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Toward a Genre of Judicial Dissent: *Lochner* and *Casey* as Exemplars

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Seventeen years ago Robert A. Ferguson developed a genre of the judicial opinion, which is characterized by four "traits": the monologic voice, the interrogative mode, the declarative tone, and the rhetoric of inevitability.[1] The monologic voice enables the Court, composed of nine individuals, to "speak" with one voice. The interrogative mode frames the case's question and then responds within the established framework. The declarative tone answers the legal question and the rhetoric of inevitability creates the sense that the Court decided the case in the only manner possible.

Ferguson's essay is merely one of many throughout the past twenty-five years that has sought to explain the nature of judicial opinions outside traditional legal frameworks. Scholars have examined the similarities and links between law and literature,[2] studied judicial interpretation,[3] questions the law's function in American culture,[4] and identified the distinctive features of the judicial opinion as a genre.[5] Yet scholars have failed to distinguish different *forms* of judicial opinions. Disagreement with the majority of the Court creates a rhetorical situation, which demands a unique response, one that does not follow the form of the majority opinion. Dissenting and concurring opinions reflect different legal interpretations and, hence, alternative legal and rhetorical choices. The purpose of this essay is to understand the rhetorical strategies used by dissenting opinions to develop a genre of judicial dissent.

A genre of judicial dissents performs the important work of challenging the rhetorical strategies of the majority opinion. Judicial decisions which contain a written dissent have less rhetorical force than unanimous opinions, because the rhetoric of the dissent challenges the unity of the monologic voice, challenges the question established by the interrogative mode, provides other forms of reasoning than those offered by the declarative tone, and demonstrates that the legal path determined by the rhetoric of inevitability is not, in actuality, inevitable.

In this essay I analyze Justice Oliver Wendell Holmes' dissent in the landmark case *Lochner* v. *New York* and Justice Antonin Scalia's dissent in *Planned Parenthood* v. *Casey*.[6] *Lochner* overturned New York's labor law limiting the amount bakers worked to ten hours a day and *Casey* upheld a woman's right to have an abortion to exemplify the traits of judicial dissents. These two cases merely serve as exemplars of judicial dissents; they illuminate how judicial dissents function rhetorically. These two dissents were chosen because they are vastly different and were penned by men with competing judicial ideologies and styles of interpretation. One dissent is extremely short while the other dissent is extended. One uses neutral language while the other has a hostile tone. One was written by a "liberal" while the other was written by a "conservative." One allows

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[1] Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law and Humanities* 2 (1990): 201-219.

[2] The foremost scholar in the law and literature movement is James Boyd White. See White's "Law as Language: Reading Law and Reading Literature," *Texas Law Review* 60 (1982): 415-45; *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984); *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1985); "Judicial Criticism," in Sanford Levison and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanson: Northwestern University Press, 1988), 394; *Justice as Translation* (Chicago: University of Chicago Press, 1990); and *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: University of Chicago Press, 1994).

[3] Examples include David E. Anderson, "Reflections on the Supreme Court, Constitutionalism, and the Rhetoric of Law," *St. Louis University Public Law Review* 8 (Spring 1989), 75-86; James Arnt Aune, "On the Rhetorical Criticism of Judge Posner," *Hastings Constitutional Law Quarterly* 23 (1996), 658-669; and Christopher Eisgruber, "John Marshall's Judicial Rhetoric," *Supreme Court Review 1996* (Chicago: University of Chicago Press, 1996), 239-481.

[4] Examples include Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984); Per Fjelstad, "Legal Judgement and Cultural Motivation: Enthymematic Form in *Marbury v. Madison*," *The Southern Communication Journal* 60 (Fall 1994), 22-32; Robert Hariman, *Popular Trials: Rhetoric, Mass Media, and the Law* (Tuscaloosa: University of Alabama Press, 1990); Marouf Hasian, Jr., Celeste Condit, and John Lucaites, "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate but Equal' Doctrine," *Quarterly Journal of Speech* 82 (1996), 323-342; and William Wiethoff, *A Particular Humanism: The Judicial Advocacy of Slavery in High Courts of the Old South, 1820-1850* (Athens, GA: University of Georgia Press, 1996).

[5] See Ferguson, "The Judicial Opinion as Literary Genre."

[6] *Lochner* v. *New York*, 198 U.S. 45 (1905) and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992).

for a broader understanding of constitutional language and the other fixes constitutional interpretation in the language of the constitutional text and the traditions of the American people. One was written a century ago while the other was written little over a decade ago. One became the Court's majority position while the other remains a minority position. One was written by a justice that would dissent once and then follow the majority in subsequent, similar cases and the other was written by a justice who dissents in every case in which he disagrees with the majority opinion. Since these two dissents, and the authors that penned them, are so different the characteristics of dissents that I identify operating within them are a good first step toward identifying a genre of judicial dissent.

The two cases derive from very different circumstances. In 1895 the New York legislature passed the Bakeshop Act, a law which restricted bakers working more than ten hours per day or more than sixty hours per week. The Supreme Court overturned the New York law in *Lochner* v. *New York*, claiming that the Due Process clause of the Fourteenth Amendment protected an individual's right to enter into a contract. Justice Holmes dissented, criticizing the majority for using an economic theory not supported by the Constitution. In the late 1980s the Pennsylvania legislature amended its abortion code to include a 24-hour waiting period, a one-parent consent policy for minors (allowing for the possibility of judicial bypass), a spousal notification policy, and an informed consent policy, which informed the woman of the risks of an abortion and the possible complications. The Supreme Court, in a plurality opinion in *Planned Parenthood* v. *Casey*, overturned the Pennsylvania restrictions, claiming that the constraints presented an "undue burden" to accessing an abortion. The Court determined that abortion is protected by a general sense of liberty contained within the Fourteenth Amendment, rather than a right to privacy. Justice Scalia dissented, claiming that the Constitution does not protect a right to an abortion.

Dissenting opinions have rhetorical markers that distinguish them from majority opinions. Following Ferguson's lead, this essay argues that dissenting opinions are characterized by four rhetorical "traits": an individualistic tone, a skeptical voice, a democratic standard, and an advocacy medium. The individualistic tone of a dissent allows for a particular judge's personal voice; the skeptical voice questions the reasoning upon which the majority bases its decision; the democratic standard allows for divergence of opinion in a non-democratic branch of government; and the advocacy medium establishes legal reasoning that future judges can use to base their decisions.

The Individualistic Tone

Dissents challenge the institutionalization of the Court by voicing an individual justice's views against the will of the Court. The individualistic tone is the writing style, also known as the "voice," of the particular justice. "Justices write in a different voice when they concur or dissent," Judge Wald states. "They speak on their own rather than for the court."[7] By calling this the "individualistic" tone I do not mean to imply that no other justices will join with this opinion; instead I claim that the personal voice (or writing style) of the authoring justice is used. A justice may author one dissent and join in another justice's dissent; the two dissents will have a different "voice" because the authoring justice is freed from the institutional constraints of the majority opinion. Whereas authoring justices of majority opinions compromise when crafting arguments (to gain the votes of like-minded justices) and use the monologic voice to institutionalize opinions, dissenting justices are not concerned with assembling votes and can write in their own style. The monologic voice is the institutionalized voice of the Court; the individualistic voice is the writing style of the dissenting justice.

[7] Patricia Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings," *University of Chicago Law Review* 62 (1995): 1412.

The individualistic tone works through the use of personal pronouns and the writing style of the individual writer. Personal pronouns separate the individual justice from the body of the Court; they highlight the reason for the dissent—the fact that the authoring justice, him or herself, disagrees with the majority decision of the Court. Since dissents do not necessitate the support of multiple members of the Court, nor do they speak for the Court, justices are freed to express themselves unrestrained by majority strictures. Some dissents are expressed in a few words while others are more extensive than the majority opinion.[8] The dissenting justice can use language that is polite, diplomatic, sarcastic, or caustic. The dissenting opinion reflects the individualistic tone of its author, liberated from the constraint of speaking for the Court.

The use of personal pronouns emphasizes the individualistic nature of the dissents, trumping individualism over institutionalism. Both justices use personal pronouns to different effects. In his *Lochner* dissent, Holmes uses them to differentiate his views from the majority's views and to distinguish the justice as a person from the justice as a legal practitioner. In his *Casey* dissent, Scalia uses his to differentiate his opinion from the majority's opinion and to establish himself as an expert legal practitioner.

In *Lochner* Holmes asserts his individualistic voice by personalizing his opinion at its beginning and its end. He begins, "I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent."[9] The agency of his own reasoning moves to the forefront of his dissent through his use of the personal pronoun "I." He, Justice Holmes, cannot agree with the majority and thus dissents. Moreover, his agency is reaffirmed at the end of his dissent when he uses the phrase "I think" three times in seven sentences. He writes, "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . ."[10] His use of "I think" qualifies his remark. The word liberty is not perverted; Justice Holmes *thinks* that the word liberty is perverted.

Holmes also uses the personal pronoun to juxtapose the justice as a person with the justice as an interpreter of the laws. According to Holmes,

> If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.[11]

His use of "I" emphasizes the role of judicial agency in decision-making. "If" he "agreed with" the theory the majority has accepted, then he should "study it further and long" before "making up [his] mind." Justices have a "duty" to perform; that duty is the interpretation of laws as the laws exist, not as the justices would like for the laws to exist. Holmes's statement clarifies that decisions are influenced by the thought process of the justices; decisions are not a mere application of legal principles to the case in question. His dissent works as an affirmation by denial. Holmes argues that he could have applied a theory that the majority of Americans do not agree with, thus we can infer that the majority of the Court has done that which Holmes refuses to do.

Like Holmes, Justice Scalia uses personal pronouns throughout his *Casey* dissent. His use of personal pronouns emphasizes the role of personal agency in judicial decision-making, juxtaposing the individual justice against the Court body. He begins his *Casey* dissent by proclaiming, "My views on this matter are unchanged from those I set forth in my separate opinions in *Webster*."[12] These views are not those of the Court; this position is Scalia's alone. From the very beginning of his

[8] For example, Justice Black's dissent in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) was more than twice the length of Justice Douglas' majority opinion, while Black's dissent in *Poe* v. *Ullman*, 367 U.S. 497 (1961) was merely one sentence.
[9] *Lochner*, 198 U.S. 45 at 74-75.
[10] *Lochner*, 198 U.S. 45 at 76.
[11] *Lochner*, 198 U.S. 45 at 75.
[12] *Casey*, 505 U.S. 833 at 979.

opinion he acknowledges the singularity of his voice, separate from his peers. Scalia emphasizes that his views preclude him from joining the Court's holding and maintains that the majority misconstrues his argument. According to Scalia, the Court's original abortion decision, *Roe*, was incorrectly decided; he refuses to extend the judicial mistake any further. These views are, nevertheless, his and not the Court's.

In addition to directly challenging the position of his brethren, Scalia circuitously questions his peers' legal prowess by asserting his own mastery of the United States' constitutional text and traditions. He contends:

> I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.[13]

Scalia presents himself as an expert practitioner, someone well versed in legal argument and reasoning. He does not acknowledge that his peers are equally competent or simply prefer a different method of constitutional interpretation—such would detract form his authority. Scalia's crafting of himself as a judicial expert lends credence to his position as a viable alternative to the majority's holding. His use of the personal pronoun, therefore, establishes an opinion—*his* opinion—which he deems to be the true and correct opinion.

The individualistic tone allows justices to write in a tone that is reflective of their personal views about the legal issue. Whereas Holmes' tone is respectful, Scalia's tone is disdainful. Scalia's language choice is hostile, condescending, and superior. Justice Holmes opts for less confrontational language; Holmes never mentions the other justices in his *Lochner* dissent. He limits his reference to the majority opinion to nouns such as "judgment," "decision," and "opinion." Scalia adopts a different approach. According to Scalia, in *Casey* the Court's reasoning is "rhetoric rather than reality,"[14] the opinion a "verbal shell game [that] will conceal raw judicial policy choices,"[15] its use of precedent "contrived,"[16] and its portrayal of *Roe* "nothing less than Orwellian."[17] In his dissent Scalia attacks his peers directly, their reasoning as well as their position. The Court, subtlety distanced from the decision in Holmes' dissent, remains an active agent in Scalia's dissent. Holmes' dissent encourages the reader to infer respect and deference for the Justice's peers and the Court as an institution. Again, both are absent from Scalia's dissenting opinion. Neither use of language is "correct"; each style merely fingerprints the authoring justice. Both justices stress the judicial agency of the majority, yet Holmes crafts his dissent rhetorically to maintain the credibility of the Court. Scalia is not concerned with how the tone of his dissent would affect the credibility of the Court, engaging in rhetorical choices to increase public controversy about abortion.

Dissenting opinions challenge the institutionalism of the majority opinion. Rather than appear as a monolithic body that simply extracts and applies the Rule of Law appropriate to the case at hand, fissures appear in the judicial body when additional opinions are penned. This rupture in judicial decision-making potentially detracts from the apolitical nature of the Court by making the Court appear subjective and divided. Rather than Ferguson's monologic voice that reinforces the Supreme Court's institutional force, the individualistic tone used by dissents dismember the body of the Court, giving voice to alternative jurisprudential visions.

The Court is not a monolithic body; few decisions are unanimous. The individualistic voice, manifested through the use of personal pronouns and the voice of the authoring justice, identifies the role that the justice plays in the judicial decision-

[13] *Casey*, 505 U.S. 833 at 980.
[14] *Casey*, 505 U.S. 833 at 981.
[15] *Casey*, 505 U.S. 833 at 987.
[16] *Casey*, 505 U.S. 833 at 993.

making process. The institution is composed of individuals. Although the Court may like to appear as if it speaks from the institution, and although justices may adopt an institutional voice when writing for the Court, the personal views and different preferences of the justices nevertheless exist and can be voiced. Individualism trumps institutionalism in the judicial dissent.

The Skeptical Voice

The individualistic tone is given force through the use of the skeptical voice. Judicial skeptics question a decision's validity and a holding's benefits. They do not allow the majority to have the "final word" in a decision. The skeptical voice questions the decision of the Court, challenges its argumentation, and explains why the majority is in error. Owen Fiss proclaims, "The law aspires to objectivity, so the nihilist observes, but he concludes that the nature of the constitutional text makes this impossible. The text is capable of any number of possible meanings, and thus it is impossible to speak of one interpretation as true and the other as false."[18] The majority opinion suggests the objectivity of the law; the dissenting opinion alludes to the subjectivity of the law.

At first blush there appears little difference between the "individualistic tone" and the "skeptical voice"; yet the individualistic tone is the *form* of a justice's dissent and the skeptical voice its *substance*. The tone reflects the personal style of a dissenter, while the voice may reframe the issue, challenge the interpretative modality of the opposition employs, or deny the Court jurisdictional grounds in the case. The skeptical tone stands in contrast to Ferguson's interrogative mode, which frames a case's question; the skeptical tone challenges the legal and interpretational grounds upon which the majority rests.

The primary function of dissents is to challenge the arguments upon which the majority opinion is based. Legal documents, such as constitutions, statutory codes, and executive orders, can be understood in many different ways. Judicial dissents present arguments for interpreting a legal text differently than the majority interprets the legal text. The alternative interpretation proffered results in a different judgment of the case. Dissenting justices disagree in the judgment of the case; dissenting justices also disagree in the arguments of the case.

Frequently dissents present a majority claim and then argue against it. Occasionally a justice may dissent yet refuse to engage the majority's argumentation.[19] Most of the time, however, justices dispute the majority claim by altering the form of constitutional interpretation.[20] Justice Holmes, in his landmark *Lochner* dissent, chose to employ prudential, balancing arguments rather than the majority's doctrinal, "right to contract," argument. In his *Casey* dissent Scalia argues against the "right to an abortion" on textual ("our law") and historical ("the traditions of our people") grounds, against the majority's doctrinal "right to privacy" doctrine.

In both *Lochner* and *Casey* the majority used doctrinal interpretation to support its decision. Doctrinal reasoning is a legal construction derived from earlier cases or extrapolated from the Constitution. In *Lochner* the majority's doctrinal argument was the "right to contract," derived from the Fourteenth Amendment's liberty clause, which states that no state shall "deprive any person of life, liberty, or property, without due process of law." In earlier cases the Court interpreted this to

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[17] *Casey*, 505 U.S. 833 at 995.

[18] Owen M. Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1982): 742.

[19] Justice Black's dissent in *Poe* v. *Ullman*, for example, merely states, "Mr. Justice Black dissents because he believes that the constitutional questions should be reached and decided." *Poe* v. *Ullman*, 367 U.S. 497 (1961) at 509.

[20] For my discussion of constitutional interpretation I draw upon Philip Bobbitt's six "modalities" of legal argument: historical ("original intent"), textual (the language of the Constitution), doctrinal (legal precedent and theory), prudential (cost-benefit analysis), structural (system of governance created by the Constitution in its totality), and ethical (the "ethos" of America). See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982). Importantly, Balkin and Bobbitt interpret the modalities as "topoi"; classifications which rhetorical scholars such as James Arnt Aune have shifted in a rhetorical direction. See James Arnt Aune, "Three Justices in Search of Historical Truth: Romance and Tragedy in Establishment Clause Jurisprudence," *Rhetoric and Public Affairs* 2, 4 (Winter 1999): 573-597 and "Tales of the Text: Originalism, Theism, and the History of the U.S. Constitution," *Rhetoric & Public Affairs* 1, 2 (Summer 1998): 257-279.

mean that a person has the liberty to enter into a contract and that the state may not limit the right to contract. In *Casey* the majority's doctrinal reasoning relied upon the "right to privacy," recognized in *Griswold* v. *Connecticut* (which determined that states could not prohibit married couples from purchasing contraceptives) and derived from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the Constitution. In his dissent Holmes adopts prudential arguments while Scalia's dissent uses textual, historical, and antithetical arguments.

Prudential reasoning is a cost-benefit analysis that weighs the costs of a decision against its benefits. In the case of *Lochner*, the state of New York had determined that the worker should be protected by maximum hour laws. The majority of the Court disagreed, claiming that the liberty clause of the Fourteenth Amendment means that the state should not impede a worker's ability to enter into a contract. These two values—protecting the health of the worker and protecting the liberty of the worker to work—are in tension. Also in tension are the democratic process and judicial regulation. For Justice Holmes, the cost of deciding a case against the majority will outweigh the benefits of an unrestricted liberty.

In his dissent Holmes argues that, while the liberty of the Fourteenth Amendment is not absolute, the restrictions upon that liberty are to be determined by the states. States have the power to enact laws that protect the safety and wellbeing of their citizens. Holmes writes, "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[21] Implicit in this statement is Holmes' recognition of both an individual liberty and a communal liberty. He tells us that the Constitution protects the individual's liberty in areas of fundamental principles. Historically, our traditions and law recognize fundamental principles as those principles without which our democratic system would fail, examples that include the liberty of speech, the liberty of democratic participation, and the liberty of press. For Holmes, the Court can protect these fundamental principles; when these principles are not threatened the communal liberty can prevail.

While Holmes prefers prudential reasoning, Scalia favors textual, historical, and antithetical reasoning. Textual reasoning uses the textual parameters of the Constitution to understand the text's meaning. The Constitution protects the rights and privileges expressly identified and defers to the states in all other questions. Historical reasoning uses the history of the United States as a guideline, contending that what rights and liberties we have protected in the past are accepted rights and practices today. And antithetical reasoning takes the position of the other to its logical extreme in order to highlight the position's logical fallacies. By contrasting the majority's opinion with its antithesis, justices rhetorically highlight opposing worldviews and challenge the efficacy of the majority's holding.

Scalia's textual and historical arguments in his *Casey* dissent follow his other abortion opinions. The Constitution does not mention the term "abortion" or the phrase "right to choose"; therefore, whether states allow or proscribe abortion should be left to the states to decide. Historically states have proscribed abortion; therefore, Scalia contends that states should be allowed to proscribe abortion. These arguments do not require much proof. The Constitution does not mention abortion. Historically states have proscribed abortion. Both are easy to show and therefore Scalia does not spend much time developing evidentiary support of these arguments.

Most of Scalia's *Casey* dissent demonstrates the fallacies of the majority opinion. His use of antithetical reasoning emphasizes the political nature of the abortion controversy by refusing to simplify the issue. Textual parameters being absent, abortion is a multifaceted political quandary to be resolved through the democratic process. He uses antitheses to challenge

[21] *Lochner*, 198 U.S. 45 at 76.

the notion of a "living" Constitution, to demonstrate that the ways in which fetal life are defined affect the legality of abortion, to criticize the judicial activism for heightening the abortion debate, and to highlight the importance of democratic resolution of the controversy.

Scalia's first antithesis sets loose and strict constitutional interpretation against one another to demonstrate the political nature of the abortion controversy. According to Scalia, the Court's refusal to limit the liberty of the Fourteenth Amendment to issues originally intended by its authors leads the Court to find constitutional meaning where none originally existed. The Fourteenth Amendment was written to enhance the lives of the freed slaves by enabling them to participate in democratic processes, not to support a right to an abortion. For the majority, the Constitution is a living, evolving document; Scalia fears that loose constitutional interpretation could stretch the notion of liberty beyond its original meaning and weaken the constitutional text.

Scalia uses other antithetical constructions, including potential life versus an unborn baby, the resolution of the abortion issue versus confusion in the law, voice versus silence, tradition versus invention, consistency versus change, empirical versus normative, and then versus now in order to dispute the Court's abortion decisions. His arguments assert that the people's voice should be heard and that the Supreme Court silenced public debate when it decided *Roe*. Each argument Scalia employs is a different side of the same multifaceted coin: the Constitution does not speak to the issue of abortion, the Court made a mistake deciding *Roe*, the Court should remove itself from its position as arbiter of abortion—a political issue, and the Court should turn the decision-making of abortion policy over to the people and their representatives.

Holmes and Scalia both use the skeptical voice to challenge the judicial reasoning of the majority opinions. The skeptical voice questions the majority's decision and challenges the legal arguments upon which the majority rests its decision. Most frequently, the skeptical voice operates through offering a different interpretation framework through which to understand the constitutional question. Without the skeptical voice, the majority opinion rhetorically appears as the "correct" decision. The skeptical voice does not allow for this rhetorical move; it offers an alterative legal means by which to determine the constitutionality of the legal question. Published dissents serve as a judicial check by rhetorically challenging the decision and the reasoning of the majority. They contest the monolithic voice of the Court by inserting into the United States Reports an alternative perspective; the Court's ruling is not handed down unfettered and free from dispute. They explain the fallacies, limitations, or errors in the majority's argument.

The Democratic Standard

The third function of dissenting opinion is to democratize the "least democratic branch" of government. Dissents do not make the Supreme Court a democratic institution, but they do have a democratizing effect on the Court via the different opinions the justices can write. David Cole claims, "The very structure of the adjudicative process creates a forum for such [antithetical] struggle . . . An alternative adjudicatory system might require consensus or unanimity in judicial decisions; instead, our judicial structure provides room for judges to express their independent views in separate concurring and dissenting opinions."[22] According to Cole, the existence of "conditions for rhetorical struggle in the structure of judicial decision-making" gives the dissent its influence.[23] The law represents a continual struggle between agonistic parties whose debate and discussion continues beyond a particular case; precedent is developed as law is interpreted and re-interpreted, and as dissenting voices are included in the decision-making process.

[22] David Cole, "Agon at Agora: Creative Misreadings in the Fist Amendment Tradition," *The Yale Law Journal* 95 (1986): 857.
[23] Cole, "Agon at Agora," 857.

Although the opinions justices write may not fully represent all divergent viewpoints—and the majority holding will prevail regardless—each justice has the ability to express his or her opinion. Democracies, at their most basic level, include the right to speak, to vote, and to protest in order to determine the laws that govern society. The political process ensures democracy and dissents are part of that process. Dissents, legal scholar Richard A. Posner tells us, "compromise the authoritarian character of the law."[24] As demonstrated through the individualistic tone and by the skeptical voice, dissents do not allow the majority opinion to be the only interpretation of constitutional questions. The effect of the use of the skeptical voice is the democratic standard. Dissenting opinions allow for other perspectives, which enact a democratic standard by acting as a judicial check against majoritarian impulses, providing alternative positions, and generating dialogue amongst the justices.

Dissents perform many rhetorical functions in their effort to democratize the Court. First, dissents are a form of political protest. As the skeptical voice demonstrates, dissents challenge the legal reasoning of a case and offer alternative interpretations of the law. Second, dissents present the position of "the Other." Democracies work by allowing different voices to enter into the "marketplace of ideas," to share different options for resolving societal problems and crises. The ability of citizens to enter into the public sphere to discuss and debate issues is central to the vitality of a democratic system. Although citizens cannot enter into the debate and discussion of a judicial opinion, the dissenting justices take on the persona of "the Other" for members of the public. Third, dissents encourage debate within the Court that is accessible to the public. Dissents may respond directly to the arguments of a majority opinion, through the use of dialectical reasoning. The presence of dissents, moreover, gives the majority alternative arguments to which to respond. While the majority does not have to respond to the arguments presented in a dissent, without a dissent the option to do so would not exist. Because dissents check the majority's opinion, provide additional legal arguments that could be used, and create a dialogue between the majority and the dissenter, dissents make the Court poly-vocal. Different legal perspectives are presented to the public in order to provide more choice for future courses of action.

Dissents are a form of political protest. They challenge the majority decision and call for a different response. Although Justice Holmes and Justice Scalia fall on different points of the political spectrum, both challenge the majority's use of substantive due process. Holmes' opinion emphasizes the importance of a democratic people governing themselves. Scalia's dissent follows Holmes' dissent. Scalia agrees that the Court should not enact policies that have not been adopted by the legislature and are not contained in the Constitution. While Holmes limits his criticism to a reminder of democratic principles, Scalia criticizes his cohorts for enacting political policies.

In *Lochner* Justice Holmes democratizes the bench by declaring that the interpretation of the Constitution should not violate the ideals of the majority of citizens. "This case is decided upon an economic theory which a large part of the country does not entertain," he declares.[25] He reminds the majority that the United States is a democratic system that should subject itself to the will of the majority. Holmes' criticism of the majority opinion is best reflected in his well-known remark that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," emphasizing the difference between expert and democratic control. Although the majority opinion makes no mention of Mr. Spencer or his *Social Statics*, Holmes nevertheless claims that the majority relies upon the philosopher's treatise of what public policies will lead to a better society; namely, complete liberty from governmental control. Holmes disagrees, reminding the Court that it is up to the people to decide what is best themselves.

[24] Richard Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990): 461.
[25] *Lochner*, 198 U.S. 45 at 75.

Justice Scalia frequently dissents, protesting the argumentation of the majority and the use of what he calls "judicial legislating." He does not agree with the Court's activism regarding abortion law, claiming that control over abortion law should be returned to the legislative process. Scalia's dissent attempts to return abortion questions to "political" venues. He begins, therefore, by attacking the foundation upon which the *Casey* decision is built: *Roe*.[26] According to Scalia, *Roe*'s majority opinion "beg[s] the question" of when life begins. Since this question cannot concretely be answered the Court should examine the validity of the *Roe* decision and its use of "reasoned judgment."

Scalia's dissent also presents an alternative point of view, which enhances symbolic democratic participation. The views of "the Other"—whether a minority position, an alternative ideological construction, or reasonable doubt—is actualized through the arguments of the dissenting voice. Scalia's dissent allows for two pro-life positions: first, that life may begin of conception and second, the effect of *Roe* has been to deny states the power to protect the fetus. Critics should note, however, that while giving voice to pro-life arguments, Scalia nevertheless does not promote a pro-life stance. Rather, as an interpretivist, he maintains that neither the text of the Constitution nor the traditions of American society support a national abortion code.[27]

The last means by which dissents emphasize democratic principles is by modeling dialectical reasoning. In his opinion Scalia presents various majority arguments, taken verbatim from the majority opinion, and then argues against each proposition in a dialectical fashion. For as rhetorical scholar George A. Kennedy explains, "Dialectic, as understood by Aristotle, was the art of philosophical disputation."[28] In five different instances Scalia "responds" to the majority perspective. First, Scalia rejects the majority's use of "reasoned judgment" to adjudicate this substantive due process claim. Second, he emphasizes the majority's lack of a consistent "undue burden" standard to apply in abortion cases. Third, he repudiates the Court's insistence upon maintaining *stare decisis*, regardless of the lack of textual support for *Roe*. Fourth, he criticizes the judicial branch's belief that it has resolved the abortion controversy, and emphasizes the lack of any national agreement as to how to resolve the quandary. Lastly, Scalia scorns his peers' attempt to affirm the Court's legitimacy, reminding his audience of the Court's darker moments: the *Dred Scott* and *Lochner* decisions.

While it is true that the Court does not model perfect democratic principles, certainly not all possible voices are acknowledged, the mere ability of a justice to dissent from the majority has a democratizing affect upon this elite institution. Dissents offer a performance of democracy within a non-democratic branch of government. The form and function of

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[26] Frequently scholars argue in support of or against the *Roe* decision, or examine the rhetorical strategies of the opposing abortion positions and future challenges for both positions. David J. Garrow's thorough historical study of the contraceptive and abortion movements in his *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (Berkeley: University of California Press, 1998) supports the *Roe* decision, while John Hart Ely's essay, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade* (1973)," in his *On Constitutional Grounds* (Princeton: Princeton University Press, 1997) and Mary Ann Glendon's *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987) argue against *Roe*. Celeste Michelle Condit's *Decoding Abortion Rhetoric: Communicating Social Change* (Urbana: University of Illinois Press, 1990) analyzes the rhetorical construction of pro-choice and pro-life arguments and Laurence H. Tribe's *Abortion: the Clash of Absolutes* (New York: W.W. Norton & Company, 1992) examines the abortion controversy from both lay and legal perspectives.

[27] Interpretivists believe that the original intent of the Founders can be known and should be heeded, while non-interpretivists hold that the original intent cannot be known therefore policy should be responsive to social needs. Thomas C. Grey is usually credited with the interpretivist/non-interpretivist distinction; see Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975), 703-18. See also Bobbitt, *Constitutional Fate*; *Constitutional Interpretation* (Oxford: Blackwell, 1991); William F. Harris II, *The Interpretable Constitution* (Baltimore, Md.: The Johns Hopkins University Press, 1993); J.M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *Law's Stories: Narrative and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (New Haven, Conn.: Yale University Press, 1996), 211-224; and Albert P. Melone and George Mace, *Judicial Review and American Democracy* (Ames, Iowa: Iowa State University Press, 1988). For commentary on Grey's interpretation distinction, see Mark Tushnet, "Justification in Constitutional Adjudication: A Comment on *Constitutional Interpretation*," *Texas Law Review* 72 (June 1994), 1707-1730; H. Jefferson Powell, "Constitutional Investigations," *Texas Law Review* 72 (June 1994), 1731-1751; Stephen M. Griffin, "Pluralism in Constitutional Interpretation," *Texas Law Review* 72 (June 1994), 1953-1969; J.M Balkin and Sandord Levinson, "Constitutional Grammar," *Texas Law Review* 72 (June 1994), 1771-1803; and Steven L. Winter, "The Constitution of Conscience," *Texas Law Review* 72 (June 1994), 1805-1883.

[28] George Kennedy, *Aristotle on Rhetoric: A Theory of Civic Discourse* (New York: Oxford University Press, 1991): 26.

dissents highlight the importance of diversity of perspectives to our political system and to judicial decision-making. Dissents limit the majority's decision, provide an alternative perspective, and invite exchanges between the justices.

The Advocacy Medium

The last function of the dissent is as a medium for judicial advocacy. Decisions, while binding and legal groundwork for future decisions, are not final. "A dissent in a court of last resort is an appeal to the brooding spirit of the law," Chief Justice Hughes proclaims, "to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Justice believes the court to have been betrayed."[29] Many dissenters, in fact, have come to be considered the great minds of the Court—justices such as Holmes, Harlan, Sr., Brandeis, and Brennan—and many of their dissents eventually became the Court's majority position. Dissents work as a medium for advocating higher values, alternative judicial ideologies or interpretational schema, and overturning earlier cases.

Examples of dissenting opinions that eventually became the Court's precedent include Justice Harlan's dissent in *Plessy* v. *Ferguson* (refuting the "separate but equal" doctrine), Justice Stone's dissent in *Minersville School District* v. *Gobitis* (upholding a child's religious freedom not to salute the American flag), and Justice Black's dissent in *Betts* v. *Brady* (advocating procedural protections in a criminal trial).[30] In the last case Justice Black, the original dissenter in *Betts*, wrote the Court's majority opinion that overturned *Betts* in *Gideon* v. *Wainwright* (ensuring counsel to indigent defendants).[31]

The persuasive efforts of dissents establish a precedent for later justices, or the original dissenter, to follow. Constitutional scholar Alexander Bickel, author of *The Least Dangerous Branch*, asserts that, "although democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal."[32] The Supreme Court, regardless of its desire to appear nonpartisan and unbiased, is made up of nine distinct individuals, each with different frames of reference and different ideological beliefs. As the makeup of the Court changes, the face of American constitutional law alters.[33]

Dissents frequently advocate an alternative perspective by appealing to "higher" principles. Judge Patricia M. Wald concurs that dissents are "most apt to turn away from the technicalities of the majority holding and play to higher levels of aspirations and values that it sees desecrated by the majority's insistence on relentless imposition of precedent regardless of the consequences."[34] Such higher ground could include racial equality, individual liberty, free exercise of religion, or free speech. Most often, such advocacy skills are used to appeal to America's fundamental "telos"; justices claim that their positions actualize democratic principles.[35]

In addition to appealing to higher values, dissents also express a particular justice's ideology and offer another way by which to interpret the Constitution. In his dissent, Justice Holmes argues against substantive due process and for allowing states to enact laws that might protect her workers. Justice Scalia argues against a right to an abortion and for overturning *Roe* v. *Wade*. Justice Holmes' use of the advocacy medium differs from Justice Scalia's, but both justices advocate judicial restraint and states' rights. Both justices allow for states to determine what is best for their citizens, so long as what is best does not

[29] Charles Evan Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievement* (Garden City: Columbia University Press, 1936): 68
[30] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896); *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940); and *Betts* v. *Brady*, 316 U.S. 455 (1942).
[31] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).
[32] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court on the Bar of Politics* (Indianapolis: Bobbs-Merril, 1962): 17.
[33] The Court's conservative turn confirms this notion. The Rehnquist Court decreased the role of the national government, in decisions such as *United States* v. *Lopez*, 514 U.S. 549 (1995); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); *Printz* v. *United States*, 521 U.S. 898 (1997); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); *Brzonkala* v. *Morrison*, 120 S.Ct. 605 (1999); and *Alden* v. *Maine*, 119 S.Ct. 2240 (1999).
[34] Wald, "The Rhetoric of Results and the Results of Rhetoric," 1412.

conflict with the rights and liberties protected by the Constitution. Both criticize the majority for reading something into the constitutional text that does not expressly exist.

In his *Lochner* dissent, Justice Holmes argues against substantive due process. Substantive due process, the legal argument which claims that the Fourteenth Amendment's due process clause pertains not only to the procedure of the law but also to the substance of the law, was what the *Lochner* majority used in order to overturn the labor law. According to the majority, the liberty protected by the Fourteenth Amendment includes the liberty of contract, the right of every worker to enter into a contract with his employer. They argue that the contract cannot be limited by state law. Holmes disagrees, claiming that a majority of the population supports labor laws. Therefore, the Court should not enact a policy that is not contained in the Constitution and that the people do not support.

Appealing to higher principles and advancing a different form of constitutional interpretation frequently result in a dissenting justice encourages the Court to overturn an earlier opinion. In his dissent Scalia calls for overturning *Roe*. He advocates decreased judicial intervention in determining the general legality of, and more specific legal parameters of, abortion laws in order to increase the democratic determination of such laws. Abortion is not a liberty protected by the Constitution. For Scalia abortion is a "closed" area of law because *Roe* decided abortion was legal; states could not decide for themselves if they wanted to allow for abortion. He claims that overturning *Roe* would enable democratic debate to occur as it should. Legislatures, rather than the courts, should craft abortion codes.

Justice Holmes' *Lochner* dissent was written almost a century ago. In the intervening years the courts have come to agree with Holmes that labor laws should be upheld. A traditional police power of the states is to protect the health of their citizens and all agree that labor laws protect, rather than harm, the worker. Justice Scalia's *Casey* dissent was written less than a decade ago. In the intervening years the courts have not seen fit to overturn *Roe*. Nevertheless, there are those persons that fear that the Court will overturn *Roe*. With every presidential election pundits, advocates, and lay individuals encourage others to think about how who they are going to vote for might affect the ideological makeup of the Supreme Court. They contend that if someone conservative is appointed women will lose their right to an abortion. They fear that another Justice will be appointed, one who would vote with Scalia to overturn *Roe*.

Conclusion

The power of the judicial branch rests in its ability to persuade its audiences: the people, the lower courts, the other branches of government. The rhetorical work of majority, concurring, and dissenting opinions is to convince their audiences of their legal positions, and to perpetuate the functioning of the democratic system and the place of judicial review within that system. Although all justices use the form of the judicial opinion, the type of opinion determines its rhetorical ends and therefore its rhetorical traits.

Although modern dissents share certain features of the majority opinion—both are written, both set forth legal arguments, both frequently consider what the other is arguing—dissenting opinions nevertheless serve a different function than majority opinions. First, dissents challenge the institutionalism of the majority opinion. Majority opinions create the fiction that their judicial decision and legal reasoning are a natural outflow from the legal question posed; dissents prove otherwise by contesting the arguments upon which the majority stands. If a majority opinion is handed down unopposed, the rhetorical significance of the unanimous opinion is that the Court decided the question in the only manner possible; the

[35] This is an interesting point. Justices, regardless of ideological position, frequently adopt telic reasoning in their dissenting opinions. Telic reasoning is concerned with the "natural end" of American social ideology.

decision is correct. Second, dissents offer other means by which to interpret the law. Dissents provide arguments for petitioners to use when contesting the law at a later time. Third, dissents continue the conversation that the legal question begins. Unanimous opinions resolve legal issues; divided courts provide for the opportunity that the ideological make-up of the Court will shift and a future decision will result in a different outcome. Critical attention should be paid to dissents because the power of dissents to challenge the institutionalism of majority opinions, to offer additional means by which to interpret the Constitution, and to leave legal questions open to alternative forms of interpretation establishes the groundwork for future judicial decisions, diminishes the power of the majority's holding, and politicizes the Court in the public sphere.

Dissents are a powerful force in judicial rhetoric. Not only is the frequency of dissents increasing, dissents often become the majority position. Dissents, regardless of whether they become of "canon" of constitutional law, affect the scope and nature of the judicial landscape. The grammar of dissents I provide in this essay gives legal rhetoric scholars a vocabulary by which to discuss the important features of dissenting opinions. The value to be weighed in future decisions will be whether the separate dissent (or concurrence, for that matter) will strengthen—by demonstrating the deliberative nature of the judiciary—or weaken—by demonstrating the political nature of many judicial decisions—the Supreme Court's institutional authority. Only time will tell. Until then, dissents will continue to give judicial rhetoric a different voice.