"ALL DISCORD, HARMONY NOT UNDERSTOOD": THE PERFORMANCE OF THE SUPREME COURT OF THE UNITED STATES*

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One prominent newspaper has described the Supreme Court in this fashion:

> As it is told in the cocktail parties and congressional corridors, personal antagonisms were never more accentuated among the black-robed Justices than in the term now closing. The hidden fires have not flamed to the surface in sharp dissents as in past days, but they are smoldering in the closed conference room, so it is said . . . .
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> Further than that, Washington hears more about what goes on inside the court than formerly. Once upon a time, and that was back in the days when the New Deal began, the conferences were shrouded in mystery. So were the persons of the Justices to a large degree. The austere court judges of that period seemed to live very much apart from the passing world.
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> Now the scene has altered. Even though still men of eminence, the jurists do not instill the old awe.[1]

Does that sound to you like an account of one of the last two or three terms of the Supreme Court of the United States? You would not be unreasonable in so thinking, but you would nonetheless be wrong. Instead, it is from a story in the *New York Times* edition of June 9, 1946, describing Fred M. Vinson, who had just been appointed Chief Justice of the United States. The captions, in the manner of the *New York Times* of those days, are also instructive. The principal one-column headline reads: "VINSON EXPECTED TO BRING SUPREME

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1. N.Y. Times, June 9, 1946, § E, at 10, cols. 5-8.

COURT HARMONY."[2] The second one-column caption preceding the text of the story reads: "But the Chief Justice-Designate, a Skilled Conciliator, Will Have his Hands Full."[3]

Contrast, or, rather compare, if you will, the article in *Time* this past July 14th:

> In a mere three days at the end of its 1979-1980 Term, the Court settled cases involving the angrily disputed questions of abortion, racial quotas, freedom of the press, and the right of federal regulators to impose heavy financial burdens on business in the interest of workers' safety. . . .
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> On such occasions, Court watchers customarily try to ascertain where the Court as a whole stands, whether it is moving toward conservatism or liberalism, toward activism or judicial restraint. The only answer is that the Court is deeply divided.[4]

These observations are reenforced by a caption under the picture of Chief Justice Burger which reads: "Chief Justice Warren Burger, The Leader of a Splintered Court With Ever-Shifting Alliances."[5]

This remarkably similar treatment by the media of two different Courts and two different Chief Justices, spanning a period of 35 years, brings to mind more than one maxim or aphorism. If one were a Frenchman, he would probably be tempted to say: "La plus ça change, la plus c'est la même chose." Or one could treat the matter as I have chosen to treat it in my title by severing a passage from Alexander Pope's *Essay on Man*:

> All Nature is but Art, unknown to thee;
> All Chance Direction which thou canst not see;
> All Discord, Harmony not understood;
> All partial Evil, universal Good.[6]

I am sure neither I nor any of my eight colleagues would claim that our decisions are a source of "universal good," but I do think there are several points to be made about what many see as the "evil" of seemingly intolerable and unceasing divisions within our Court. Let us start with the Constitution itself, which is short and sweet on the subject of the Supreme Court of the United States. It merely says: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[7] The Judiciary Act of 1789,[8] which was

2. *Id.*
3. *Id.*
4. TIME, July 14, 1980, at 11.
5. *Id.*
6. Pope, *An Essay on Man*, in EIGHTEENTH-CENTURY ENGLISH LITERATURE 635, 639 (1969).
7. U.S. CONST. art. III, § 1.
8. Ch. 20, §§ 1-35, 1 Stat. 73.

really the fundamental legislative charter for the federal judicial system in the United States, set the number of Justices on the Supreme Court at six, and its growth from that number to the present number of nine has been largely a result of the expansion of the settled part of the country westward from the crest of the Appalachians to the Pacific Ocean. Up until 1891 each Justice of the Supreme Court was expected to "ride circuit" at least for a small part of the year; before 1850, it became apparent that with the means of transportation available six Justices could not perform both that task and the task of sitting in Washington to hear cases orally argued to them and write opinions deciding those cases. Thus, as early as 1837 the membership of the Court was increased to eight Associate Justices plus the Chief Justice. The point to be made is not so much one of numbers as it is that the Supreme Court of the United States has always been a "collegiate" court, that is, a court consisting of several judges rather than one. To the best of my knowledge, this is true of all appellate courts in both our federal system and all of our fifty state systems, and certainly it is true in Arizona with respect to both the Courts of Appeals and the Supreme Court of Arizona.

If there are to be a number of judges on an appellate court and difficult legal questions presented to them, surely it is not unreasonable to expect that they will on occasion disagree. One may point to the thirty-four year Chief Justiceship of John Marshall as a period in which there were very few dissents, but the Court was starting off on a virtually new tack when he assumed his office. The modus operandi of the Court in publishing opinions was not even firmly established. The Court had begun its existence following the English King's Bench model of announcing decisions by publishing seriatim the opinions of each of the individual justices. Marshall, in what his biographer Beveridge referred to as "one of those acts of audacity that . . . rendered his career historic,"[9] changed to the pattern of announcing an "opinion of the court," and it was not clear that dissent from this opinion was permissible. Indeed, when Justice Johnson, a Jefferson appointee on Marshall's Federalist court, first disagreed with the reasoning of an opinion of the Court in a separate concurrence, Johnson, as he wrote to Jefferson, "heard nothing but lectures on the Indecency of Judges cutting at each other" for the rest of the Term.[10] Once the right to dissent was established, however, the number of dissents grew even during Marshall's reign.

9. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919).

10. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 195 (1959); *see id.* at 192-96.

Each member of the Court, as do most other public officials, takes an oath when he enters upon his office; ours is to "uphold the Constitution and laws of the United States." It is scarcely surprising, therefore, that each Justice feeling himself bound by that oath on occasion feels that the views of the majority of his "brethren" which are prevailing in a particular case are so contrary to his own understanding of the Constitution that he must protest in the now traditional form of a dissenting opinion. It speaks no ill of Chief Justice Vinson, who served from 1946 until his death in 1953, that there is general agreement that he failed in the task of "uniting" or "harmonizing" the Court.

The biographer of Justice Robert H. Jackson had this to say of Vinson's tenure:

> [I]t does not appear that Chief Justice Vinson, who was appointed for the purpose of harmonizing the Court, reduced the disagreement between [Justice Jackson and Justice Black] any more than among other Justices on the Court. The proportion of dissents increased each year of his Chief Justiceship. It is always somewhat naive to think that men of the type of Black or Jackson could be jollied out of their differences and convictions. Their disagreements are intellectual matters, fundamental to their respective characters, of the very warp and woof of their philosophies of law and life. They were not likely ever to be reconciled to each other's viewpoint, however much each might respect the other's ability.[11]

Friedman and Israel, in their multi-volume work on the Justices of the Supreme Court, have this to say of Vinson's tenure:

> Although Truman admired Vinson's record in government and agreed with his political philosophy, his personality was the most important factor influencing the decision to appoint him to the High Court. His sociability and friendliness, his calm, patient, and relaxed manner, his sense of humor, his respect for the views of others, his popularity with the representatives of many factions, and his ability to conciliate conflicting views and clashing personalities and to work out compromises were qualities that Truman admired. Even more important, those personal qualities seemed to the President to fit the needs of the situation inside the Supreme Court. Dissension and dissents were on the rise, with Hugo L. Black, William O. Douglas, Frank Murphy, and Wiley B. Rutledge in one bloc and Felix Frankfurter and Robert H. Jackson in another. Rumors were circulating that members would resign if a representative of the rival faction were elevated to the leading position. Many assumed that Jackson, who had served for five years, would be chosen, and Truman considered him. But the President selected his Secretary of the Treasury.

11. E. C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 276 (1958).

> Vinson seemed capable of unifying the Court and thereby improving its public image.
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> . . . .
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> Vinson, however, failed to unite the Court. He did reduce tensions. . . . [But the] [m]ore fundamental clashes persisted for they were rooted in intellectual differences that defied his abilities as a conciliator. It seems likely that Truman had overestimated the ability of a man of personal charm to unite men of the sort that Vinson now faced, some of whom had great intellectual ability, very independent spirits and strong convictions. . . .
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> Consequently, dissenting opinions persisted as a major feature of the Court's life. Prior to 1935, the Court had seldom decided less than eighty-five per cent of its cases unanimously; in Vinson's first term, only thirty-six per cent were unanimous. By his third term, the percentage had dropped to twenty-six, and in 1952 a record low of nineteen per cent was reached. If, as seems likely, Vinson tried to reduce the number of dissents, he failed miserably.[12]

Discord and rancor are always unsettling, and certainly reports of judicial decisions record both of these characteristics on occasion. But I seriously doubt that we would want a court, such as exists in many of the civil law countries in Western Europe, where reasons for a decision are seldom explained, the author of the decision is not identified, and dissenting opinions are all but *verboten*. Considering the fact that on many occasions the Senate of the United States is unable to agree with the House of Representatives on a particular issue, or that Congress itself is unable to agree with the President, is it any more likely or any more desirable that the members of the Supreme Court consider themselves restrained from any published disputes about the result reached in particular cases?

I simply do not think that one who reflects upon the wide range of issues which parties seek to litigate in courts today would conclude that unanimity of decision in every case is either a feasible or desirable goal. As Chief Justice Hughes put it in 1936, in addressing the American Law Institute:

> How amazing is it that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! . . . The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their applications, we do not suddenly rise into a stratosphere of icy certainty.[13]

12. 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 2641-42 (1969).

13. 13 ALI PROCEEDINGS 61, 64 (1935-1936).

Justice Frankfurter echoed this theme a quarter of a century later, in his retirement letter to his brethren:

> The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, nor even agreement on the routes of thought by which decisions are reached. The nation is merely warranted in expecting harmony of aims among those who have been called to the Court.[14]

It is this harmony in pursuit of a common aim—"to uphold the Constitution and laws of the United States"—which underlies the discord reflected in our opinions.

The pleas of practitioners and academics for greater "certainty" in our opinions, apparently to be achieved by a reduction in the number of dissents and separate concurrences, are really quite paradoxical. Certainly some voluntary suppression of dissent should and does occur, simply because life is short and other demands on judicial time more pressing. Even the "Great Dissenters," Holmes and Brandeis, held back on occasion, saving the expression of their disagreement for personal correspondence or unpublished opinions. But if dissenting views are strongly held, they should be voiced. Given the validity of Holmes' admonition that "[c]ertainty generally is illusion, and repose is not the destiny of man,"[15] any stifling of significant dissent would likely present a false facade of certainty which lawyers would rely on, only to see it crumble as views which would otherwise have been expressed in separate opinions suddenly surface as law or affect the development of law in the future. Lawyers who complain of the prevalence of dissents these days and ask for greater leadership from the Chief Justice should consider the frustration experienced by Jefferson during Marshall's tenure. Jefferson criticized the Marshall court in these terms: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."[16]

Even if unanimity of decision in every case were a desirable goal, how would it be achieved in a court where each judge's vote is presumably equal to that of the other, if there is not agreement in fact? Both in the *New York Times* account of the Vinson appointment and in the *Time* magazine story about the four decisions rendered at the close of our term in July of 1980 there is a subtle implication that somehow the

14. 371 U.S. ix, x (1962).
15. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 181 (1920).
16. Letter to Thomas Ritchie (1820), *quoted in* ZoBell, *supra* note 10, at 194.

Chief Justice ought to "harmonize" or "bring together" the disputatious Associate Justices so that the Court may speak with one voice. Not only do I think, for the reasons that I have just expressed, that such forced or feigned unanimity would be undesirable, but I think that history has shown it to be impossible of achievement.

In other contexts, forced unanimity may be not only possible but also desirable. Obviously the Chief Justice is not the counterpart of the President of the United States, who may hire and fire his Cabinet officers at will. Many of these dismissals are smoothed over by a letter of resignation from the Cabinet officer, to which the President responds with an appropriate letter expressing appreciation for that officer's services. But President Ford's dismissal of James Schlesinger during his administration, and President Truman's dismissal of Henry Wallace during his, are examples of the fact that when, in the vernacular, "push comes to shove," we have a tripartite system of government, and Cabinet officials serve not only in form but in fact at the pleasure of the President because they are subordinates of his within the Executive Branch of the federal government.

The Cabinet crisis which culminated in Truman's firing of Henry Wallace involved foreign affairs. Truman inherited Wallace as his Secretary of Commerce upon President Roosevelt's death. Ironically, in light of later events, when Truman was Vice President, his tie-breaking vote, cast as President of the Senate, was necessary to confirm Wallace as Roosevelt's Secretary of Commerce. Wallace's vision of the "Century of the Common Man" included a notion that an attitude of simple goodwill between nations would suffice to bring world peace—a view that conflicted somewhat with Truman's more realistic approach to problems in particular and the Cold War atmosphere in general.

In March of 1946, Wallace wrote Truman a letter urging greater economic and trade ties with the Soviets—to disabuse the Soviet mind of what Wallace considered understandable fears of capitalistic encirclement. Wallace suggested a special mission to Moscow to develop long-range trade and development ties. Truman, however, had just appointed General Walter Bedell Smith as his Ambassador to the Kremlin and had already briefed Smith on the policy to take to Moscow. On July 23, Wallace penned another letter to Truman—a lengthy exposition which said that the Russians had "reasonable . . . grounds for fear, suspicion and distrust" because of specified American activities such as atomic weapons testing, the size of the defense budget, and efforts to obtain air bases abroad. The letter urged a change in American policy in these and other specified areas. On September 12, Wallace delivered an all-out attack on American foreign policy in a New

York speech. In the course of this speech he claimed that Truman had approved it, a claim that Truman immediately asserted was false.

The dispute arose, in part, from a failure of communication. Wallace had indicated to Truman that he was going to make a speech in New York, urging that Americans should look at the world through American eyes rather than the eyes of an anti-Russian press. Truman responded that he was glad Wallace was going to help Democrats in New York, which Wallace apparently took as approval of the content of his speech even though Truman had not reviewed it. But the differences between the two members of the executive branch were more fundamental than crossed signals. After Truman confirmed that he was sticking to his foreign policy and that there would be no change along the lines suggested by Wallace, Wallace nonetheless told the press that he intended to fight for his position and, without the President's knowledge or approval, released the July 23rd letter. Tremendous uncertainty was created both at home and abroad, as the media circulated rumors that a change in United States foreign policy was imminent.

Truman called Wallace onto the carpet and had a long conference with him. As Truman wrote in his memoirs, "Wallace had a following. I realized that his appeal had some effect. If I could keep him in the Cabinet I might be able to put some check on his activities."[17] The two agreed to a temporary gag order. Secretary of State Byrnes, however, was understandably miffed at Wallace's activities. Furthermore, Wallace quickly breached the gag order by adding to a statement he and the President had prepared, and by discussing their conference with numerous subordinates at the Commerce Department. On September 20, after Byrnes expressed his irritation and indicated he might resign if Wallace continued to interfere in foreign affairs, Truman decided that his Secretary of Commerce had to go. He called Wallace to the White House and asked for his resignation. "If that is the way you want it, Mr. President," Wallace replied, "I will be happy to comply."[18] After his firing, Wallace continued his speechmaking and criticism of American foreign policy not only in the United States but, much to Truman's annoyance, from foreign platforms as well. Unanimity in official executive circles, however, had been achieved.

But the relationship of the President to his Cabinet under our system is simply not comparable to the relationship of the Chief Justice of the United States to his eight colleagues, nor is it analogous to that of any other collegiate court of which I know. The Associate Justices do

17. 1 H. TRUMAN, MEMOIRS: YEAR OF DECISIONS 558 (1955).
18. *Id.* at 560.

not serve at the pleasure of the Chief Justice, and are not subject to dismissal by him any more than they are subject to appointment by him. The Constitution provides that they shall be nominated by the President, confirmed by the Senate, and serve during good behavior.[19] Wallace created confusion among statesmen considering American foreign policy, just as many lawyers and scholars claim that disagreements on the Court create confusion for them. The method of resolving the confusion available to Truman—firing the disputant—is not too high a price to pay to ensure clarity and certainty in American foreign policy. I think there would be general agreement that subjecting Associate Justices to dismissal for their dissents would be too high a price to pay for unanimity on the Court. The values of independence ensured in all cases by life tenure take precedence over the desirability of unanimity in any one case.

A more apt analogy might be to the English parliamentary system, where Parliament reigns supreme, and the Cabinet, which commands the support of the majority of the members of the House of Commons, is headed by a Prime Minister. It is not uncommon, in texts on comparative government, to see the Prime Minister referred to as *primus inter pares*.

There is certainly a superficial appeal to this analogy. While the Prime Minister "forms" the government, the members of the Cabinet receive their seals of office from the monarch—although not since the time of Queen Victoria has the monarch "ruled" as well as "reigned." The Prime Minister is recognized as being ultimately responsible to the Parliament and to the country for the conduct of the government, but there are significant practical limitations upon his theoretical right to dismiss one of the other members of the Cabinet. This is well illustrated by the British military effort to rescue the famous General "Chinese" Gordon, when the latter was besieged in Khartoum in the Sudan toward the end of the last century. Many of you may remember the excellent motion picture entitled "Khartoum" made in the early '60's with Richard Burton and Charlton Heston in leading roles. In the foreword to General Gordon's diaries, the editor says:

> When Gordon set out from Cairo to Khartoum on January 26, 1884, he became, though he would never know it, the most celebrated personage in the world. . . . The English, it had long been generally agreed by foreign observers, were mad. . . . Mr. Gladstone's government had apparently displayed the reckless courage of a gambler [when] it was in fact both profoundly timid and disastrously uncer-

19. U.S. CONST. art. II, § 2, cl. 2; art. III, § 1.

tain as to the precise nature of its own intentions.[20]

The Prime Minister of England at that time was William Gladstone, who headed a Liberal government commanding the support of a majority of the House of Commons in Parliament. But it was a somewhat patched together majority; many of its members were of a reformist bent for that time, but many were also former Whigs, who represented generally large land holding interests opposed to the increasing power of industrial and business interests, and were not necessarily sympathetic to the claims of the underprivileged. On foreign policy, Gladstone's great opponent had been Benjamin Disraeli, a Conservative and his predecessor as Prime Minister. Disraeli was in many respects the architect of the British Empire of the late 19th Century; it was he who persuaded Parliament to confer upon Queen Victoria the title "Empress of India" as well as Queen of England. Gladstone, on the other hand, was what was then called a "little Englander;" he was generally opposed to further expansion of the British Empire, as was much of the party which he led.

So it had been on a note of extreme caution that the Cabinet headed by Gladstone had sent General "Chinese" Gordon from Cairo to Khartoum—a distance of nearly 1,000 miles—not as an official representative of the government, but simply as an "observer." Once in Khartoum, Gordon was besieged by natives of the Sudan under the leadership of the fabled "Mahdi," and it soon became apparent that unless reenforcements were sent to raise the siege of the city, Gordon and other English nationals in the city would be killed. It was an awkward situation for the Prime Minister, who had no desire to spend more money to finance an expedition to Khartoum. But the press and the public, fascinated by the drama of the situation, clamored for some sort of action. When a motion first came up in Cabinet to send an expedition to relieve Gordon, nine favored it, but the Prime Minister and two others opposed it, and it was therefore at least temporarily shelved.

One of the nine who favored it, however, was Lord Hartington, who occupied a powerful position in the Cabinet not only because he was the Minister of War but because he was the leader of the Whigs. As Lord Elton put it in his introduction to the Gordon diaries:

> [But] Lord Hartington had begun to find that the accusations of bad faith . . . were intolerable and on July 31st he positively threatened resignation. Lord Hartington was the leader of the Whigs, and without him the Cabinet could not hope to survive. Mr. Gladstone hesitated no longer. That very day he informed Lord Granville that he would himself propose a financial grant for a relief

20. GENERAL GORDON'S KHARTOUM JOURNAL 9 (Lord Elton ed. 1961).

expedition.[21]

Official unanimity was achieved in the Khartoum episode largely because Gladstone was determined to hold the Cabinet together to achieve goals in other areas, such as Irish home rule. No one would suggest such a model for our Court's decisions. Each case must be decided on its own terms, and "logrolling" has no place in the Court despite its prevalence in other branches of government.

A third model would be the papal form of government. It is my understanding that the Pope, when he speaks *ex cathedra* on a matter concerning "faith or morals" is regarded as infallible, and at least in theory his word is law, in the religious sense, without any requirement of consultation with or ratification by any lesser members of the Church hierarchy. When the Pope defines doctrine concerning faith or morals, he theoretically achieves unanimity of belief in the Church. This example can be dismissed fairly shortly, I think. The doctrine of papal infallibility does not date back to the origins of the papacy, but to the long historical tradition associated with the Church's "Petrine theory," which holds that Peter was the first Bishop of Rome and that his authority stemmed from the biblical passage rendered in the King James version of the Bible as "Thou art Peter, and upon this rock I shall build my church."[22] This verse places the Pope in a totally different position from any Chief Justice of the United States. More than 400 volumes of the United States Reports indicate that the Associate Justices have not regarded any of the sixteen Chief Justices as "infallible" when they were speaking on matters of law and have felt free to disagree with them publicly. The papal model is also inapplicable because of differences in the nature of the knowledge being expounded. When the Pope speaks on a matter of faith or morals, his act is referred to as an act of "definition," aided by divine inspiration. Although one can disagree with dogma thus defined, the disagreement is likely to be a matter of conscience, and resolution of the dispute is not likely to be advanced much by reasoned efforts at objective proof. The judicial function is of course more modest. The acts of definition have already been performed, with varying degrees of clarity, by the framers of the Constitution and the legislators. The tools available to the Justices, moreover, are far less authoritative than inspiration from the Holy Spirit, and in the area of legal reasoning it is possible to articulate reasoned disagreement more readily than in areas of faith or morals.

Prior to making a speech to the National Conference of Chief Justices at Seattle in 1973, at a time when Chief Justice Jack Hays presided

21. *Id.* at 19.
22. *Matthew* 26:18 (King James).

over the Supreme Court of Arizona, I undertook some research to show how much more productive and efficient the present Supreme Court of the United States was, with its law clerks and supplemental personnel, than was the Court before the creation of the United States Court of Appeals by Congress in 1891. So I went back to the United States Reports for a term of Court late in the 1880's, and was not a little surprised at what I discovered.

As you may know, during the past decade the number of cases in which our Court has granted certiorari, heard oral argument, received briefs, and handed down an opinion on the merits has ranged between 140 and 160 per term. I discovered that the Court, in the particular term in the 1880's which I was studying—which I thought would have, in the absence of law clerks and other supporting personnel, decided many fewer cases on the merits—had actually decided somewhere between 250 and 300 cases on their merits.

I did not, in my speech to the Chief Justices in 1973, and I do not now, use this figure to suggest for a moment that law clerks are a hindrance rather than a help. But in seeking for some explanation of the difference, I looked at the kinds of cases that the Supreme Court of the United States was deciding in the 1880's. A large number of them were diversity cases and many others involved admiralty, receivership, and other types of equity cases. In short, the Supreme Court was then performing the traditional function of a "first round" appellate court without the benefit of an intermediate court of appeals: that is, deciding whether a trial court has properly applied relatively settled principles of torts, contracts, equity, and the like to the facts of a particular case. There were very few constitutional cases and very few cases dealing with the criminal law. This is completely understandable when one realizes that "federal question" jurisdiction was conferred on the federal courts only in 1875, and the counterpart of sections 1343[23] and 1983[24] had been enacted only four years earlier.

When one contrasts the type of cases that the Supreme Court decided in those days, when the law was considered a "learned profession" with a body of principles still largely derived from the common law, with the work of the present Supreme Court, it seems to me that the splintering and differences of opinion on the present Court are entirely understandable. Much of our case load today turns on the construction of acts of Congress, where Congress has exercised its powers over interstate commerce in a far more sweeping way than had the Congresses prior to 1891. Since the right to appeal from the judgment

23. 28 U.S.C. § 1343 (1976 & Supp. III 1979).
24. 42 U.S.C. § 1983 (1976).

of the trial court in criminal cases was extremely limited in the 1880's, the many perplexing questions of criminal law with which our Court deals occupied only a small fraction of the time of the Court. And when one considers that another large part of our caseload derives from what one of my predecessors described as the "vague and ambiguous" mandate of the fourteenth amendment to the United States Constitution, it is not at all surprising that each Justice, seeking to fulfill his oath of office, should on many occasions reach a different answer than that reached by one or more of his colleagues. As long as the 220-odd million inhabitants of this country see fit to confide the "judicial power of the United States" to "one supreme Court," it is surely best that it be a collegiate court which no Chief Justice seeks to, or is capable of, "dominating" or even of "harmonizing" by virtue of his very limited special prerogatives as compared to those of his eight colleagues. It is a difficult enough jurisprudential inquiry whether so much authority should be confided to an appointed Court whose members have life tenure. But if that is to be done, surely it is better that the Court be a collegiate one, with internal debate reflected in published dissents, rather than one which any Chief Justice may control other than by the same powers of reason and persuasion that are available to his eight associates as well.

The framers of the United States Constitution were in the truest possible sense of the phrase "writing on a clean slate." As Justice Holmes put it in his well known quote in the case of *Missouri v. Holland*:[25]

> [T]hey have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[26]

But they were astute statesmen as reflected in the Federalist Papers, and particularly in Madison's Federalist Paper No. 51 which deals with the absolute necessity of checks and balances in any republican form of government. They could not possibly foresee every contingency that might arise in the governance of a nation which would ultimately expand from the Atlantic to the Pacific and grow from a population of 3 million to more than 220 million. But it may well be that a good part of their wisdom lay in *not* attempting to foresee every contingency. And, while the judicial article of the Constitution is remarkably short, in its provision for "one supreme Court," the framers may well have

25. 252 U.S. 416 (1920).
26. *Id.* at 433.

created, without spelling it out, an additional check and balance to which Madison does not specifically refer in his Federalist No. 51. For the inevitable dissents generated by difficult cases are themselves a form of "check and balance" within the federal judicial system itself. While we may overdo dissents and separate concurrences, those who would insist on an artificial unanimity may mistake the rancorous exchanges in a particular case for a malfunction of the system. I do not think they are correct, and will conclude by returning to the line from Pope's *Essay on Man* which I have chosen as the title for my Article. Dissenting and concurring opinions, when not overdone, are quite true to the spirit of checks and balances which permeates the Constitution. They are, on one level, discordant and an understandable cause of concern to lawyers advising their clients; but on another and more fundamental level they are, in Pope's words, "Harmony not understood."