

**Constitutional Adjudication and Democracy:
One Voice Or Many?**

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Charles Evans Hughes' pithy remark in 1907 that 'the Constitution is what the judges say it is'² sparked a vigorous, and probably never-ending, debate about the tension between the objective and subjective elements in judicial law-making. In contested cases of constitutional interpretation in a multi-member final appellate court, can there be one 'right' view, produced by the objective application of an external standard, or is the prevailing view merely the accidental consequence of the aggregation of individual subjective opinion to form a view that happens to have majority support?³

I am going to leave hanging this large jurisprudential perennial, and devote this short (IALS-mandated 3-5 page) paper to an intriguing subset of the question. Whether the judges are discovering an objective truth or whether the legal system merely deems it to be so by giving authoritative effect to the opinion of the officials charged with the task of resolving disputed questions,⁴ should the judges speak with one voice or many?

My focus here is not so much on the permissibility⁵ or desirability⁶ of dissent, but rather on the question of whether the view of the court, or a majority of the court, should be expressed in a single consolidated opinion of the court, or rather in a multiplicity of individual opinions.⁷

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² *Addresses and Papers of Charles Evans Hughes* (1908) 133, 139 (cited in Fred R Shapiro, *The Oxford Dictionary of American Legal Quotations* (1993) 216). Interestingly, Hughes, later a Chief Justice of the United States Supreme Court, became concerned that this remark was widely taken to be highly critical of the Court, when he purported merely to be referring to the Court's essential function: *The Autobiographical Notes of Charles Evans Hughes* (1973) 143-144 (also cited in Shapiro, op cit).

³ See Michael Coper, *Encounters with the Australian Constitution* (1987) 400-422; Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582-585.

⁴ United States Supreme Court Justice Robert Jackson captured this beautifully in his well-known aphorism that 'we are not final because we are infallible, but we are infallible only because we are final': *Brown v Allen* (1953) 344 US 443, 540.

⁵ The UK's Privy Council did not allow dissent until it bowed to pressure in 1966 from Australian Chief Justice Garfield Barwick: see Tony Blackshield, Michael Coper and Jack Goldring, 'Privy Council' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 560.

⁶ The theory and practice of dissent has been comprehensively explored in Australia by Andrew Lynch: see, for example, 'The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court Australia 1981-2003' (2007) *Sydney Law Review* 195; 'Does The High Court Disagree More Often In Constitutional Cases? A Statistical Study Of Judgment Delivery 1981-2003' (2005) 33 *Federal Law Review* 485; 'Taking Delight in Being Contrary, Frightened of Being a Loner or Simply Indifferent - How Do Judges Really Feel About Dissent?: Cass

The very posing of this question may come as a surprise to my IALS colleagues at this conference. My impression — though I stand willing to be corrected (the opportunity for which is a major benefit of IALS gatherings) — is that most appellate courts around the world do not exhibit the latitude for individual self-expression that has been an enduring feature of the modus operandi of the High Court of Australia for over a century.⁸ Yet the practice in Australia has, in some quarters, been a cause for concern. As a consequence, I am currently engaged with some ANU colleagues in an empirical study, commissioned by the National Judicial College of Australia, of what the consumers of judicial opinions⁹ think of the relative merits of multiple opinions as against an opinion of the court, or at least of a majority of the court.

The project was sparked by a concern that multiple opinions in support of a common outcome are a recipe for uncertainty and lack of clarity in the law, and come at a social and economic cost. Yet there are robust arguments on both sides, and I use this paper to sketch out those arguments in broad outline, concluding with some thoughts on where the issue sits in the context of the conference theme of constitutional adjudication and democracy.

In favour of the collective opinion

The arguments for a consolidated opinion of the court, or a majority of the court, are clear enough. Clarity, and consequently certainty, are best served, so it is argued, when the court speaks with one voice. Litigants know where they stand, lower courts know what they must follow, lawyers know how to advise their clients, students more easily know what the law is, and the community has a knowable framework of laws within which to go about its business. Moreover, cases can be disposed of more efficiently, and more cases can be dealt with in a given time frame. To state the same argument from the other side, a multitude of ways of stating the same conclusion leaves the law in a state of doubt, delivers a much more onerous task to those who have to master it, and slows down the whole process of case disposal.

In favour of multiple opinions

On the other hand, there are powerful arguments in favour of each judge stating his or her view in a separate, individual opinion.

Sunstein's 'Why Societies Need Dissent' (2004) 32 *Federal Law Review* 311; 'Is Judicial Dissent Constitutionally Protected?' (2004) 4 *Macquarie Law Journal* 81; 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724; 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470.

⁷ See generally Michael Coper, 'Joint Judgments and Separate Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 367-369; also 'Concurring Judgments', 129-130.

⁸ The High Court of Australia — confusingly called the High Court rather than the Supreme Court of Australia, evidently to distinguish it from the Supreme Courts of the States within the Australian federation — was established in 1903, and has unambiguously been Australia's final appellate court since the abolition of Privy Council appeals, a staged process that was completed in 1986.

⁹ Lower courts, legal advisers, academic lawyers, the media, litigants, and of course citizens at large.

First, the certainty claimed for a single consolidated opinion is often illusory. The achievement of agreement amongst powerful individual judicial minds may require a degree of compromise that glosses over issues perhaps peripheral to the instant case but of potential importance to the future development of the law. Experienced legal advisers sometimes prefer to know the nuance of individual opinion in order to better predict the course of future development, even if that necessitates a greater investment of time and effort.¹⁰ Academic lawyers may similarly appreciate the richness of the raw material that comprises the basis of their scholarly analysis and speculation. (Trial judges, though, will most likely spurn subtlety and yearn for unvarnished clarity to inform their rulings and jury directions and thus render them less vulnerable on appeal.)

Secondly, the giving of reasons by each individual judge is often seen as the best assurance that the judge has truly and conscientiously turned his or her mind to the question and provided a transparent and examinable justification for his or her decision. The judicial oath may even be invoked to demand such transparency. Collective opinions may be a cover for laziness or even undue influence; Thomas Jefferson certainly thought so in 1820 when he described the United States Supreme Court as ‘huddled up in a conclave’ and characterized Chief Justice John Marshall as ‘a crafty Chief Justice’ who, ‘with the silent acquiescence of lazy or timid associates,...sophisticates the law to his own mind by the turn of his own reasoning’.¹¹ In other words, whatever the efficiency gains of collective decision-making, in the sphere of pronouncements by final appellate courts the practice may be seen to threaten the very integrity of the judicial process.¹²

Thirdly, aficionados of constitutional interpretation well understand the endemic complexity and subtlety of the task, and the wide range of principles and values competing for attention, and will rarely be surprised at the diversity of opinion this produces. If these differences are subsumed into collective opinions, that may distort the world as it really is. We may need to accept the wisdom of Oliver Wendell Holmes that ‘certainty generally is illusion, and repose is not the destiny of man’.¹³

¹⁰ Less defensibly, there is a consequent risk of greater cost to the client, unless advisers treat keeping up to date with the law as their general responsibility or defray the cost over their practice as a whole.

¹¹ Thomas Jefferson, Letter to Thomas Ritchie, 25 December 1820, in Paul Ford (ed), *Writings of Thomas Jefferson* (1899) 10:171, cited in Shapiro, above n 2, 307. Similarly, Australian Chief Justice John Latham observed in 1950 that ‘I am now finding it possible to adopt (the method of assigning one judge to write the judgment of the Court) more frequently, but it has to be watched in order to prevent a tendency which, I suggest, has at times been most odious in the Privy Council, to leave it to one judge to do all the work and really make up the mind of the Court’: correspondence from *The Papers of Sir John Latham*, cited in Coper, above n 7, 368, and searchable at <http://catalogue.nla.gov.au/Record/3662490>.

¹² I am speaking here of domestic appellate courts, and of judicial independence in the sense of the independence of the judges from each other. It may be that, in relation to at least some international tribunals, the independence of those tribunals from external pressure (for example, from member states) is, by contrast, better protected by a collective view of the tribunal and non-disclosure of individual opinion.

¹³ Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 465; *Collected Legal Papers* (1920) 181.

How important are reasons anyway?

Of course, this debate makes a number of assumptions. First, it assumes that, in the tension between the competing demands of process and outcome, between the need for reasons and the imperative for decision, reasoning and justification have an important role to play.¹⁴ Some societies — especially those in the western common law tradition — may value this more highly than others. Some may prioritise execution over deliberation. I will be interested to discover at this IALS conference to what extent this tension is culture-bound, and how it plays out across the range of decision-making processes, not just in the judicial sphere but also in legislative and administrative processes and in other facets of public and private governance.

Variations even within a shared tradition

Secondly, even within the common law tradition, there is a wide spectrum of ways in which the opinions of final appellate courts find expression. Despite Jefferson's angst about the dominance of Chief Justice Marshall, pressure of business long ago entrenched in the United States Supreme Court the practice of an opinion of the court — moderated frequently by separate pluralities and occasionally by individual glosses, but with the attention of commentators grabbed mainly by the strong tradition of dissent — while in Australia, despite an irregular pattern of joint judgments of two or more judges, a single opinion of the court, or of the majority, is by far the exception rather than the rule.

In part, this is because there is no formal procedure in Australia analogous to the conferencing of the United States Supreme Court judges to allocate the opinion writing;¹⁵ but does the practice drive the culture, or the culture drive the practice? Certainly, in the High Court of Australia there is a well-entrenched ethos of rugged individualism, and it will be interesting, when the results come in of our survey of the consumers of High Court judgments,¹⁶ to see not only whether this ethos is seen to be sustainable, but also whether it is seen to be the product of what might be called the 'good' justifications set out above, or rather of some less attractive personality traits such as arrogance, stubbornness, or self-indulgence.

Balancing competing goals in our constitutional ecosystems

In truth, the tension between collectivism and individualism in judicial decision-making in final appellate courts reflects our desire to achieve a range of competing goals simultaneously. We value collective opinions because they represent consensus, clarity, certainty, and stability, whereas we value individual opinions because we associate them with individual responsibility, fluidity, difference, diversity, and more easily detectable harbingers of change. I suppose that

¹⁴ See Tony Blackshield, 'Judicial Reasoning' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 373-376.

¹⁵ See Troy Simpson, 'Conferences' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 130-133. More recently, there has been conferencing of a sort: see Michael Kirby, 'Ten Years in the High Court: Continuity and Change' (2005) 27 *Australian Bar Review* 4, 15-16.

¹⁶ The results of a pilot study, involving interviews with a random selection of lower court judges, senior practitioners and senior academic lawyers, are to be presented immediately after this IALS conference, at the Australian Legal Convention in Perth, Western Australia, on 19 September 2009.

any constitutional ecosystem will seek to strike a balance between these goals, and will achieve a balance that both varies over time and differs from that achieved in other systems.¹⁷

It is a balance we are all familiar with, though we tend to think about it more in the macro-context of our legal system and its panoply of institutions than in the micro-context of how our final appellate court finds its own style¹⁸ and modus operandi. It is a balance between certainty and flexibility, between continuity and change, between consensus and diversity, between corporatism and individualism, between accountability and independence, between expedition and due deliberation, perhaps even between skepticism and faith. Understanding how we react to and evaluate that balance may need the insights of a range of other disciplines such as philosophy, sociology and psychology.

One voice or many in the context of democratic theory

Where, then, does this issue of whether a final appellate court should issue the product of its collective will or tolerate individual idiosyncrasy sit in the context of constitutional adjudication and democracy?¹⁹

The most familiar, the most fundamental, and the most enduring debate about constitutional adjudication and democracy is of course the debate about the legitimacy of judicial review: what justifies the second-guessing, by unelected judges, of the legislative and executive actions of our elected officials?²⁰ As we know, the answer lies partly in the abstract notion of 'the law' — teased out by the high priests of ratiocination and given authoritative force by the state. In this kind of arrangement, there is, however, no room for mere judicial fiat; the pronouncements of the high priests must be *persuasive*.

Which, then, is the more persuasive statement of the law: the fuzzy compromise of a judicial collective, or the elusive common ground embedded in individual variations?

I dare say there is no single right answer to this question or any simple resolution of the dilemma. The mere fact of having a multi-member court, coupled with the expectation of (and arguably duty to give) reasons, may be seen as more significant to the justification of judicial review than the form in which those reasons are expressed.²¹ Moreover, in the pragmatic spirit of the common law, gains can be made in incremental improvements to the ways in which our constitutional systems function, whether they lean towards the collective or the individual

¹⁷ Interestingly, part of the balance lies in the very idea of having a multi-member appellate court rather than a single judge. Whether expressed in consolidated or fragmented form, the judgment of a multi-member court already proffers a safeguard against individual subjectivity.

¹⁸ Michael Meehan, 'Judicial Style' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 378-380.

¹⁹ For the broader context of the role of a constitutional court in a democracy, see Michael Coper, 'Democracy' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 203-204.

²⁰ Cf Michael Coper, 'Marbury v Madison' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 453-455.

²¹ See n 17 above.

approach to judicial adjudication. To the extent, for example, that the debate is about *clarity* in judicial reasoning,²² there may be more important factors than those discussed in this paper: for example, the core judicial craft of good writing, the reservation of disagreement to points of major principle rather than of minor preference, the publication of court-sanctioned summaries of decisions, and so on.

In the end, any system depends for its efficacy on the capacity, skill, commitment, and integrity of the human beings who operate it, and the degree of trust that particular societies repose in their institutions and their traditions. I suspect that many countries, perhaps most, have successful or unsuccessful judicial systems despite, rather than because of, the detail of their particular institutional arrangements.

²² Which I think is an important element of judicial accountability: see Michael Coper, 'Accountability' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 3-4.