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Dissenting Opinions: In the Georgia Supreme Court

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ESSAY

DISSENTING OPINIONS: IN THE GEORGIA SUPREME COURT

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I. INTRODUCTION

The dissenting opinion enjoys a truly unique, even ironic, institutional status. It is without formalized counterpart in other governmental branches, yet it exposes the decisional processes of that branch commonly perceived as the most secretive of the three. Apparently rooted in the Latin, "*dissensus*" (or "disagreement"),[1] and spurned in many juristic (particularly civil) systems,[2] the judicial dissent looms large in American legal history.[3] It is as traditional, that is to say, as it is unique.

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[1] BLACK'S LAW DICTIONARY 486 (7th ed. 1999).

[2] "The practice of the highest judicial tribunal permitting the public statement of dissent from its members is far from universal. In many of the civil law countries of continental Europe, particularly those influenced by French judicial practice, courts almost always proceed without public dissent from their members." Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2235 n.2 (1996).

[3] While "dissent" and "dissenter" conform to their Latin etymologic heritage, "dissenter" in England came to denominate a member of a religious body which had separated from the established church and, eventually, to one of the "Protestant Dissenters" named in a 1688 act of the British Parliament. Other religious dissenters were known as "dissidents" and, in later years, as "nonconformists."

Here in modern America "dissenter" has come to bear legal connotations . . . .

PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 3 (1969).

The dissent manifests itself, of course, through "[a]n opinion by one or more [appellate] judges who disagree with the decision reached by the majority" in the case.[4] The dissenter(s) may record that difference simply by stating the fact of disagreement itself. Alternatively, the dissent may elaborate, either briefly or with unstinting exposition, the analytical reasoning undergirding its conflicting position. The degree of dissenting elaboration generally determines the extent to which the court's dispositional dilemma is revealed to public scrutiny.[5]

The signals emitted by a court's dissenting practices likewise yield to alternative perceptions.[6] On the one hand, the revealed lack of consensus may portend a judicial body wracked by factionalism, paralyzed by contentiousness, and bereft of effective leadership. Contrarily, the expressed differences of solution may suggest a vibrant decisionmaking process, fueled by deliberative participation, operating with independent originality, and calculated to avoid a rush to automatic judgment. The message transmitted by the fact (and volume) of judicial dissent thus lies largely in the eyes of the beholder.

Under our system of justice, each jurisdiction necessarily evolves its own distinct tradition of judicial dissent. That evolution's impetus, history, pattern, and results all converge in an informative profile—affording yet another means of studying a state's highest appellate court. A dissent profile of the Georgia Supreme Court thus offers an additional evaluative view of the state's most important judicial cathedral.[7]

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[4] BLACK'S LAW DICTIONARY 1119 (7th ed. 1999).

[5] It is recognized that disagreement with the reasoning of the court's majority may also appear in separate concurring opinions. These concurrences are often included in general references to "dissents." *See, e.g.*, Antonin Scalia, *The Dissenting Opinion*, J. SUP. CT. HIST. 33, 33 (1994) (including concurrences in definition of "dissenting opinions," as such opinions disagree with court's reasoning). However, they are not included in the later tabulations of "dissenting opinions" in this study.

[6] "As dissent outside the courtroom may represent the struggle to modify existing patterns to newly acquired knowledge, or to resist untried experiment, so its reflection in the courtroom may represent the galloping of legal activists or the reins of legal conformists seeking to slow the ruptures of established precedents." JACKSON, *supra* note 3, at 4.

[7] This is the third in a series of empirical studies focusing on particular practices in the Georgia Supreme Court. For the previous efforts, see R. Perry Sentell, Jr., *The Peculiarity of* Per Curiam*: In the Georgia Supreme Court*, 52 MERCER L. REV. 1 (2000); R. Perry Sentell, Jr., *Juristic Giants: A Georgia Study in Reputation*, 34 GA. L. REV. 1311 (2000).

II. IN GENERAL

The practice of judicial dissent has drawn considerable attention in legal literature.[8] The resulting accounts focus upon various facets of the practice, featuring treatments of its history, its impetus, its purposes, and its results. Although the treatments differ, of course, in their assorted references and details, they nevertheless transmit a common theme: Judicial dissent constitutes an intriguing and remarkable institution. That institution, the accounts impart, merits thoughtful appraisal and foundational reflection.

Much of the published perspective relates, naturally, to dissent within the United States Supreme Court.[9] As our highest

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[8] For a sampling of that literature, see generally: ALAN BARTH, PROPHETS WITH HONOR (1st ed. 1974); JACKSON, *supra* note 3; DONALD E. LIVELY, FORESHADOWS OF THE LAW (1992); Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275 (1993); Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255 (Feb.-Mar. 1991); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Mark A. Kadzielski & Robert C. Kunda, *The Origins of Modern Dissent: The Unmaking of Judicial Consensus in the 1930's*, 15 UWLA L. REV. 43 (1983); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227; Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000); C.A. Marvin, *Dissents in Louisiana: Civility Among Civilians?*, 58 LA. L. REV. 975 (1998); Scalia, *supra* note 5; Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643 (1992); Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995); Stack, Note, *supra* note 2.

[9] This focus constituted the common denominator of three books appearing within a period of less than twenty-five years (1969-1992). In JACKSON, *supra* note 5, at 18-19, the author formulates his general approach as follows:

> In the following pages, we consider the incidence of dissent from time to time. Here we might draw general conclusions from the undeniable fact that throughout the early years of the Republic, when so many cases of first impression were being presented to the Court and when partisan feelings ran high and infected the members of the Court, the maximum of dissent (during the Taney regime) was no more than 25 per cent of the decisions rendered, half of which were by a single justice; that during the Fuller and White terms, with the "Great Dissenter" on the bench, 1913 matched 1892 with less than 1 per cent of dissents; that during the era of Holmes, Brandeis, and Stone dissents never exceeded 21 per cent; while since 1942, dissent invariably is found in more than half the cases decided. During the controversial pre-1937 period, when the reactionary Four Horsemen (Sutherland, McReynolds, Butler, and Van Devanter) prevailed and gradually went down to defeat, dissent never exceeded one in five, while following the accession of Black and Douglas they gradually rose to today's level of more than three in five.

In BARTH, *supra* note 8, at 8, the author posits his premise and objective as follows:

> Dissent has played a seminal role in the functioning of the Supreme

national judiciary, the Court and its Justices offer a compelling composite for scholarly exposition. The commentators thus recount the Court's original emulation of the English system in which each judge, in seriatim fashion, orally presented his individual opinion in each case.[10] Under that system, there were no dissents, for there were no opinions of the Court.[11] Chief Justice John Marshall terminated the Court's English persuasion and originated the practice whereby one of the Justices, usually Marshall himself,

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Court. Sometimes it has served to stir the sensibilities and prod the conscience of the country, eventually leading the Court—which is, in a true sense, the custodian of the country's conscience—"to correct the error into which the dissenting judge believes the court to have been betrayed." It is with such dissents that this book will endeavor to deal.

Finally, in LIVELY, *supra* note 8, at x-xi, the author states as his purpose:

to demonstrate the influence of dissenting opinions in the evolution of constitutional law. Although at odds with dominant understanding of the Constitution when first articulated, dissents facilitate the law's development while providing a linkage that establishes a source of continuity. What appears to be settled principle, therefore, may preface but not necessarily predict future law. Not infrequently, dissents have been the foundation for future constitutional landmarks.

[10] Voss, *supra* note 8, at 645.

For more than a decade after the establishment of the United States Supreme Court, the justices perpetuated England's method of delivering opinions. The individual opinions were delivered in inverse seniority, with the last opinion delivered by the senior justice. In the area of court structure and law, the colonies, and ultimately the states in the new republic, were comfortable with the English tradition. Sir William Blackstone's 'The Common Law' was clearly the most read and cited document by lawyers and judges.

Id. JACKSON, *supra* note 3, at 22.

Marshall continued his practice of writing for the Court to a point where he rendered the Court's opinion in almost half of the nearly one thousand decisions it handed down during his regime. Thus he sought not only to avoid dissent but also, by the trend of his argument and choice of his language, to foreclose the expression of differences with the reasoning he employed to lead to an agreed-upon result, a syndrome of concurring opinions.

Id.

[11] Scalia, *supra* note 5, at 33-34.

During the first decade of the Court's existence, there was not a single dissent—for the simple reason that, in significant cases at least, there was no opinion of the Court from which to dissent. Whenever more than a mere memorandum judgment was called for, we followed the custom of the King's Bench and the other common law courts: each Justice filed his own separate opinion.

Id.

announced a single "opinion of the Court."[12] Dissents during Marshall's tenure were extremely rare until 1804, the year marking President Thomas Jefferson's appointment of Justice William Johnson to the Court.[13] Remaining on the bench for thirty years, Johnson, at Jefferson's anti-federalist urgings, emerged as the Court's earliest principal dissenter.[14] He receives general and resounding credit for establishing the model that Chief Justice Roger Taney and other dissent-disposed justices would subsequently evolve.[15]

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[12] Brennan, *supra* note 8, at 432-33.

> Chief Justice Marshall broke with the English tradition and adopted the practice of announcing judgments of the Court in a single opinion. At first, these opinions were always delivered by Chief Justice Marshall himself, and were virtually always unanimous. Unanimity was consciously pursued and disagreements were deliberately kept private. Indeed, Marshall delivered a number of opinions which, not only did he not write, but which were contrary to his own judgment and vote at conference.

Id. For a slight variance on the theme:

> Charles Warren, the leading Supreme Court historian, contended... that Marshall was not the initiator of the practice of having the opinions of the Court delivered by the Chief Justice as charged by Jefferson in the 1820's. Nevertheless, it is undeniable that Marshall appreciated that seriatim opinions bred dissent and uncertainty and that unity of opinion was essential if the Court, lacking other resource, was to corral and gain strength from popular support. It is undeniable that in the first case in which he participated and which he decided, following his accession to the bench, Marshall undertook to put the English seriatim practice, which had theretofore been followed by the Court, at rest, by writing for the Court.

JACKSON, *supra* note 3, at 21.

[13] Kolsky, Note, *supra* note 8, at 2070. "Fortunately, President Jefferson appointed Justice William Johnson to the Supreme Court in 1804. Johnson rejected the practice of silent opposition that had been adhered to by the other Justices and put forth his disagreements with the majority for all his judicial contemporaries and successors to ponder." *Id.*

[14] *Id.* at 2077-2078.

> When Johnson became a Justice on the U.S. Supreme Court, he assumed that he would continue the practice of issuing seriatim opinions that he had followed while sitting on the South Carolina Constitutional Court. In fact, he issued a substantial concurrence in one of his first opinions, only to be severely rebuked by the other Justices.
>
> President Jefferson, the man responsible for nominating Johnson to the Court, also influenced Johnson's decision to break with tradition. Jefferson encouraged Johnson to oppose Marshall's practice of issuing a single opinion on behalf of the entire Court.

Id.

[15] *Id.* at 2097.

Despite its historic origins and overwhelming modern presence, judicial dissent has long provoked a sharply divided press.[16] Reflective of one persuasion, Judge Learned Hand believed that a dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[17] Contrarily, Justice William Brennan proclaimed dissents to "contribute to the integrity of the process, not only by directing attention to perceived difficulties with the majority's opinion, but . . . also by contributing to the marketplace of competing ideas."[18] Indeed, Brennan insisted, "[t]he right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births."[19]

Dissent advocates offer a myriad of beneficial purposes which they conceive the exercise to serve. Among the more prosaic, Justice

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> According to conventional wisdom, John Marshall masterminded the rise of a powerful Supreme Court. While this is probably an accurate explanation of the Court's *initial* leap to co-equal status with other branches of government, the work of Justice William Johnson is arguably more responsible for the *enduring* prestige and legitimacy of the Court. Had Marshall's practice of issuing one opinion for the Court continued unchallenged for his entire tenure, this practice might have become permanent; the more time that passed, the harder it would have been for a Justice to challenge the status quo. As the Court's first major dissenter, Johnson opened the door for future Justices to air independent views. Consequently, Justice Johnson deserves far more recognition than he is given; he was truly a crucial figure in American legal history.

Id. Again, "Johnson's early dissents laid the groundwork for Taney and later Justices to disagree with the majority." *Id.* at 2081. Similarly, "[d]issent became a more common phenomenon in the post-Marshall era." Indeed, "[t]he rate of dissent during Taney's era, which lasted for almost three decades, was nearly double that of Marshall's." LIVELY, *supra* note 8, at xxv.

[16] "At one polarity is the need for certainty--an expectancy in the law. On the other end is the acknowledgment that the law, like societal needs and political realities, is dynamic." Voss, *supra* note 8, at 648. Again, on the one hand, "[d]issents point up the fallibility in the law, and thus encourage doubts about its legitimacy." Bennett, *supra* note 8, at 257. At the same time, "[t]he individualistic American psychology appreciates the dissent." *Id.*

[17] LEARNED HAND, THE BILL OF RIGHTS 72 (1958).

[18] Brennan, *supra* note 8, at 435.

[19] *Id.* at 438.

> Through dynamic interaction among members of the present Court and through dialogue across time with the future Court, we ensure the continuing contemporary relevance and hence vitality of the principles of our fundamental charter. Each justice must be an active participant, and, when necessary, must write separately to record his or her thinking.

Id.

Frankfurter valued the dissent as an opportunity to "record prophecy and shape history."[20] Not to be outdone, Justice Cardozo envisioned the dissenter as one who "speaks to the future," with a voice "pitched to a key that will carry through the years."[21] Even more expansively, Chief Justice Hughes characterized a dissent as "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."[22] In more practical terminology, dissenting opinions are perceived to "effect legislative action,"[23] to exhibit a "form of institutional disobedience,"[24] to serve as "signposts to lawyers,"[25] to seek "inhouse changes,"[26] to "get the attention" of a reviewing court,[27] and to salve the "judges' conscience."[28] Alternatively, Justice Scalia deems the dissent useful both within and without the Court.[29] Externally, "a signed majority opinion, opposed by one or more signed dissents, makes it clear that these decisions are the product of independent and thoughtful minds";[30] internally, a dissent operates "to improve the majority opinion."[31] Finally, it is maintained, "[d]issents serve as an important institutional reminder about the value of free speech."[32]

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[20] Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 162 (1927).

[21] BENJAMIN N. CARDOZO, LAW AND LITERATURE 36 (1931).

[22] CHARLES E. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (Columbia Paperback ed. 1966).

[23] Voss, *supra* note 8, at 653.

[24] *Id.* at 654.

[25] *Id.* at 655.

[26] *Id.*

[27] *Id.* at 657.

[28] *Id.*

[29] Scalia, *supra* note 5, at 35. Scalia recounts the "Supreme Court lore" of "Chief Justice Warren's heroic and ultimately successful efforts to obtain a unanimous Court for the epochal decision in *Brown v. Board of Education*." *Id.* Scalia agrees that the unanimity of *Brown* "helped to produce greater public acceptance," but queries as follows: "[W]ould it have had that effect if *all* the decisions of the Supreme Court, even those decided by 5-4 vote, were announced as unanimous? Surely not." *Id.*

[30] *Id.*

[31] *Id.* at 41.

[32] Kolsky, Note, *supra* note 8, at 2086. In selecting outstanding examples of dissent, virtually all dissent advocates include Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919), and Justice Jackson's dissent in *Korematsu v. United States*, 323 U.S. 214, 242 (1944).

Those who oppose the dissent practice generally employ a measure of selectivity in the precise practice they oppose. Primarily, that selectivity turns upon degree: wildly excessive dissent, it is feared, causes law to seem "infinitely manipulable"[33] and "just another prize in the political wars."[34] Moreover, "[r]epeated dissent does not serve the institutional purposes that initial dissent may, or likely does so only to a very modest extent."[35] This is because "[t]he issues were posed and presumably taken into account by the majority the first time around."[36] Additionally, it is suggested, judicial dissent may present an impediment to the necessary linkage between a court and the ideal of the rule of law. "From the perspective of the rule of law, the practice of dissent is a problem."[37]

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[33] Bennett, *supra* note 8, at 259. Indeed, from 1924 until 1972 Cannon 19 of the American Bar Association's Canons of Judicial Ethics provided:

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. . . . Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of law resort.

The Canon is reprinted in HENRY S. DRINKER, LEGAL ETHICS 331-32 (1953).

[34] Bennett, *supra* note 8, at 259. Justice Jackson put it as follows:

> There has been much undiscriminating eulogy of dissenting opinions. It is said they clarify the issues. Often they do the exact opposite. The technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess. So the poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant.

ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 18-19 (1955).

[35] Bennett, *supra* note 8, at 260.

[36] *Id.* On the techniques of a dissenter when similar cases subsequently arise, see generally Maurice Kelman, *supra* note 8. Kelman suggests three options for such a dissenter: (1) "to abandon [his] past dissent under the pressure of stare decisis," (2) "to cling to his own doctrinal position," or (3) to only temporarily desist in his views. *Id.* at 230-31.

[37] Stack, Note, *supra* note 2, at 2246. Although, therefore, the rule of law cannot justify the dissent, the author concludes, he argues that nonetheless:

> the Supreme Court's legitimacy depends in part upon the Court reaching its judgments through a deliberative process, just as Congress's legitimacy depends in part on its members enacting legislation through such a process. Given the secrecy of the Court during the formation of its judgments, the practice of dissent is necessary to manifest the deliberative character of the process through which the Court reaches its decisions.

Id. at 2236. As for the basic rule of law position, "[r]ule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185,

Likewise, there is perceived tension between judicial dissent and the principle of stare decisis, or, as Justice Traynor reasoned: "Once [the dissenter has issued his dissent] he has had his day. He should yield to the obligation that is upon him to live with the law as it has been stated."[38] Finally, there surfaces the cause of judicial civility: "A dissenting vote cast without written reasons, or a dissenting opinion which expresses only trivial and insubstantial grounds for the author's disagreement with the majority opinion, has no value and may harm the collegiality of the bench."[39]

This massive historical background, and its reflected philosophic dispute over both essence and value, prompts an insistent temporal inquiry. At what juristic juncture did the judicial dissent undergo its metamorphosis from exceptional exercise to functional fixture? Although not a facet of extensive analysis, the question received explicit attention in one distinctly American investigation.[40] Isolating practices in the United States Supreme Court and the highest appellate courts of six states, the study purported to pinpoint a crucial twelve-year developmental expanse.[41] During the period, 1930-1942, it extrapolated, "[t]he number of dissenting votes . . . increased rather dramatically throughout the country."[42]

1191 (1992).

[38] Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957).

[39] Marvin, *supra* note 8, at 977.

[40] Kadzielski & Kunda, *supra* note 8, at 43.

[41] *Id.* at 44. The six states were California, Illinois, New Hampshire, New York, Ohio, and Pennsylvania. *Id.*

[42] *Id.* at 43. The numerical findings were announced as follows:

> The results show clearly a general trend toward divisiveness. In California, for example, a dissent rate averaging ten per cent during the first years of the decade increased to over thirty per cent at the end. In Illinois the dissent rate rose from six per cent in 1930 to thirty-eight per cent in 1939. In New Hampshire, there was only one dissenting vote recorded during the first five years of the decade, a five year span in which a total of 366 cases were decided; by the end of the decade the dissent rate was six per cent. In New York, the rate jumped from twenty-two per cent in 1930 to fifty-seven per cent in 1939 and eighty-two per cent in 1941. In Ohio, the dissent rate was nineteen per cent in 1930, dropped to four per cent two years later, then climbed to forty-eight per cent at the close of the decade. In Pennsylvania, the rate rose from three per cent at the outset of the period to eight per cent at the conclusion. The United States Supreme Court had a dissent rate of less than fifteen per cent at the beginning of the decade; this had increased to nearly fifty per cent at the

With pivotal period posited, the analytical effort proceeded to examine, and largely reject, a variety of explanations: random fluctuation,[43] changes in court membership,[44] and emergence of a new judicial philosophy.[45] Rather, the authors conjectured, "[t]here must have been something more basic, more fundamental, which upset the way courts approached legal issues in the 1930's and 1940's."[46] Pursuing the illusive agent of change, the study identified four contributing factors: (1) the "economic and social strife" of the Great Depression;[47] (2) the "continually worsening international situation";[48] (3) the advent of administrative agency litigation presenting "questions of social policy, rather than pure questions of law";[49] and (4) dramatic social upheaval lending to the "general turbulence of the decade."[50] In a period dominated by these disorienting and disrupting factors, "the effort to achieve a judicial consensus was just not made, leading to more devisiveness or at

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> end. These dissenting votes tended to emerge in the full range of cases decided by these courts; they were not limited to particular types of cases.

Id. at 45-46. Similarly, a 1992 article from Arizona concluded that "[t]he average of dissents [in the Arizona Supreme Court] from 1982-1990 was over 12%, which is double the overall average of dissents from statehood through 1981." Voss, *supra* note 8, at 664.

[43] Kadzielski & Kunda, *supra* note 8, at 49.

> In this paper it is submitted that the reasonable inference to be drawn from the data as a whole is that there was a reason for the patterns observed other than pure chance. In fact, the most remarkable thing about the study is that the results were so similar in all the courts surveyed. One would expect to find at least one state that did not follow the pattern. Yet, in every jurisdiction, there was a clearly discernable increase in the dissent rate.

Id.

[44] *Id.* at 49-50. "Interrelated with this is the presence of turnover on the courts." *Id.* at 49. An analysis would "show that changes in membership do not really coincide with changes in the dissent rate." *Id.* at 50.

[45] *Id.* at 51. ("Looking at the nation as a whole, the presence or absence of a liberal-civil libertarian viewpoint on a court does not seem to have affected dissent trends.")

[46] *Id.* at 52.

[47] *Id.* at 57. "From the pinnacle of prosperity on which it had rested in 1929, the country plummeted to the depths of the Great Depression." *Id.* "[T]he overriding concern throughout the period was the general misery of the people, which began to look more and more like a permanent situation." *Id.* at 59.

[48] *Id.* ("World stability and order appeared to be breaking down again.")

[49] *Id.* at 60. Again, "[t]he challenge in general terms was to the institution of a firm, established judiciary deciding cases according to set standards without being subject to ordinary political pressures." *Id.* at 61.

[50] *Id.* at 61. ("Anyone living during that time period had to realize that the world which felt so secure in 1929 was never going to return.")

least more reported devisiveness."[51] Accordingly, the investigators concluded, "[t]he changing relationships across the entire spectrum of American society, including among the members of the American judiciary, during the Depression were reflected in a dramatic way through the increased number and changed nature of dissents."[52]

This body of observations on the practice of judicial dissent–its origins, its controversial status, its detracting and supporting rationales, and its perpetuation to primacy–all confirm the practice as one of true institutional proportions. At the least, they virtually beg for an empirical examination of the Georgia experience.

III. IN GEORGIA

A. PRELIMINARY

1. Method. A treatment of every dissent appearing in the reports of the Georgia Supreme Court would constitute a massive undertaking. Perhaps, however, the analytical purpose might be served by a more restrictive focus, an approach of illustrative selectivity. In that spirit, the method adopted sought to isolate specific groups of cases decided at more or less regular intervals across the relevant judicial span. Although constituting but a minuscule proportion of the whole, the selected "case clusters" provide a revealing perspective on the legacy of dissent within the Georgia Supreme Court.[53]

The focused case groupings assumed the following pattern: (1) a group of 100 cases (containing dissents) starting in 1846 and counting forward; (2) a group of 100 cases (containing dissents) starting in 1910; (3) a group of 100 cases (containing dissents) starting in 1950; (4) a group of 100 cases (containing dissents) starting in 1980; and (5) a group of 100 cases (containing dissents)

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[51] *Id.* at 62.

[52] *Id.* at 67. Delving into more subjective motives and publicity, another observer concludes that "historically, the canonization of dissents was a two-tiered process, which began as part of the effort to cement the New Deal Court's switch in time, and since has evolved into a judicial tool for the instigation of constitutional change." Krishnakumar, *supra* note 8, at 783.

[53] I am deeply indebted to Ms. Carol Watson, the University of Georgia Law Library's Reference/Computing Services Librarian, for the computer searches treated in this study. She bears no responsibility, of course, for my treatment of those search results.

starting in 2001 and counting backwards. These selections thus produced a total of 500 decisions by the supreme court in which at least one member of the court dissented. They reveal the court's earliest 100 cases containing dissents, its most recent 100 such cases, and three clusters of 100 cases each at intervening junctures.[54] In this fashion, the study seeks to unfold a relevant and continuing chronicle of the court's dissenting practices.

2. Frequency Facets. An initially instructive revelation depicts rates of dissent frequency—the period of time spanned by each of the randomly selected case clusters. The earliest isolated 100 cases ran from 1846 to 1876,[55] a period of roughly 29.5 years. The second 100 cases appeared between 1910 and 1915,[56] a period of roughly 4.5 years. The third case cluster extended from 1950 to 1952,[57] a period of roughly 1.4 years. The fourth 100 cases began in 1980 and ran into 1981,[58] a period of roughly 1.2 years. The final 100 cases extended from 1999 into 2001,[59] a period of roughly 1.9 years.

These findings thus reflect a remarkable increase in the supreme court's dissent practices. At the inception of its reports, the court required a period of almost 30 years to accumulate a total of 100 cases with dissents. Since the mid-twentieth century, it is revealed, 100 "dissent" cases occur in intervals of less than two years. Equally noteworthy is the total amount of time consumed by all the case clusters: a period of roughly 38.5 years. Of the 155 years spanned by the supreme court's official reports, therefore, this study directly touches 38.5 of those years, with dissents overall averaging roughly 13 for each year.

Finally, during the 38.5 years scrutinized, the court reported a total of approximately 12,765 cases. Accordingly, for the period studied, the 500 cases containing dissents represented almost 4% of the supreme court's total output.

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[54] Each of the 500 cases required individual examination.
[55] 1846 to July 1876.
[56] January 1910 to July 1915.
[57] January 1950 to June 1952.
[58] January 1980 to March 1981.
[59] February 1999 to January 2001.

TABLE I. THE GEORGIA DISSENT SAMPLE SCENARIO

No. of "Dissent" Cases	*Years Covered*	*No. of Years*
100	1846-76	29.5
100	1910-15	4.5
100	1950-52	1.4
100	1980-81	1.2
100	1999-2001	1.9
TOTALS 500 CASES		38.5 YEARS

3. Points of Ponder. As observed, impressions derived from both actual and perceived dissent practices play an inordinate role in characterizing a court's overall level of performance. It is essential, therefore, that any assessment of those practices proceeds in a consistently focused functional context. The effort requires attention to a relatively few defining features in each of the scrutinized case groupings. Recurring reference to those features provides a degree of uniformity that is prerequisite to meaningful comparative appraisal.

Attention devolves, therefore, to three basic inquiries, capable of precise evaluation, concerning each case cluster. First, what is the litigational context (*e.g.*, civil or criminal) in which the dissent occurs? Second, what is the quantity of dissent (*e.g.*, a single justice or multiple dissents) in each case? Third, what is the dissent's reflected degree of elaboration (*e.g.*, notation or opinion)? These features—"Context," "Quantity," and "Elaboration"—constitute the points of ponder in each of the isolated case groupings. They are the points for pondering an institution within an institution: the practice of dissent within the Georgia Supreme Court.

B. GEORGIA SUPREME COURT DISSENTS: FIRST SAMPLE (1846-76)

From their beginning, the Georgia Supreme Court's official reports reveal that from 1846, and extending into its July term,

1876, the court decided a total of 7,250 cases. This 29.5-year span of activity was also the period of time required for the court to record its first 100 cases containing dissents. Those dissents represented roughly 1.3% of the court's total output, and reflected an average of approximately 3.4 dissents per year of the period. This "first sample" grouping of cases provides a crucial point of origin for considering the supreme court's dissent practices across the ages. A review of the sample's "points for ponder" offers an emerging mosaic of intriguing proportions.

1. Context. The litigation contexts characterizing these historic dissents weighed heavily on the civil side of the court's docket. Reflecting, perhaps, the passions of the period, disagreements among Georgia's earliest high-court jurists most frequently occurred in cases of a non-criminal complexion. Of the court's first 100 cases containing dissents, 90 of those cases may fairly be classified as "civil." This left only 10 cases, of course, in which the dissent concerned criminal litigation.

2. Quantity. As for the "amount" of dissent punctuating each of the first sample's 100 cases, differentiation will register three possible postures. The case may be one containing one dissent by a single justice; it may contain one dissent joined by other justices; or it may contain more than one dissenting opinion. Classification according to those distinctions throughout the study will hopefully assist in gauging the precise quantity of dissent permeating the focused cases. For the cases in the first sample, however, these registered degrees of intensity mattered little: each of the 100 cases contained only one dissent, offered by a single justice.[60]

3. Elaboration. The extent to which the dissenting justice expresses his or her disagreement may be pivotal either in understanding the justice's position in an individual case or, as here, in studying the phenomenon of the court's dissent practices. The report's statement simply that a justice dissents is one thing; its inclusion of the dissenter's substantive views may be quite another.

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[60] This is explained by the fact that during the entire 29.5-year period under review, the Georgia Supreme Court was composed of only three justices. Should more than one justice agree with the "dissenting" position, therefore, that position would no longer constitute the court's minority view.

The distinction bears emphasis throughout the study, and appeared in this first sample of case groupings as follows: 18 cases simply registered a notation of the fact that a specified justice dissented, and 82 cases included what might fairly be characterized as a dissenting opinion.

TABLE II. GEORGIA DISSENTS: FIRST SAMPLE (1846-76)

Total Years	*Total Cases*	*Total Dissents*	*% of Dissents*	*Average per Year*
29.5	7,250	100	1.3%	3.4

TABLE III. GEORGIA DISSENTS: FIRST SAMPLE (100 CASES)

Ponder Points	*Percentage*
(1) Context:	
Civil	90%
Criminal	10%
(2) Quantity:	
Single Justice Dissent	100%
Other(s) Joined	0%
Multiple Dissents	0%
(3) Elaboration:	
Notation	18%
Opinion	82%

C. GEORGIA SUPREME COURT DISSENTS: SECOND SAMPLE (1910-15)

Moving out of the 1800s to a point shortly past the turn of the twentieth century, dissent practices within the supreme court reflected a number of changes. The largest difference revealed by the second case grouping concerned the pace of dissenting activity: What had consumed almost 30 years during the first sample now required a period of only 4.5 years. It also required far fewer cases:

Of the 3,252 cases reported between 1910 and 1915, the 100 dissents of the period accounted for 3.1% of the court's output, a striking increase from the first sample's 1.3%. The dissenting activity's quickening pace likewise yielded a drastic increase in averages: from 3.4 dissents per year in the first sample to an average of 22.2 dissents for each of the 4.5 years in the second sample. The period's "points for ponder" reflected highly noteworthy developments as well.

1. Context. One exposed development, a doubling of dissents in criminal cases, hinted perhaps at a shifting of values within the court. Although the second sample's 78 civil cases continued to dominate the justices' dissenting efforts, the 22 criminal-case dissents loomed large by contrast. It was a contrast that foretold the future.

2. Quantity. The second case grouping's dissent quantity also sharpened considerably. Although the sample still featured no multiple dissenting opinions in a single case, it did reveal multiple dissenters joining the case's single dissent. Thus, while 53 of the cases contained one dissent by one justice, 47 dissents received expressed support from one or more additional members of the court.[61]

3. Elaboration. The extent to which the dissenters expressed themselves registered a marked decrease during the second period of scrutiny. With mounting frequency, the sample revealed, dissenters determined to forego an articulation of their views, content simply to impose a bare notation of dissent. Those notations rose from 18 in the first sample to a total of 39, resulting in a concomitant decline from 82 to 61 in elaborated, to some extent, dissenting opinions.

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[61] This became possible by virtue of the fact that during the entire period encompassed by the second sample, the supreme court's membership stood at a total of six justices.

TABLE IV. GEORGIA DISSENTS: SECOND SAMPLE (1910-15)

Total Years	*Total Cases*	*Total Dissents*	*% of Dissents*	*Average per Year*
4.5	3,252	100	3.1%	22.2

TABLE V. GEORGIA DISSENTS: SECOND SAMPLE (100 CASES)

Ponder Points	*Percentage*
(1) Context:	
Civil	78%
Criminal	22%
(2) Quantity:	
Single Justice Dissent	53%
Other(s) Joined	47%
Multiple Dissents	0%
(3) Elaboration:	
Notation	39%
Opinion	61%

D. GEORGIA SUPREME COURT DISSENTS: THIRD SAMPLE (1950-52)

The third grouping of cases sampled the supreme court's dissent practices precisely midway through the twentieth century. With those practices ever accelerating, the sample period proved a brief one indeed: a mere 1.4 years. During that period, the court reported a total of but 753 decisions, with the 100 tabulated dissents constituting 13.3% of its output. This dramatic increase in judicial disagreement yielded an average of 71.4 dissents per year for the period. Having more than tripled the average prevailing only thirty-five years earlier (in 1915), the court's dissent practices raised a host of concerns. Would the "ponder points" of the period assist in assessing the phenomenon?

1. Context. Interestingly, the third case sample's startling increase in frequency of dissents yielded virtually no variation in context consequences. Holding almost precisely to the pattern established by the second sample, the 100 dissents of the third case grouping reflected a division of 76 civil cases and 24 criminal-case disagreements. Assuredly, this 24-case body of criminal dissents continued its advance well beyond the 10 cases of the first sample. Without question, however, the court's predominating theater of disagreement halfway through the twentieth century remained that of civil litigation.

2. Quantity. The third sample of the court's dissent-marred dispositions also continued to evidence the more evenly split result in dissent quantity. One dissent by one justice claimed a presence in a bare majority (51) of the cases, while additional justices joined the single dissent in 46 cases. The major quantity innovation of this third case grouping, however, consisted of dissent diversification: the sample featured three cases in which there appeared more than one dissenting opinion. The period's dramatic increase in judicial disagreement thus carried over to the dissenters themselves.[62]

3. Elaboration. The third sample reflected a striking development concerning dissent elaboration practices: bare notations of dissent rose from 39 in the second period to 73, while the number of dissenting opinions fell from 61 to 27. Whether or not resulting from the period's dramatic increase in dissent frequency, elaboration practices thus almost reversed themselves from the previous sample. Perhaps the acceleration in activity simply left less time for an explanation of that activity. For whatever reason, the dissenters of the third sample manifested an exceedingly strong preference for merely stating the fact of their dissent completely unelaborated by analysis or rationale.

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[62] During the entire period encompassed by the third sample, and for the remaining samples of this study, the supreme court's membership totaled its current number of seven justices.

TABLE VI. GEORGIA DISSENTS: THIRD SAMPLE (1950-52)

Total Years	*Total Cases*	*Total Dissents*	*% of Dissents*	*Average per Year*
1.4	753	100	13.3%	71.4

TABLE VII. GEORGIA DISSENTS: THIRD SAMPLE (100 CASES)

Ponder Points		*Percentage*
(1)	Context:	
	Civil	76%
	Criminal	24%
(2)	Quantity:	
	Single Justice Dissent	51%
	Other(s) Joined	46%
	Multiple Dissents	3%
(3)	Elaboration:	
	Notation	73%
	Opinion	27%

E. GEORGIA SUPREME COURT DISSENTS: FOURTH SAMPLE (1980-81)

The fourth sampled case-cluster of supreme court dissents moved the analytical focus into the court's "modern" practices. Roughly 30 years advanced from the third case grouping, and approximately 20 years before the present, the period surveyed by the fourth sample neatly bridged the transitional gap separating the "then" and the "now." Initially, the sample revealed that the prior period's drastic increase in rate of frequency constituted no aberration. Indeed, the frantic pace of dissenting activity reached a new high: the court required a period of only 1.2 years to record 100 dissents. During that period, the court reports recorded a total of 753 decisions (precisely the same as the prior period), with the dissents amounting to 13.3% of the court's output. The average number of dissents

per year soared to 83.3. With these characteristics in place, the points of ponder fleshed out the fourth sample's remaining details of distinction.

1. Context. The court's previously registered inclination toward increased disagreement in the criminal context received only the slightest nudge during the period chronicled by the fourth sample. Thus, the period's 73 civil-case dissents allowed the criminal-case disagreements to rise from 24 in the third sample to a high, at this point in the study, of 27 cases. Nevertheless, as this increase surpassed one-fourth of the court's total dissenting activity, it represented substantial movement from the one-tenth proportion registered for criminal-case dissents of earlier times.

2. Quantity. For the first time in the study, the single dissent concurred in by no other justice lost its majority hold on revelations of dissent quantity. Indeed, it accounted for only 45 of the dissents in the fourth sample. Consequently, in 52 cases of the period, additional justices joined the single dissent, leaving, as in the third sample, three cases in which there appeared more than one dissenting opinion.

3. Elaboration. One of the most striking features of the third sample claimed a continuing, and mounting, presence in this fourth case cluster. Once again, that is, the bare notations of dissent dominated the number of occasions on which dissents were elaborated by dissenting opinions. Thus, by a division of 66 to 34, mere notations outnumbered the instances in which dissenters articulated their substantive positions in a case.

TABLE VIII. GEORGIA DISSENTS: FOURTH SAMPLE (1980-81)

Total Years	*Total Cases*	*Total Dissents*	*% of Dissents*	*Average per Year*
1.2	753	100	13.3%	83.3

TABLE IX. GEORGIA DISSENTS: FOURTH SAMPLE (100 CASES)

Ponder Points	*Percentage*
(1) Context:	
Civil	73%
Criminal	27%
(2) Quantity:	
Single Justice Dissent	45%
Other(s) Joined	52%
Multiple Dissents	3%
(3) Elaboration:	
Notation	66%
Opinion	34%

F. GEORGIA SUPREME COURT DISSENTS: FIFTH SAMPLE (1999-2001)

In order to capture the supreme court's most current dissent practices, the fifth sample's tabulations began in early 2001 and reached backwards to the extent necessary to accumulate 100 dissent-bearing cases. The requisite period of time proved to be 1.9 years, during which interval the court decided a total of 757 cases. Accordingly, the prior rate of dissent frequency slowed only slightly during the fifth sample period, with dissents accounting for 13.2% of the court's total output. Thus, the dissents of the surveyed period averaged 52.6 per year. From this timely perspective, the study sought not only to update the court's dissenting-activity performance, but also to establish a concluding basis for correlating the past and present. That basis, it resulted, reflected substantial refinements regarding each of the points for ponder.

1. Context. The point of context radiated a truly striking development: The dissents of the fifth sample assumed an almost equal division between 51 civil cases and 49 criminal cases. Changing times, sentiments, and values, it appeared, had worked a defining judicial revolution. They had, over the study's chronicled period, propelled the court's criminal dissent ratio from one in ten

cases to one in two. Indeed, the sample reflected, that ratio had increased from roughly 25% only twenty years earlier to roughly 50% today. A decisional shift of such magnitude seemingly revealed a court pinioned on the poles of a societal schism. It revealed, perhaps, that modern concerns with personal liberties, at the expense of proprietary norms, stand far from confined to the philosophic realm.

2. Quantity. The quantity of dissent also experienced an intriguing evolution in the fifth case grouping. That grouping, as contrasted with the fourth sample, reflected the following developments: First, instances of a single dissent by one justice fell from 45 to 34; second, instances in which other justices joined the single dissent rose from 52 to 57; third, instances of multiple dissents tripled from 3 cases in 1980 to 9 cases in 2001. On virtually all fronts, it resulted, the calculable amount of disagreement within the court continued its fermentation.

3. Elaboration. Of all the fifth sample's reflected revelations, perhaps the most impressive was that of dissent elaboration. With the registered shift in dissent context, and the demonstrated increase in dissent quantity, the period also introduced a daunting judicial compulsion for articulating the reasons of dissent. Consequently, the traditionally overwhelming practice of bare dissent notation plummeted from 66% in 1980 to 12% a mere twenty years later. Concomitantly, dissenting opinions surged from 34% to a towering 88%. The court not only harbored an intensifying quantity of disagreement; those justices who disagreed displayed an abiding determination to make known, both to their colleagues and to the bar, the reasons underlying their differences of opinion.

TABLE X. GEORGIA DISSENTS: FIFTH SAMPLE (1999-2001)

Total Years	*Total Cases*	*Total Dissents*	*% of Dissents*	*Average per Year*
1.9	757	100	13.2%	52.6

TABLE XI. GEORGIA DISSENTS: FIFTH SAMPLE (100 CASES)

Ponder Points	*Percentage*
(1) Context:	
Civil	51%
Criminal	49%
(2) Quantity:	
Single Justice Dissent	34%
Other(s) Joined	57%
Multiple Dissents	9%
(3) Elaboration:	
Notation	12%
Opinion	88%

G. A SUMMARY OF THE SAMPLES

In review, Georgia's Supreme Court stands revealed as an historic and evolving entity. Its official reports span a total of 155 years (1846-2001), recording both the court's unanimous decisions and the occasions upon which its members expressed disagreement. Because those latter occasions assist in characterizing the court's overall performance, this brief study attempts to shed light upon the court's dissenting practices. Focusing upon a minute segment of opinions containing dissents, the study isolates five 100-case clusters. As repeatedly observed, those clusters encompass the court's first 100 such cases, its most recent 100 cases, and three groupings of 100 cases each at intervening junctures. The clusters represent a total of roughly 38.5 years during which period the court decided approximately 12,765 cases. Accordingly, the study touches but 500 of more than 12,000 cases and but 38.5 of 155 years. Hopefully, nevertheless, both the cases and the years, which were selected completely at random, realistically illustrate the court's dissenting practices.

One immediate and graphic illustration depicted the substantial acceleration in the court's rate of dissent frequency over the years.

As initially observed, the requisite period for accumulating 100 cases with dissents dropped from almost 30 years during the mid-nineteenth century, to slightly over 4 years at the turn of the twentieth century, to less than 2 years from mid-twentieth century to the present.[63] For the last 100 years, therefore, substantial disagreement within the court has assumed institutional status.

Given the impressive frequency of dissent, the study then proceeds to delineate three tangible facets for analysis within each 100-case cluster. Those facets, "Context," "Quantity," and "Elaboration," assist in an uniform appraisal of each selected period. They provide points for pondering the uniqueness of each case grouping, a basis for chronicling the essence of dissent across the ages. Having presented a composite of the results extracted from each case sample, perhaps a compendium of those composites, facet by facet, might helpfully conclude the study.

1. Context. Initially, the study sought to locate the litigation context (civil or criminal) in which the dissents occurred. That context reflects upon the values held by the court and by the society it serves. As tabulated for the respective case samples, the supreme court's context of dissent evolves as a work in progress.

TABLE XII. GEORGIA DISSENTS' CONTEXT (1846-2001)

	1st Sample 1846-76	*2nd Sample* 1910-15	*3rd Sample* 1950-52	*4th Sample* 1980-81	*5th Sample* 1999-2001
Civil	90%	78%	76%	73%	51%
Criminal	10%	22%	24%	27%	49%

2. Quantity. The presence of dissent within the court is one thing; the amount of that dissent may be quite another. The study attempted to register that distinction by reflecting the number of justices dissenting, and the number of dissents, during each

[63] See *supra* Table I.

surveyed period. This effort sought to gauge the precise quantity of dissent permeating each case cluster.

TABLE XIII. GEORGIA DISSENTS' QUANTITY (1846-2001)

	1st Sample 1846-76	*2nd Sample* 1910-15	*3rd Sample* 1950-52	*4th Sample* 1980-81	*5th Sample* 1999-2001
Single Justice Dissent	100%	53%	51%	45%	34%
Other(s) Joined	0%	47%	46%	52%	57%
Multiple Dissents	0%	0%	3%	3%	9%

3. Elaboration. The final facet isolated for observation in each case sample concerned the dissent's physical format. On occasion, the dissenting justice simply notes the fact of his or her disagreement in the case. Alternatively, the justice may provide a more substantive contribution, an elaborated statement of position on the issue in conflict. The precise form and degree of expression bodes crucial to a full understanding of a court's dissenting practices and received emphasis throughout the study.

TABLE XIV. GEORGIA DISSENTS' ELABORATION (1846-2001)

	1st Sample 1846-76	*2nd Sample* 1910-15	*3rd Sample* 1950-52	*4th Sample* 1980-81	*5th Sample* 1999-2001
Notation	18%	39%	73%	66%	12%
Opinion	82%	61%	27%	34%	88%

IV. CONCLUSION

The judicial dissenting opinion constitutes, uniquely and even ironically, an institution within an institution. It operates historically and universally throughout our appellate judicial system, with each state's highest court evolving its own distinct dissent tradition. Although that tradition may be characterized according to the subjective persuasions of the observer, its account offers yet another means for measuring the dispensation of justice.

Against the general background here sketched, the assembled Georgia specifics yield an impressive profile. Justices on the Georgia Supreme Court have employed dissenting opinions since the court's earliest reported cases. Over the intervening 155 years, the practice has steadily increased to reveal substantial disagreement as a fixture within the court's membership.

Other lessons from the profile are that: (1) After initially composing no more than 10% of the total, "criminal" cases have come to require as much of the court's dissenting energy as "civil" ones; (2) The single justice dissent has steadily lost ground to dissents expressing the views of more than one justice; and (3) In recent years, dissenting justices tend overwhelmingly to elaborate full dissenting opinions rather than simply note the fact of their disagreement.

Whatever else these lessons teach, it appears clear that Georgia justices expend considerable time and effort in decisional disputes. In the most optimistic of perceptions, that teaching depicts a Georgia Supreme Court passionately engaged in a vigorous and independently deliberative decisionmaking process.