissent usually makes it harder for the majority to craft its opinion because now its freedom to frame and/or to ignore the losing side's arguments with relative impunity is sharply curtailed. Moreover, from the dissenting justice's standpoint, the decision to dissent means that he or she must take on

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3. This is not a legal term.

the onus of writing yet another opinion on a court that, quite typically, is already struggling under the burden of having to decide and to produce reasoned opinions in far too many cases. Additionally, on an appellate court that chooses to assign its cases randomly among the individual judges to draft proposed opinions for the court (as is true for the Rhode Island Supreme Court), the court cuts no slack for any of its dissenters in the distribution of the opinion-writing workload. Rather, any dissents are simply added to that judge's pro-rata workload of majority opinions that the court previously assigned to him or her to write on behalf of the court. Thus, from the standpoint of each appellate judge on such a court attempting to manage his or her heavy opinion workload as efficiently as possible and to minimize any unnecessary or extra work, there is a built-in disincentive for these judges to take on the extra burden of preparing a dissent. In addition, because the reasoning of the majority and any dissents will inevitably be compared and judgments will be rendered concerning which is the better-reasoned or the best solution to the problem posed by the case, the filing of a dissent also means that the intellectual stakes of the case, as well as its potential media interest, have also increased for all concerned. Thus, the author of the majority opinion and all of the judges who have decided to join therein typically will have to work harder to ensure that the opinion effectively sets forth the majority's rationale in light of whatever holes the dissent may have attempted to poke in its reasoning. This is also why whenever one or more dissents will be filed, it usually takes longer for the appellate court to issue an opinion in such a case.

As a result, some appellate judges have gone to extraordinary lengths to discourage dissents. Supreme Court Justice Potter Stewart went so far as to characterize them as "subversive literature."<sup>4</sup> Others are apt to accuse dissenters with having committed the dastardly crime of incivility or with having poisoned the well of collegiality that should nourish all of the judges on an appellate court. Of course, a dissent need not be uncivil in its substance or its tone, nor should the mere filing of dissents function as some type of crude barometer to measure the lack of collegiality on an appellate court. On the contrary, a dissenter should feel free to express the precise degree of his or her disagreement—or, if war-

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4. William J. Brennan, Jr., *In Defense of Dissents*, 37 *Hastings L.J.* 427, 429 (1986) (quoting Justice Potter Stewart).

ranted, outrage—that he or she believes is appropriate given the substance and tenor of the majority’s opinion in any given case. As Justice Antonin Scalia has put it:

To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one’s colleagues; to address precisely the points of law that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority’s disposition should engender—that is indeed an unparalleled pleasure.<sup>5</sup>

Thus, when one or more judicial officers on deck believes the good ship of state is about to strike an iceberg unless the court immediately corrects its disastrous course, they should be forgiven if the tone and civility of their discourse in remarking upon these dire straits proves in the telling to be somewhat sharper than it would be in asking their fellow officers to please pass the salt during a captain’s table dinner.

Justice Benjamin Cardozo’s observations on this point are likewise noteworthy:

Comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase. He dreams of [the consequences] of careless dicta . . . . Not so, however, the dissenter . . . . For the moment, he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant.<sup>6</sup>

In 1923, the American Bar Association (ABA) issued an opinion opposing in most instances the practice of appellate judges filing separate written dissents from the majority’s published legal opinion in a case: “[J]udges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclu-

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5. Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33, 42. I am indebted to Justice Scalia’s above-cited lecture for rekindling my interest in this subject, for articulating many of the ideas that I have tried to elaborate upon in this Article, and for highlighting the excerpts from some of the great dissents that are referenced herein.

6. Benjamin N. Cardozo, *Law and Literature*, 14 Yale Rev. 699, 715 (1925), reprinted in *Law and Literature and Other Essays and Addresses* 34 (1931).

sion and the consequent influence of judicial decision . . . . [E]xcept in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged.”<sup>7</sup> Other scholars and judges have agreed with the ABA, concluding that, if dissents are to be allowed at all, then they should be restricted. For example, no less a leading legal light than Judge Learned Hand once lamented that a dissent in a judicial opinion “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”<sup>8</sup> Indeed, even Justice Oliver Wendell Holmes, who was dubbed “The Great Dissenter” for his famous Supreme Court dissents in the early part of this century, called the practice of dissenting largely “useless” and “undesirable” in the first dissent he ever wrote after joining the high Court’s bench.<sup>9</sup> And yet, Justice Holmes’ memorable and much-quoted dissent in that same case, *Northern Securities Co. v. United States*, proves why he was wrong and why he continued to prepare and file dissents in later cases:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.<sup>10</sup>

In contrast to Justice Holmes’ initial misgivings about dissenting, Justice William O. Douglas, a maverick judge if ever there was one, believed that “[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court.”<sup>11</sup> Although other factors also help to make life as an appellate judge more than tolerable, the ability to dissent does make appellate judging much

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7. Alex. Simpson, Jr., *Dissenting Opinions*, 71 U. Pa. L. Rev. 205, 217 n.26 (1923) (quoting ABA Proposed Canons of Judicial Ethics, No. 19).

8. Learned Hand, *The Bill of Rights* 72 (1958).

9. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). The members of the United States Supreme Court, of course, have continued to file dissents and to debate their utility. See, e.g., *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 708 (1994) (Souter, J.) (“Justice Cardozo once cast the dissenter as ‘the gladiator making a last stand against the lions.’ . . . Justice Scalia’s dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining.”).

10. *Northern Sec. Co.*, 193 U.S. at 400-01 (Holmes, J., dissenting).

11. William O. Douglas, *America Challenged* 4 (1960).

more agreeable than it otherwise would be for a judge who, from time to time, disagrees with the way in which his or her judicial colleagues have decided to resolve an appeal.

## II.

In addition to contributing to the personal satisfaction experienced by those who serve as appellate judges, the filing of dissents also serves many useful and worthwhile institutional purposes. Thus, notwithstanding the substantial body of criticism leveled against them, I have decided to circulate a draft dissent and/or publish my ultimate disagreement with the majority of my colleagues whenever doing so can serve some potentially useful purpose(s). Given the substantial body of authority that deplors dissents in appellate courts of last resort, what might these potentially useful purposes be?

First and foremost, a dissenting opinion serves the interests of the truth. If an appellate bench is not of one mind, then the filing of separate opinions by those judges who disagree with the majority point of view is the only truthful way to reflect the court's actual disparate opinions on the matters before it. Moreover, the filing of separate opinions shows exactly who disagrees with what and why there is disagreement as well as the extent and depth of that disagreement. Most importantly, it unmaskes the false appearance of unanimity on the court if in fact unanimity does not exist on how the legal issues presented should be resolved. If dissents are discouraged or routinely buried in the interests of presenting a united judicial front of "monolithic solidarity," then cases that are really decided by less than unanimous agreement—indeed, even by only a one-judge margin—will appear to the unsuspecting litigants, lawyers, and public as unanimous when in fact the court is divided in its legal judgment. Further, the filing of separate opinions has the salutary benefit of restoring power and influence to the truly unanimous judicial opinion.

Ironically, the traditional English practice, followed, for example, by the judges who sat on the King's Bench, was for each judge to prepare and file a separate opinion in each case.<sup>12</sup> Indeed, until John Marshall was sworn in as the fourth Chief Justice of our

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12. See Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L.Q. 186, 190-91 (1959).

United States Supreme Court, this was the original practice of that Court.<sup>13</sup> But for the sheer volume of the cases handled by most appellate courts today and for the reasons expressed herein, there is much to commend this ancient practice, especially when there are differences in (1) the reasoning of the justices, (2) the emphasis they place on certain facts, and/or (3) the way in which they express themselves about the particular legal problem presented by the case at bar and how it should be resolved.

A policy of encouraging the filing of separate opinions also helps to keep the court in the vanguard of the law's intellectual vibrancy.<sup>14</sup> When it is functioning properly, an appellate court of last resort is not just a locus of legal judgment; it is a living, legal nerve center, a law laboratory, and a lyceum for critical legal research and development. Thus, it is not just law school professors who are able to provoke and foment discussion concerning the legitimacy or rightness of the law's various twists and turns as reflected in the courts' latest rulings. Rather, appellate judges participate in this exercise as well, even as they decide the cases themselves. Indeed, the predominant practice in the legal academy is not to require law students to scrutinize the works of law professors or other expert legal commentators for them to learn about the law and its various disciplines. Rather, professors traditionally provide students with selected opinions from appellate courts of last resort, so that they can mill the grist of what they need to know about the law and its controversies from studying the majority and dissenting opinions of these courts themselves.<sup>15</sup>

A further benefit of writing separate opinions is that they provide competition for the majority opinion in its race for acceptance in the marketplace of ideas. Indeed, it was Justice Holmes who in dissent championed this very notion before it was popular to do so:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe . . . that

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13. See Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 *Geo. L.J.* 2069, 2070 (1995).

14. See Scalia, *supra* note 5, at 39.

15. See *id.*

the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.<sup>16</sup>

Vigorous written debate of the issues in a separate appellate opinion also can serve to improve the majority's final work product by forcing the prevailing side to deal with (or to ignore at its peril) the toughest objections that can be raised to its position as urged by the losing side and/or by the dissenting opinion. If the majority cannot answer these arguments effectively, or at all, then perhaps its opinion is less deserving of respect, let alone of being slavishly followed as precedent, when analogous factual situations arise in the future. Separate opinions also can serve to improve the majority's opinion in other tangible ways. They usually cause the majority to hone and tighten its analysis, to omit those arguments that are most vulnerable to objections, to recast loose language that can be held up to public criticism (if not to scorn), and to acknowledge some important limitations on the scope of its holding. Moreover, a majority opinion opposed by one or more dissents, with each carrying the names of their respective authors, is usually a good indication that these decisions are the product of independent and reflective thought and that they emanate from judges who, though they try to persuade one another about how a case should be resolved, do not simply acquiesce in the majority's point of view to serve the interests of "monolithic solidarity"—even when unresolved differences and disagreements about the case still remain at the end of the court's decision-making process.

But perhaps the best way in which a separate judicial opinion can improve the majority's opinion is by *becoming* the court's opinion.<sup>17</sup> Winston Churchill once wrote that, despite all the frustrations he experienced while holding high public office, he never suffered from any desire to be relieved of his responsibilities as Prime Minister. Rather, as he stated, "[a]ll I wanted was compli-

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16. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

17. See Scalia, *supra* note 5, at 41.

ance with my wishes after reasonable discussion."<sup>18</sup> This, too, is the fantasy of a dissenting appellate judge. But sometimes a draft of a persuasive dissent or concurrence, once it is distributed to the other judges, changes the outcome of the case, causing one or more of the justices who formed the original majority to abandon at least one of the points (if not the entire result) championed in the majority's original draft opinion. Thus, what begins as a lone dissent can sometimes end up as a unanimous opinion for the court. Oral objections to the result and/or to the reasoning of the majority that are communicated during one of the court's conferences, or even in written form, do not tend to be as fully articulated, as pointedly researched, or as convincingly argued as they are when they have been embodied in a written draft of a formal dissenting or concurring opinion that the author has prepared for eventual publication.<sup>19</sup> Thus, even if they are never published, dissents serve the internal corrective functions of checking the court's preliminary thinking, of opening other vistas on the problems presented by the case at bar, and of giving those judges in the majority one last chance to opt out of skiing down that steep, mogul-strewn trail that they have started to take in lieu of what the dissenter believes is a wider, safer, or straighter path to the bottom of the case. Conversely, by allowing the majority to glimpse "the road not taken,"<sup>20</sup> dissents also can persuade the court to abandon the tried and true in favor of a less-traveled and, therefore, riskier legal path. In such cases, the preparation and circulation of what will become an unpublished dissent "has made all the difference."<sup>21</sup>

Dissents also lighten the plight of the poor law student. That long-suffering scholar does not necessarily study the best of what has been produced by the giants of the law, but all too often the worst.

If one is a student of Italian literature, he will read Dante. If a student of physics, Newton. If biology, Darwin. And so forth. But if his field of study is law, he will—at least in a common law system such as ours—be condemned to reading, as often as not, the likes of Lord Tindall or Justice Duvall, not

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18. Winston S. Churchill, *The Second World War: The Hinge of Fate* 89 (1950).

19. See Scalia, *supra* note 5, at 42.

20. 1 Robert Frost, *The Road Not Taken*, in *The Poetry of Robert Frost* 105, 105 (Edward Connery Lathem ed., Imprint Society 1971) (1916).

21. *Id.*

because they write well or think well (they do not), but because what they say is authoritative; it is the law. Dissents and separate concurrences provide a small parole from this awful sentence. Unlike majority opinions, they need not be read after the date of their issuance. They will not be cited, and will not be remembered, unless some quality of thought or of expression commends them to later generations.<sup>22</sup>

Thus, dissents often exude an infused passion, an expressive potency, and even a telltale hint or two of not-so-latent literary leanings—together with other dynamic and imaginative qualities—that are typically lacking in more homogenized majority opinions.<sup>23</sup>

Recall, for example, the jeremiad delivered by the first Justice John Harlan in *Plessy v. Ferguson*,<sup>24</sup> the case that was overruled a half century later by *Brown v. Board of Education*.<sup>25</sup> *Plessy* held that a state could lawfully require railroads to compel white people and black people to ride in separate cars. Before civil rights for all citizens was even thought practically possible, Justice Harlan came up big in dissent when he declaimed:

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.

. . . .

. . . [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . . In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

. . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.<sup>26</sup>

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22. See Scalia, *supra* note 5, at 42.

23. See *id.*

24. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

25. 347 U.S. 483 (1954).

26. *Plessy*, 163 U.S. at 554, 559, 560 (Harlan, J., dissenting).

In retrospect, it is somewhat reassuring to recognize that at least someone in a position of authority had the courage to express this point of view long before it was officially adopted by the Court itself many years later in 1954.<sup>27</sup> Separate opinions also compete for future judicial votes in similar cases to come before the deciding court, as well as before other appellate courts that face similar issues. Thus, an opinion that is on the losing side today can form the basis for a winning argument in a future case, if not in the dissenter's own jurisdiction, then perhaps in another jurisdiction that has yet to settle the issue. As Chief Justice Charles Evans Hughes once put it, "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."<sup>28</sup> Justice William Brennan also believed that a dissent is "offered as a corrective—in the hope that the Court will mend the error of its ways in a later case."<sup>29</sup> Indeed, the best dissents "seek to sow seeds for future harvest."<sup>30</sup> Justice Stanley Fuld of the New York Court of Appeals agreed with Justice William O. Douglas, stating that although "it may serve no immediate purpose in the case at hand, the dissent 'may salvage for tomorrow the principle that was sacrificed or forgotten today.'"<sup>31</sup>

Thus, it is hardly surprising that, from time to time, the reasoning in a dissenting opinion is sometimes adopted as the law in a later majority opinion of the same court that initially rejected the dissenter's position. This phenomenon has occurred in Rhode Island just as it has in other jurisdictions. For example, in 1915, Justice William Sweetland dissented from the Rhode Island Supreme Court's opinion in *Rice v. Sheldon*<sup>32</sup> because he believed

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27. It was the opinion of Judge A. Leon Higginbotham, Jr. that "the historical oppression of African Americans in the United States would have been far less pervasive had, in the Supreme Court, the 1896 views of Justice John Harlan prevailed." A. Leon Higginbotham, Jr., *Shades of Freedom* 118 (1996).

28. Charles Evans Hughes, *The Supreme Court of the United States* 68 (1928).

29. Brennan, *supra* note 4, at 430.

30. *Id.* at 431.

31. Stanley H. Fuld, *The Voices of Dissent*, 62 *Colum. L. Rev.* 923, 928 (1962) (quoting William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 *J. Am. Judicature Soc'y* 104, 107 (1948)); see also Charles P. Curtis, Jr., *Lions Under the Throne* 75 (1947) (stating that the dissent is a formal appeal to the future).

32. 94 A. 711, 713 (R.I. 1915) (Sweetland, J., dissenting).

that an offer of proof, when questioning a witness, should be unnecessary if the purpose of the question is apparent and the evidence sought is material.<sup>33</sup> Some fifty-three years later in *Manning v. Redevelopment Agency of Newport*,<sup>34</sup> the defendant agency in that case argued "that profert was unnecessary . . . whenever the purport, the purpose as well as the admissibility of the testimony which was sought to be elicited [was] all clearly apparent from the questions themselves or from the discussion preceding the ruling on admissibility."<sup>35</sup> In response to the defendant's argument, Justice Alfred Joslin, writing for the court and drawing upon the rationale of Justice Sweetland's dissent in *Rice*, acknowledged, "[t]hat is a sound principle."<sup>36</sup> Similarly, in *State v. Rhode Island State Police Lodge No. 25*,<sup>37</sup> the court reversed its prior holding in an earlier opinion in that same case,<sup>38</sup> and adopted Justice Thomas Kelleher's reasoning in his dissenting opinion to the first decision as the more appropriate statement of the law. Specifically, the court felt that it was prudent to draw the distinction previously noted by Justice Kelleher between grievance and interest arbitration in the context of labor-arbitration cases.<sup>39</sup>

The 1994 case of *Tantimonico v. Allendale Mutual Insurance Co.*<sup>40</sup> marked yet another instance in which the Rhode Island Supreme Court decided to adopt the reasoning of a prior dissenting opinion. In *Marioenzi v. DiPonte*,<sup>41</sup> the court had held that when an entrant onto another's land is injured, the entrant's common-law status should not determine the degree of care owed by the owner to that entrant. Rather, the dispositive inquiry should be whether the owner used reasonable care for the safety of any party he or she reasonably could expect to be present upon the premises. Thus, under *Marioenzi*, a landowner potentially could be liable to a trespasser for the landowner's mere negligent conduct.<sup>42</sup> Justice Joslin, in dissent, believed that such a rule was unsound and that

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33. See *id.* at 715.

34. 238 A.2d 378 (R.I. 1968).

35. *Id.* at 383.

36. *Id.* (citing *Rice*, 94 A. at 713 (Sweetland, J., dissenting)).

37. 544 A.2d 133 (R.I. 1988).

38. See *Rhode Island State Police Lodge No. 25 v. State*, 485 A.2d 1245 (R.I. 1984).

39. See *Rhode Island State Police Lodge No. 25*, 544 A.2d at 136.

40. 637 A.2d 1056 (R.I. 1994).

41. 333 A.2d 127 (R.I. 1975).

42. *Id.* at 133.

a possessor of land only owed trespassers the duty to refrain from willfully or wantonly injuring them upon discovering their position of peril.<sup>43</sup> Later, citing Justice Joslin's dissent extensively, the *Tantimonico* court reversed *Marioenzi's* supposed "final but fitting interment" of the common-law categories of entrants onto land and reverted to the lesser degree of duty owed to a trespasser, consistent with Justice Joslin's earlier dissent in *Marioenzi*.<sup>44</sup>

In *State v. Innis (Innis II)*,<sup>45</sup> Justice Kelleher's dissent in an earlier *Innis* decision (*Innis I*)<sup>46</sup> became the law—with the aid of the United States Supreme Court. When the *Innis I* majority held that certain police officers' remarks to the defendant in that case constituted an interrogation that would require suppression of the defendant's responsive statements, Justice Kelleher vigorously dissented.<sup>47</sup> He believed that the statements of the police to the defendant were not communicated in an effort to induce the defendant to speak, and therefore they should not be suppressed. Later, the United States Supreme Court agreed with Justice Kelleher and vacated the Rhode Island Supreme Court's decision in *Innis I*.<sup>48</sup> As a result, the Court afforded Justice Kelleher the opportunity to author the majority opinion in *Innis II*, which embraced the conclusions and reasoning set forth in his lone dissent filed some fourteen months earlier.<sup>49</sup>

Another United States Supreme Court reversal, this time of the First Circuit Court of Appeals' decision in *44 Liquormart, Inc. v. Rhode Island*,<sup>50</sup> represents a case where the opinions expressed in Justice Florence Murray's prior dissents later became the law. Specifically, Justice Murray, in *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*,<sup>51</sup> and *S & S Liquor Mart, Inc. v. Pastore*,<sup>52</sup> dissented because she believed that the government, as the party seeking to suppress any truthful and nonmisleading com-

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43. See *id.* at 134 (Joslin, J., dissenting).

44. *Tantimonico*, 637 A.2d at 1058-59 (citing *Marioenzi*, 333 A.2d at 134-35 (Joslin, J., dissenting)).

45. 433 A.2d 646 (R.I. 1981).

46. 391 A.2d 1158 (R.I. 1978).

47. *Id.* at 1167-72 (Kelleher, J., dissenting).

48. See *Rhode Island v. Innis*, 446 U.S. 291 (1980).

49. *Innis II*, 433 A.2d at 647-55.

50. 39 F.3d 5 (1st Cir. 1994) (reversing *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543 (D.R.I. 1993)).

51. 497 A.2d 331, 342-43 (R.I. 1985) (Murray, J., dissenting).

52. 497 A.2d 729, 738-39 (R.I. 1985) (Murray, J., dissenting).

mercial speech—in this case, a liquor advertisement—bore the burden of demonstrating the constitutionality of such a restraint, i.e., whether the regulation directly advanced the governmental interest asserted.<sup>53</sup> The majority's opinions, on the other hand, had attempted to place the burden on the party asserting the statute's unconstitutionality. In *44 Liquormart*, the United States Supreme Court vindicated Justice Murray's dissents when it held that the State, as the party seeking to suppress the liquor advertisements, was required to carry the burden of showing that the regulation advanced a legitimate governmental interest.<sup>54</sup>

Finally, even if a dissent does not eventually become the law, it can play an important role in shaping an appellate court's subsequent jurisprudence. For example, some aspect of its reasoning could well prove useful to the court in deciding later cases pertaining to similar issues. The Rhode Island Supreme Court's opinion in *Benner v. J.H. Lynch & Sons, Inc.*<sup>55</sup> is illustrative. In an earlier drug products-liability case, *Anthony v. Abbott Laboratories*,<sup>56</sup> the court held that the applicable statute of limitations began to run "when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer."<sup>57</sup> In *Anthony*, the manifestation of an injury, the cause of the injury, and the plaintiff's knowledge of the manufacturer's malfeasance all occurred at different points in time. Justice Joseph Weisberger dissented and stated that extending this test any further in future cases "would certainly dilute the effectiveness of the statute of limitations."<sup>58</sup> In the later-decided *Lynch* case, the court explicitly heeded Justice Weisberger's cautionary remarks in his earlier dissent, stating:

Today, in interpreting the discovery rule of § 10-7-2, we must be mindful not to interpret *Anthony* to extend far beyond the facts on which it was based. The majority opinion was cognizant that the rule it enunciated was for application "in a drug product-liability action where the manifestation of an injury, the cause of that injury, and the person's knowl-

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53. See *Rhode Island Liquor Stores Ass'n*, 497 A.2d at 342; *S & S Liquor Mart*, 497 A.2d. at 738.

54. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504-05 (1996).

55. 641 A.2d 332 (R.I. 1994).

56. 490 A.2d 43 (R.I. 1985).

57. *Id.* at 46.

58. *Id.* at 50 (Weisberger, J., dissenting).

edge of the wrongdoing by the manufacturer occur at different points in time." Moreover, in a dissenting opinion it was stated that an extension of the *Anthony* test to "less complex but debatable personal injury liability cases . . . would certainly dilute the effectiveness of the statute of limitations." 490 A.2d at 50 (Weisberger, J., dissenting). It is that less complex personal-injury case that we face today.<sup>59</sup>

Separate opinions also serve the independent virtue of the court itself practicing free speech in an increasingly pluralistic society.<sup>60</sup> A public manifestation of this result is particularly desirable in a justice system like ours where legal results are not always determinable by logical application of preexisting rules to specific factual situations. In fact, more and more law is indeterminate in the sense that answers to legal questions often lie outside the black boxes of settled precedent and unambiguous constitutional and statutory provisions. Thus, there is not always one right answer to legal problems. Indeed, there are bad answers and good answers, and some good answers are better than other good answers, and sometimes, the best answers are better than even the better good answers. Separate judicial opinions allow the reader to decide which, if any, of the answers given by the judges who have addressed the particular legal problem before the court is the best response to that problem and to agree or disagree with how the majority and the dissenting judge(s) resolved the legal issues presented by this type of case.

For these same reasons, quality dissents enhance rather than diminish the prestige of an appellate court. If history should some day indicate that one or more of the court's decisions has proven to be a truly regrettable error, then it is sometimes palliating to discover that at least one or more of the judges on that court not only was able to discern the true light hidden under the majority's legal bushel, but was willing to give cry, sometimes even eloquently, to his or her disagreement with that rationale.<sup>61</sup> Justice Robert Jackson's memorable dissent in *Korematsu v. United States*,<sup>62</sup> the

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59. *Lynch*, 641 A.2d at 337 (first citation omitted).

60. See Kolsky, *supra* note 13, at 2086 ("In light of the First Amendment, it would be anomalous if the Supreme Court, as interpreter of all constitutional rights, refused to permit its own members to voice their dissenting views.").

61. See Scalia, *supra* note 5, at 35-36; see, e.g., *supra* notes 24-27 and accompanying text (discussing Justice Harlan's dissent in *Plessy*).

62. 323 U.S. 214 (1944).

famous World War II case in which the Court affirmed a United States military order providing for the internment of Japanese Americans, offers a case in point. There, Justice Jackson stated:

A military order, however unconstitutional, is not apt to last longer than the military emergency . . . . But once a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need . . . . All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.<sup>63</sup>

Without such dissents and concurrences as have cascaded down to us across the decades, our rich heritage of American law would be "a [much] diminished thing."<sup>64</sup> One of my personal favorites is a separate opinion in which Justice Robert Jackson recounted the agony of an appellate judge having to admit publicly that his current thinking differed from his prior published views on the same subject. In a concurring opinion, Justice Jackson explained why he decided to join a majority opinion that reached the exact opposite result of an opinion that Justice Jackson himself had authored ten years earlier, when he was then serving as the United States Attorney General:

Precedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others . . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly

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63. *Id.* at 246 (Jackson, J., dissenting) (footnote omitted).

64. Frost, *The Oven Bird*, in *The Poetry of Robert Frost*, *supra* note 20, at 119, 120 ("The question that [it] frames in all but words / Is what to make of a diminished thing.").

put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . ." Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.<sup>65</sup>

### III.

Especially here in Rhode Island, a state that was founded and nourished by an independent, contrary-minded breed of dissenters,<sup>66</sup> we should cherish the institution of dissenting judicial opinions. Since the Rhode Island Supreme Court began publishing its opinions in 1828, its justices have authored 457 substantive dissenting opinions (excluding concurrences).<sup>67</sup> Interestingly, the vast majority of those dissents, 433, occurred in this century, while a mere twenty-four dissenting opinions were written during the court's terms spanning the years 1828 to 1900. To be sure, the filing of a dissenting opinion has of late become a comparatively

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65. *McGrath v. Kristensen*, 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring) (citations omitted).

66. See, e.g., Patrick T. Conley, *Democracy in Decline* 8 (1977) (noting that the founder of Rhode Island, Roger Williams, "was the most contrary of those independent-minded and strong-willed ministers who departed from centrifugal Massachusetts Bay to find an intellectual and religious refuge in the New England wilderness"); William G. McLoughlin, *Rhode Island: A Bicentennial History* 3 (1978) (noting the original Rhode Island settlers' "self-willed, stubborn, religious zeal that motivated, or forced, [them] to leave the rigid, established churches of Massachusetts, Connecticut, Plymouth, or England for the liberal heterodoxy of Rhode Island").

67. The filing of a separate opinion either concurring with the majority or concurring in part as well as dissenting in part, is an opinion that I include when generally discussing "dissenting opinions." See *supra* note 2. Members of the Rhode Island Supreme Court have deployed such concurrences with increasing frequency to express their separate view(s). Specifically, 121 such Supreme Court concurring opinions have been logged by its justices, 97 of which have been filed since 1960. (This number of 457 dissenting opinions, however, excludes these pure concurrences and includes only those separately filed opinions in which the individual justice or justices either dissented from the majority or concurred in part and dissented in part from the majority).

more acceptable judicial phenomenon than it was during the nineteenth century. In fact, from 1828 to 1851, the court published twenty-three years' worth of opinions before the first dissent even appeared. In 1851, Justice Levi Haile became the first justice on the Rhode Island Supreme Court to dissent from one of its opinions.<sup>68</sup> However, he gave no reasons for doing so and the published opinion simply notes his dissent, "Haile, J., *dissentiente*," from the majority's opinion without indicating any reasons therefor.<sup>69</sup> Thereafter, in 1852, it was Justice Haile again who authored the first substantive dissent in the court's history.<sup>70</sup> But this was his first and only substantive dissent during his nineteen-year career as a supreme court justice.

It was not until Elisha Potter served as an associate justice from 1868 to 1882 that the Rhode Island Supreme Court had its first somewhat consistent dissenter. During his fourteen years of service on the court, Justice Potter authored sixteen substantive dissenting opinions. Thus, on the average, he filed only slightly more than one dissent per year while he served as a supreme court jurist. Nonetheless, upon Justice Potter's death in 1882, the chief justice at the time, Thomas Durfee, while remembering him as an esteemed and capable Rhode Island jurist, recalled him as an independent thinker who filed "many dissenting opinions." However, Chief Justice Durfee, who only dissented once in his twenty-six years on the state's highest bench,<sup>71</sup> also sounded a disapproving note when he spoke about Justice Potter's propensity to dissent: "But he was, with all his suavity, thoroughly independent. He had his own views and never hesitated to express them. The reports contain many dissenting opinions from his pen. I confess that I think he sometimes may have yielded too far to his temperament."<sup>72</sup>

Nevertheless, throughout the remainder of the nineteenth century, and even into this century, many notable and respected jurists who served on the Rhode Island Supreme Court failed to file a

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68. See *Hazard v. New York, Boston & Providence R.R. Co.*, 2 R.I. 62, 63 (1851) (Haile, J., dissenting).

69. *Id.*

70. See *B. B. Knight & Co. v. Richmond & Carr*, 2 R.I. 75, 78 (1852) (Haile, J., dissenting).

71. See *In re Penniman*, 11 R.I. 333, 352 (1876) (Durfee, C.J., dissenting).

72. In *Memoriam Mr. Justice Potter*, 13 R.I. 744 app. at 747 (1882) (Durfee, C.J.).

single dissenting opinion during their years on that bench, thereby refraining perhaps from indulging in whatever temptation they may have felt on any particular occasion to author a separate opinion disagreeing with the majority.<sup>73</sup> One of these notable non-dissenters was Justice George Brayton, who served as an associate justice from 1843 to 1868 and as chief justice from 1868 to 1875—a thirty-two-year span of time during which the court published over 900 opinions. Yet another justice who never dissented during his nine-year tenure was Chief Justice Samuel Ames (1856-1865). Others dissented only once or rarely during their years of service. For example, Justice C. Frank Parkhurst, who served on the court for fifteen years from 1905 to 1920, dissented only once,<sup>74</sup> as did Justice William W. Douglas (associate justice from 1891-1905 and chief justice from 1905-1908).<sup>75</sup>

As the years progressed, however, many Rhode Island justices have followed in Justice Potter's footsteps,<sup>76</sup> and have filed substantive dissents on a more-or-less regular basis. Some of these more prolific dissenting justices include: Justice John Blodgett, who wrote fourteen dissents from 1900 to 1912; Justice Walter Vincent, who also wrote fourteen dissents from 1912 to 1925; Justice John Sweeney, who filed twenty dissents from 1920 to 1935; Justice William Moss, who authored twenty-two dissents from 1935 to 1948; Justice Francis Condon, who authored forty-nine dissenting opinions in his thirty years of service (from 1935 to 1965);

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73. It is also interesting to note that during a substantial portion of this period, the court was comprised of more than the five members it currently has (and has had since 1906). Specifically, from 1891 to 1897, the court had six justices who collectively dissented a total of five times, while from 1897 to 1905, the court was comprised of seven members who dissented 13 times. Thereafter, the court reverted briefly back to six members from 1905 to 1906 (with only one dissenting opinion filed during that period). In 1906, the court was reconstituted to consist of just five members. Since that time, the court's five justices have contributed the bulk of the court's dissenting jurisprudence—some 419 opinions, excluding concurrences.

74. See *Heathcote v. Barbour*, 90 A. 803, 804 (R.I. 1914) (Parkhurst, J., dissenting).

75. See *Collins v. Harrison*, 56 A. 678, 679 (R.I. 1903) (Douglas, J., dissenting).

76. Justice Potter's dissents actually have been cited well into this century. See *Colvin v. Goldenberg*, 273 A.2d 663, 667 n.3 (R.I. 1971) (Kelleher, J.) (citing *Randall v. Peckham*, 11 R.I. 600, 606-09 (1877) (Potter, J., dissenting)); *Opinion to the Governor*, 69 A.2d 531, 549 (R.I. 1949) (Condon, J.) (citing *Boston & Providence R.R. Co. v. New York & New England R.R. Co.*, 13 R.I. 260, 285 (1881) (Potter, J., dissenting)).

Justice Thomas Roberts, who wrote eighteen dissents from 1956 to 1975; Justice Joslin, who signed thirty-nine dissents during his sixteen years of service from 1963 to 1979; Chief Justice Joseph Bevilacqua, who authored twenty-seven dissents from 1976 to 1986; and Justice Murray, who wrote twenty dissents from 1979 to 1996. But the leading dissenter in Rhode Island history, as measured by the total number of dissents, was Justice Kelleher, who filed fifty-six dissents from 1966 to 1992.

Nonetheless, after noting the number of years that each justice served and his or her total number of dissents, it is important to recognize that several other variables factor into any consideration of what Rhode Island justices may have been inclined to file dissents and with what frequency.<sup>77</sup> Chief among these variable factors, however, is the court's caseload during the years in question. Thus, any analysis of what justices dissented and how frequently they did so should include the percentage of the court's published opinions<sup>78</sup> during those justices' years of service to

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77. For example, as stated, the number of judges constituting the full complement of justices entitled to sit on the Rhode Island Supreme Court has fluctuated throughout its history. Moreover, at different points in its history, certain seats on the court have been left vacant for an extended period of time, often due to the delay in electing or appointing a new justice after a previous sitting justice may have retired or deceased during a particular court term.

78. "Published opinions" (which for the purposes of this analysis shall be referred to as "opinions") includes a matter which the court disposed of by means of an opinion authored by a single justice on behalf of the court, a *per curiam* opinion, or an order in (1) the Rhode Island Reporter from the 1835-36 term (the first term of Justice Haile, who authored the first substantive dissenting opinion) to the 1883-84 term, and (2) the Atlantic Reporter, First and Second Series, from the 1884-85 term to the 1964-65 term. Thereafter, in the 1965-66 term, the Rhode Island Supreme Court Clerk's Office began recording the number of published opinions. The totals for that year to March 26, 1999 reflect that office's records, copies of which are on file with the *Roger Williams University Law Review*. As an aside, the beginning of a term, or year, is October 1st and the end of that same term is September 30th of the following year, consistent with the recordation of statistics in the Supreme Court Clerk's Office (notwithstanding the fact that in the early years of the court, no such delineation existed, but rather a "January Term," "February Term," etc. for each month of the calendar year).

Subject to the exceptions noted below, published opinions include all cases disposed of by the court via a published opinion, thereby giving any justice on the court the opportunity to dissent. Thus, although commentators generally recognize a *per curiam* opinion as an opinion for an appellate court on a matter or matters that it unanimously agrees upon, see Ruggero J. Aldisert, *Opinion Writing* 18 (1990); Joyce J. George, *Judicial Opinion Writing Handbook* 219 (3d ed. 1993), justices of the Rhode Island Supreme Court, similar to those on the United States Supreme Court, see Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature*

which they filed substantive dissenting opinions. Such an analysis reveals that the court's all-time leader in the total number of dissents filed, Justice Kelleher, was not also the judge who dissented most frequently. Rather, the most frequent dissenter per cases decided by the court was Justice Harold Andrews, who briefly served on the court from January 1956 until his death in December 1958. During that period, Justice Andrews participated in 173 opinions and dissented on just four of those occasions, yielding a total dissent rate of 2.31%. Not far behind is the aforementioned Justice Potter with a dissent rate of 2.07%.<sup>79</sup> As measured by this yardstick, I currently rank third among the court's most frequent dis-

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*and Functions*, 76 *Judicature* 29 (1992), have filed separate, substantive dissenting opinions from per curiam decisions. See, e.g., *City of Providence v. S & J 351, Inc.*, 693 A.2d 665, 668 (R.I. 1997) (Flanders, J., dissenting); *In re Thao*, 635 A.2d 1195, 1196 (R.I. 1994) (Murray, J., dissenting); *In re Pearlman*, 627 A.2d 314, 315 (R.I. 1993) (Murray & Lederberg, JJ., dissenting); *Lisi v. Resmini*, 603 A.2d 321, 324 (R.I. 1992) (Murray, J., dissenting); *Lisi v. Gallucci*, 602 A.2d 938, 939 (R.I. 1992) (Murray, J., dissenting); *Lefebvre v. Kando*, 383 A.2d 589, 590 (R.I. 1978) (Doris, J., dissenting); *Narragansett Elec. Co. v. Harsch*, 367 A.2d 195, 198-99 (R.I. 1976) (Paolino & Joslin, JJ., dissenting); *Wildenhaim v. Knight*, 173 A. 83, 84 (R.I. 1934) (Sweeney, J., dissenting); *Ross v. Providence Journal Co.*, 154 A. 562, 563 (R.I. 1931) (Sweeney, J., dissenting); *Mersky v. Leary*, 134 A. 13, 15 (R.I. 1926) (Sweeney, J., dissenting); *American Coated Paper Co. v. Pawtucket Glazed Paper Co.*, 110 A. 392, 394 (R.I. 1920) (Sweeney, J., dissenting); *Blais v. Rhode Island Perkins Horseshoe Co.*, 94 A. 261, 261 (R.I. 1915) (Vincent & Baker, JJ., dissenting); *King v. Providence Gas Co.*, 90 A. 4, 5 (R.I. 1914) (Vincent, J., dissenting); *Carr v. American Locomotive Co.*, 77 A. 774, 774 (R.I. 1910) (Blodgett, J., dissenting); *Gallowshaw v. Lonsdale Co.*, 55 A. 932, 932 (R.I. 1903) (Tillinghast, J., dissenting). Hence, because a per curiam decision offers any member of the court an opportunity to dissent, it is therefore included in this total. The same rationale extends to dissenting opinions from final orders of the court, see, e.g., *Aschaffenburg v. Maxillofacial Surgeons, Ltd.*, 674 A.2d 407, 407 (R.I. 1996) (Flanders, J., dissenting); *State v. DeWitt*, 403 A.2d 679, 679 (R.I. 1979) (Doris, J., dissenting), even though their occurrence is not as common. This total number of published opinions does, however, exclude memorandum decisions (1) granting non-dispositive motions, e.g., motions for an extension of time, to file a supplemental brief, to consolidate, etc.; and/or (2) giving only a mandate and not citing any case or statutory law, e.g., a denial of a petition for writ of certiorari. These distinctions and adjustments are necessary to get the best read on a justice's frequency of dissents as compared with justices of a different era, while acknowledging that other procedural variations may produce discrepancies in the court's opinion-publication practices from year to year. For example, many of the appeals that are disposed of via memorandum decisions are presently decided during a conference of the justices or after a prebriefing conference, from which a non-published order may issue.

79. Justice Potter, after his March 16, 1868 election to the court, served until his death on April 10, 1882, just nine days after his last opinion in *Petition of Louis Angell*, 13 R.I. 630 (1882) (Potter, J.). During this period, in which he dissented 16 times, Justice Potter sat for 773 cases.

senters, having filed fourteen dissents (out of 698 opinions) for a dissent rate of 2.01% since my appointment in 1996. Thereafter, rounding out the court's five most frequent dissenters, we have Justice Moss with a 1.69% dissent rate,<sup>80</sup> and Justice Joslin, dissenting at a rate of 1.43% of the court's opinions.<sup>81</sup> Other notable dissenters, with their rate of dissents noted in parentheses, include: Justice Condon (1.39%),<sup>82</sup> Chief Justice Bevilacqua (1.39%),<sup>83</sup> Justice G. Frederick Frost (1.25%),<sup>84</sup> Justice Kelleher (1.20%),<sup>85</sup> Justice John Doris (1.11%),<sup>86</sup> and Justice Maureen McKenna Goldberg (1.08%).<sup>87</sup> It is likewise interesting to note the remainder of the current court's membership and their frequency of dissenting opinions: Chief Justice Joseph Weisberger has authored or joined a dissenting opinion thirteen times in 4198 published opinions for a dissent rate of .31%, while Justices Victoria Lederberg and John Bourcier have dissented with a frequency of .63%,<sup>88</sup> and .33%,<sup>89</sup> respectively.

As shown by the above empirical analysis, even the most frequent dissenters in Rhode Island's legal history have filed dissents in only a little over two percent of the court's published decisions. Thus, despite Rhode Island's reputation and history as a haven for the contrary-minded, its highest court has largely functioned as a bastion of "monolithic solidarity," a trend that continues on the current court. This record is even more striking when one compares the dissent rates for Rhode Island's jurists with those of the

80. Participating in 1301 decisions over his 13 years of service, Justice Moss authored 22 dissenting opinions.

81. Justice Joslin, who served from 1963 to 1979, dissented a total of 39 times in 2716 court opinions.

82. Justice Condon participated in 3503 opinions over a span of 30 years of service (1935-1965) and filed 49 dissents during that period.

83. Over his 10-year, 1976-1986 tenure, Chief Justice Bevilacqua dissented a total of 27 times in 1931 opinions.

84. In 642 opinions, spanning four years (1959-1963), Justice Frost dissented eight times.

85. Justice Kelleher's 56 dissents occurred over his 26-year, 4650-opinion career on the court from 1966 to 1992.

86. Justice Doris, over seven years from 1973 to 1980, dissented 14 times within 1259 opinions.

87. Justice Goldberg, since her appointment in 1997, has authored four dissents while participating in 369 opinions.

88. Justice Lederberg has dissented 10 times in 1575 opinions since 1993.

89. In 904 of the court opinions he has participated in, Justice Bourcier's name appears on three dissents.

United States Supreme Court. With respect to the relative frequency of their filing of dissenting opinions, Rhode Island Supreme Court justices have been and remain mere pikers when contrasted to the ranks of the dissenters on the current United States Supreme Court. There, Justice John Paul Stevens leads all of the Justices with a dissent rate of 19.25% of the high Court's cases. Justice Stephen Breyer weighs in with dissents on 9.96% of the Court's cases; Justice Scalia is at 8.78%, and Justice Clarence Thomas has dissented from 7.39% of the Court's opinions during his tenure.<sup>90</sup> Even so, the most prolific of the United States Supreme Court's dissenters does so no more than once in every five opinions rendered by the Court, hardly an overwhelming number. To make one further comparison, consider Justice William Brennan, yet another purportedly prolific dissenter. Justice Brennan, however, only dissented in 10.45% of the 4534 opinions in which he participated. Thus, even the most frequent dissenters on our nation's highest Court agree with the majority of the Court in over eighty percent of the Court's published opinions.

#### IV.

Although I am very happy and pleased to be serving as a Rhode Island Supreme Court jurist, I would be less so if I was unable to dissent from the cases we decide whenever I choose to do so. The substance of appellate judging—providing the best possible judicial responses to the legal problems posed by the cases and controversies that are appealed to courts of last resort—must never be sacrificed to appease the unslakable gods of collegiality and civility, whatever blandishments their professed votaries may offer to dampen or extinguish the fires of dissension. In any event, I believe we should celebrate and encourage the filing of substantive judicial dissents whenever one or more appellate judges disagrees

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90. For a more comprehensive recollection of statistics chronicling the opinion-writing activity among the Justices of the United States Supreme Court, see *Harvard Law Review's* annual *Supreme Court Review*, from which these percentages are derived. The *Harvard Law Review*, similar to the statistical analysis herein of Rhode Island Supreme Court opinions, see *supra* note 78, denotes an "opinion" as any opinion authored by a single Justice on behalf of the Court and any per curiam containing substantial legal reasoning. See, e.g., *The Supreme Court, 1996 Term*, 111 Harv. L. Rev. 51, 431 n.a (1997). See generally *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 301-02 (1968) (explaining the tables' compilation).

with the result or reasoning in a given case. Almost invariably, the filing of such dissents is an important hallmark of a thinking, independent, and hardworking appellate court.