
Introduction – What Makes a Dissent ‘Great’?

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I Introduction

The delivery of dissenting opinions is such a familiar phenomenon of appellate court decision-making in common law systems as to often go unremarked. Outside the United States of America, in which judicial dissent has long been viewed with a pronounced romanticism and has amassed a vast literature, direct scholarly attention has been limited. This is certainly true in Australia. Additionally, what judicial and academic discussion there is on the topic typically falls into one of two camps. In the first are contributions that engage in a fairly abstract weighing of the benefits of judicial dissent against its costs to the institutional authority and efficiency of the courts; these reflections are predominantly sourced from the judiciary. In the second is academic research with an empirical focus, in which determining the frequency of judicial disagreement and the identification of regular coalitions and dissenters on the bench feature as dominant objectives.

Despite the value of these different contributions, an important gap in our understanding of this topic remains: specifically, when and how has dissent *really mattered*? A full appreciation of the practice of judges writing minority opinions – what motivates them to do so, the adoption of a particular tone or style, and the impact of disagreement upon the work and standing of the court and the later development of the law – can only be gained through a substantive discussion about the value and significance of particular examples. This book aims to fill this gap by presenting a diverse collection of such opinions in which the circumstances and consequences of judicial dissent are explored in detail.

At the same time, *Great Australian Dissents* is, as its title unambiguously indicates, a celebration of the genre. The contributing authors were invited to nominate a minority opinion they believe merits inclusion in the pantheon – but pointedly, they were not offered any pre-determined criteria for that purpose. Many of the dissents here will be ones widely

anticipated by those who have studied and worked in the law, some may surprise, and the inclusion of others again may be hotly contested – just as they were at the two day workshop in which the chapters of this book were initially presented and discussed. The common purpose of the 21 authors across the 17 chapters that follow is to justify their selection to the reader. In doing so, they place the dissenting opinion in context so that its novelty and impact may be appreciated against the majority's approach and the existing law. The authors detail the opinion's immediate attractions and enduring appeal, if not vindication. In this way, the chapters of the book work in dialogue with each other to illuminate the topic of dissent more generally – not simply by providing instances when minority opinions have been distinctly valuable, but by also constructing a holistic understanding of those attributes and circumstances which lead some dissents to stand out as significant, even to become iconic, while so many lie forgotten.

The purpose of this chapter is to introduce this highly varied collection and also the central themes that emerge from it – the many different ways in which a minority opinion may, despite losing the day when the case was decided, nevertheless make some claim to greatness.

II Recognising Dissent

The precise origins of the practice of judicial dissent are unclear. Although the significance of the right to make speeches in the Appellate Committee of the House of Lords has been pointed to as providing a constitutional basis for the practice of judicial dissent in English law,¹ this is not the same as an historical explanation for the emergence of the practice.² Sir John Baker has described the transition from a seemingly open-ended search for judicial consensus in the late medieval period, which could produce stasis, to a willingness by the end of the 16th century to accept decisions by majority in order to achieve an authoritative judicial pronouncement of the law.³ Minority opinions, it is clear from Baker's account, were not

¹ John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221, 233; Alan Paterson, *The Law Lords* (Macmillan, 1982) 98.

² Chris Young, 'The History of Judicial Dissent in England: What Relevance does It have for Modern Common Law Legal Systems?' (2009) 32 *Australian Bar Review* 96; Cf Michael Kirby, 'Judicial Dissent – Common Law and Civil Law Traditions' (2007) 123 *Law Quarterly Review* 379, 385–6.

³ John Baker, *The Oxford History of the Laws of England, Vol VI 1483–1558* (Oxford University Press, 2003) 49–51.

suddenly permitted, but are just the natural consequence of the seriatim practice of judgment delivery employed in the English courts for centuries, by which individual judges announced their opinion on the case in order of seniority.⁴ Although Lord Mansfield briefly enforced a practice of unanimous opinion delivery upon his appointment as Lord Chief Justice in the second half of the 18th century,⁵ the English tradition has otherwise been unbroken, although fluctuations in the relative levels of unanimity and dissent have certainly occurred over time.⁶ The seriatim practice of judgment delivery, with its inherent capacity for explicit judicial disagreement was exported throughout the common law world.

A notable exception was the Judicial Committee of the Privy Council, which heard appeals from Britain’s former colonial possessions. The Privy Council’s rigid requirement of unanimity was something strongly disdained by Australia’s Sir Garfield Barwick, and his part in ending that institutional practice is discussed in chapter 7 – that dissent is a curiosity in this collection for although its author was an Australian judge, it was not delivered in an Australian case. It should also be noted that there has been a lingering wariness around the delivery of dissent in criminal appeal matters due to the serious consequences for the accused.⁷ In some jurisdictions this has taken the form of a statutory instruction to the courts to strive for unanimity. The dissent examined in chapter 8 provides an example of a dissenting judge having to overcome that sort of pressure for conformity in order to deliver an opinion that proved hugely influential on the English criminal law.

The use of seriatim opinions by the United States Supreme Court was short-lived. The Court’s fourth Chief Justice, John Marshall, imposed the practice of near constant unanimity on his colleagues in order to secure its fledgling authority.⁸ The resistance of Justice Johnson, emboldened by Thomas Jefferson behind the scenes, prevented Marshall CJ from

⁴ M Todd Henderson, ‘From Seriatim to Consensus and Back Again: A Theory of Dissent’ (2007) *The Supreme Court Review* 283, 292–4.

⁵ Ibid 294–303.

⁶ With respect to decision-making trends in the United Kingdom’s final court since the 1970s, see Alan Paterson, *Final Judgment – The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

⁷ Alder, above n 1, 242.

⁸ Henderson, above n 4, 305–25; John P Kelsh, ‘The Opinion Delivery Practices of the United States Supreme Court 1790–1945’ (1999) 77 *Washington University Law Quarterly* 137, 143–52.

eradicating the potential for judicial dissent.⁹ But the result was what the current court's Justice Bader Ginsburg has called a 'middle way':

[There are] three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States – generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees.¹⁰

While that description basically holds, the early 1940s was a watershed between the consensus driven approach instigated by Marshall and the rise again of individual expression on the Supreme Court through separate concurrences and dissents.¹¹ The delivery of an opinion 'for the Court' means that identification of both concurring and dissenting judgments is not only a much simpler task when reading the case reports of the United States Supreme Court, but it may be thought to assume a greater significance in the process of judicial deliberation and composition of judgments. A Justice who is disinclined to join the Court's opinion has the option of writing a separate concurring opinion or a dissent. Either represents a formal and deliberate breaking away – a disassociation 'in varying degrees' – from the central judgment which represents the views of the majority. By contrast, the status of judgments in the seriatim tradition was so indistinct as to baffle American observers:

A judge may in fact be dissenting from his panel's disposition, but the reports never say so. Similarly, a judge may in fact be concurring – he may agree with the disposition but disagree with the reasoning of a majority of the panel – but the reports never say that he's concurring. You have to read through all the judgments in order to discover that any one of them is a concurrence. Indeed, there could not as a logical matter be dissents or concurrences in the English system, because no appellate panel ever adopts a single judgment as the judgment of the court . . .¹²

⁹ Meredith Kolsky, 'Justice William Johnston and the History of Supreme Court Dissent' (1995) 83 *Georgetown Law Journal* 2069, 2069–81.

¹⁰ Justice Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133, 134.

¹¹ Henderson, above n 4, 325–41; Mervin I Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books, 2015), 209–26.

¹² Arthur J Jacobson, 'Publishing Dissent' (2005) 62 *Washington and Lee Law Review* 1607, 1609.

That observation has less purchase as the trend towards more unanimous or joint judgments increasingly supplants the pure seriatim practices which were the historical norm in the English and Australian courts.¹³ But it relevantly highlights a consideration that explains the historical tendency to less strident expression of dissent in the English and Australian courts – often what ended up as a minority opinion was not consciously written as such, but was simply the judge’s opinion on the case. What made it a dissent was nothing more than the failure of a majority of the bench to agree with it; the opinion possessed no inherent properties as a dissent. The dissent of Justice Anthony Mason in *Hospital Products Ltd v United States Surgical Corporation*,¹⁴ discussed in chapter 12, is a very good example and about which its author has said:

At the time I wrote it I thought it could end up as the judgment of the Court or a judgment that formed part of a majority in the Court. But it didn’t turn out that way. So, though not written as a dissenting judgment, it became a dissenting judgment.¹⁵

Some cases throw up issues that make consensus difficult to obtain, and the judges will resort to the highly individualised mode of expression in the seriatim tradition. The result can be that a crisp line between the majority that determines the High Court’s orders and those who disagree simply does not exist. The cases discussed in chapters 10 and 13 are each of this description, and show a bench fragmented across a range of different issues. On such occasions, the dissents under examination will also be unlikely to make any overt display of their minority status – and indeed on some aspects of the case they may share substantial agreement with the reasoning of the majority or even the orders of the Court.¹⁶ The United States Supreme Court has experience of partial dissents, even under circumstances where no solid majority sustains the ‘opinion of the Court’,¹⁷ but an American audience would probably be surprised by the identification of such opinions, from which the reader has to draw out

¹³ See respectively, Paterson, above n 6, 99–110 and Justice Susan Kiefel, ‘The Individual Judge’ (2014) 88 *Australian Law Journal* 554, 557.

¹⁴ (1984) 156 CLR 41.

¹⁵ Katy Barnett, ‘Sir Anthony Mason Reflects on Judging in Australia and Hong Kong, Precedent and Judgment Writing’ on Melbourne Law School, *Opinions on High* (28 July 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/28/barnett-mason/>>.

¹⁶ See Andrew Lynch, ‘Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia’ (2002) 24 *Sydney Law Review* 470, 492–502.

¹⁷ Mark A Thurmon, ‘When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions’ (1992) 42 *Duke Law Journal* 419.

the author's differences from the rest of the Court, as 'great dissents'. If they barely look like a dissent, how can they be truly great?

III Great Dissenters; Great Dissent?

The whole notion of 'greatness' is a complex one, strongly linked to judicial reputation. Occasionally, Justices of the High Court of Australia have acquired the sobriquet of 'Great Dissenter'. In chapters 3 and 5 we are reminded that, though long forgotten now, Sir Owen Dixon wore this label in his first decade on the Court, in reference to his regular minority opinions on the interpretation of the constitutional guarantee of freedom of inter-state trade and commerce. He soon shed the title when his views attracted the support of others and his swift emergence as the dominant force on the Court was assured. By contrast, a reputation for dissent defines the judicial careers of two later Justices – Lionel Murphy and Michael Kirby. The status of both as a minority voice on the bench shapes scholarly assessment of their contribution.¹⁸ Invaluable as those personal studies are, it would be misguided to seek to understand the phenomenon of minority opinions, much less its significance, through the prism of any particular individual. To do so is not merely insufficient, but also risks distorting or limiting an appreciation of dissent as a broader experience.

These dangers are acutely apparent when one asks what the identification of an individual as a 'Great Dissenter' is supposed to signify. The title is an imported one, having a long lineage in the appraisal of Justices of the United States Supreme Court. The first Justice John Marshall Harlan was referred to as the Great Dissenter on account not only of 'the sheer number of his separate opinions, but for their importance in helping to shape the country's constitutional development'.¹⁹ Undoubtedly, Harlan J's most famous dissent stands also as one of the Court's – his objection to the constitutional validity of the 'Jim Crow' segregation laws of the Southern states in *Plessy v Ferguson*.²⁰ But Harlan J's influence, on this and other constitutional issues, was far from apparent at the time, with the importance of his legacy only emerging several decades after

¹⁸ Michael Coper and George Williams (eds), *Justice Lionel Murphy – Influential or Merely Prescient* (Federation Press, 1997); Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (Thomson Reuters, 2009); and Scott Guy and Kristy Richardson, 'Justices Murphy and Kirby: Reviving Social Democracy and the Constitution' (2010) 22 *Bond Law Review* 26.

¹⁹ Urofsky, above n 11, 105. ²⁰ 163 US 537 (1896).

his death. In the meanwhile, the title of Great Dissenter was even more memorably attached to Justice Oliver Wendell Holmes Jr, not due to his rate of dissent, which was modest, but because of his persuasive oratory when in disagreement with a majority of the Court on questions of great significance.²¹ Since then, the title has been invoked in respect of others (including Harlan J’s grandson who also served on the Court)²² – but it clearly refers to more than the mere fact of disagreement, pointing also to a discernible judicial attitude or a philosophy which is plaintively or persistently raised against the mainstream of the Court’s opinion.

A similar flavour is found in Australian appellation of the ‘Great Dissenter’, although it is arguable that popular usage tends to emphasise the quantity of an individual’s dissent over more specific qualities of judicial style or outlook. So far this century, the Australian media have identified Kirby J and then Heydon J in quick succession as the Great Dissenter on the High Court.²³ In many respects the conferral is not inapt. There is no doubt that Kirby J and Heydon J were distinct outliers on the bench for at least some of their time at the High Court; both had two consecutive years towards the end of their respective tenures in which they dissented in over 40 per cent of cases while all other judges had a dissent rate of less than 10 per cent.²⁴

More importantly, Kirby J and Heydon J appeared to embrace their outlier status, speaking candidly and persuasively about the value of judicial

²¹ Allen Mendenhall, ‘Holmes and Dissent’ (2011) *The Journal Jurisprudence* 679, 681. Schwartz links these two aspects of Holmes J’s reputation, saying he would forego dissent except when in disagreement on ‘great cases’: Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law* (Oxford University Press, 1997) 107.

²² See, eg, Tinsley E Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (Oxford University Press, 1992); Michael Mello, *Against the Death Penalty – The Relentless Dissents of Justices Brennan and Marshall* (Northeastern, 1996); and Thomas F Shea, ‘The Great Dissenters: Parallel Currents in Holmes and Scalia’ (1997) 67 *Mississippi Law Journal* 397.

²³ See, eg, Chris Merritt, ‘It’s unanimous: Kirby still the great dissenter’ *The Australian* (Sydney) 16 February 2007; and Harriet Alexander, ‘Great dissenter takes a swipe at “closed minds” of the bench’ *The Sydney Morning Herald* (Sydney) 16 March 2013.

²⁴ Regarding Kirby J: Andrew Lynch and George Williams, ‘The High Court on Constitutional Law – the 2006 Statistics’ (2007) 30 *University of New South Wales Law Journal* 188, 196; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law – the 2007 Statistics’ (2008) 31 *University of New South Wales Law Journal* 238, 245. Regarding Heydon J: Andrew Lynch and George Williams, ‘The High Court on Constitutional Law – the 2011 Statistics’ (2012) 35 *University of New South Wales Law Journal* 846, 855; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law – the 2012 Statistics’ (2013) 36 *University of New South Wales Law Journal* 514, 522.

individualism and the importance of dissent.²⁵ Further, they each maintained a distinctive vision of the judicial role which not only underpinned their disagreement with the rest of the Court but was something they articulated at length in public speeches and articles.²⁶ Lastly, both took full advantage of the liberty that is afforded the judge writing alone in dissent, free from the deadening effects of compromise and the responsibility to lay down the law with colleagues in the majority, to compose highly memorable opinions replete with ‘passages of great force, eloquence, and ardor.’²⁷ Justices Kirby and Heydon proved to be highly adept at delivering what, in the former’s judgments, were referred to as ‘kicks’ against the positions adopted by their colleagues.²⁸

In Kirby J’s case, his biographer, Professor A J Brown, noted that the kicks became ‘increasingly poetically drafted, and increasingly noticed’, but they were ‘primarily tactical weapons in his battle for public opinion.’²⁹ In chapter 17, Brown reflects on the different audiences that apparently explain the stark differences between Kirby J’s dissent and that of Chief Justice Gleeson in the unsuccessful challenge to Australia’s immigration detention law in *Al-Kateb v Godwin*.³⁰ The appeal to an external audience is a noted feature of some judicial opinions.³¹ While that strategy may be particularly understandable in a dissent,³² Professor Melvin I Urofsky claims that, ‘unless it can show convincingly how wrong the majority is, it will never – no matter how well it may be written – be more than an angry tirade or enter into the constitutional dialogue.’³³ In his contrasting of

²⁵ See Kirby, above n 2; J D Heydon, ‘Threats to Judicial Independence: The Enemy Within’ (2013) 129 *Law Quarterly Review* 205; J D Heydon, ‘Japanese War Crimes, Retroactive Laws and Mr Justice Pal’ (2011) 85 *Australian Law Journal* 627.

²⁶ See, eg, Michael Kirby, *Judicial Activism – Hamlyn Lectures, 2003* (Sweet & Maxwell, 2004); J D Heydon, ‘Varieties of Judicial Method in the Late 20th Century’ (2012) 34 *Sydney Law Review* 219.

²⁷ Alan Barth, *Prophets with Honor – Great Dissents and Great Dissenters in the Supreme Court* (Knopf, 1974) xii. See also Justice Antonin Scalia, ‘The Dissenting Opinion’ (1994) *Journal of Supreme Court History* 33, 42.

²⁸ A J Brown, *Michael Kirby – Principles/Paradoxes* (Federation Press, 2011), 391–2, 396, 399.

²⁹ Ibid 392, 399. See also Gavan Griffith and Graeme Hill, ‘Constitutional Law: Dissents and Posterity’ in Freckelton and Selby, above n 18, 217, 217.

³⁰ (2004) 219 CLR 562.

³¹ Lawrence Baum, *Judges and their Audiences – A Perspective on Judicial Behaviour* (Princeton University Press, 2006); Nuno Garoupa and Tom Ginsburg, ‘Judicial Audiences and Reputation: Perspectives from Comparative Law’ (2009) 47 *Columbia Journal of Transnational Law* 451.

³² Lani Guinier, ‘The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent’ (2008) 122 *Harvard Law Review* 4.

³³ Urofsky, above n 11, 407.

the opinions in *Al-Kateb v Godwin*, Brown explores whether the decision to write for the public sacrifices a dissent’s appeal to the Court on a later occasion.

Justice Heydon may not have as deliberately employed ‘kicks’ but his personal style also tended to forthrightness; his flair for acerbity avoided the strident hyperbole of Justice Antonin Scalia’s dissents, while being no less quotable.³⁴ In chapter 18, the authors examine Heydon J’s very final judgment and highly distinctive dissent in the context of earlier disagreements with the Court and his broader advocacy of a particular conception of judicial legitimacy, going back over several years. Once again, the issue of audience is a clear focus.

Despite all that, it is unclear whether either Kirby J or Heydon J will be regarded as a Great Dissenter by future generations. Although, their reputation for judicial disagreement is undoubtedly cemented in a way that was not the case for the young Dixon J of the 1930s, the ultimate indicium of a Great Dissenter is to speak to posterity. The question of subsequent influence, rather more nuanced than may first appear, is discussed in Part IV below, but in the context of whether an individual is aptly acknowledged as a Great Dissenter, only time can really tell. Although an opinion of Kirby J and Heydon J each appears in this collection, it is just too soon to know whether these or their other prominent dissents will endure, let alone prevail.

In any case, this is a book about great dissents, not Great Dissenters. While we might assume the former emanate from the latter, this need not be so. For one thing, those who are mythologised as dissenters may leave a plentiful, but nevertheless thin, legacy. Professor Mark Tushnet confronted this paradox when he explained the omission from his personal selection of great dissents of the United States Supreme Court of any opinions by Justice William O Douglas.³⁵ Douglas was the Court’s longest ever serving Justice, its most prolific dissenter, and was regarded as a Great Dissenter in his lifetime.³⁶ But Tushnet described Douglas J’s dissents as diminished not only by a ‘somewhat slapdash’ writing style but more significantly, as ‘curiously time-bound’.³⁷ In short, they were of

³⁴ ‘Scalia has perfected the “opinion as attack ad” rhetoric’: Mark Tushnet, *I Dissent – Great Opposing Opinions in Landmark Supreme Court Cases* (Beacon Press, 2006) xxii. As one commentator remarked on Scalia J’s criticisms of the majority reasoning in cases from the Court’s 2014–15 term: ‘Welcome to the era of the judicial dissent as body slam’: Dahlia Lithwick, ‘Sunday Book Review: “Dissent and the Supreme Court” by Melvin I Urofsky’ *The New York Times* (21 October 2015).

³⁵ Tushnet, above n 34. ³⁶ Schwartz, above n 21, 106. ³⁷ Tushnet, above n 34.

little value beyond the immediate case itself. Professor George Williams has offered a similar explanation for Murphy J's lack of influence in the High Court's development of implied constitutional rights, despite his pioneering opinions in the area, most especially with respect to the freedom of political communication. Williams said that Murphy J's legal method 'ensured that his decisions would not likely be repeated and would not be capable of being developed'.³⁸ Two opinions of Justice Murphy do appear in chapters 11 and 13 of this collection, though his idiosyncratic style is certainly acknowledged in assessing the impact of his views and the very limited extent to which they have been attributed by judges who came after him.

Conversely, it is clear that great dissents have been written by judges who enjoy no particular reputation for dissent. This should not be nearly as surprising as the previous observation. Judges who are the intellectual leaders of the court may find themselves occasionally in the minority, but the qualities that explain their usual ability to attract, if not actually shape, majority support amongst their colleagues can hardly be expected to have deserted them. Whether due to the high regard in which the judge is held, or the strength of reasoning in the particular dissent (indeed, probably a powerful combination of both), such opinions may stand over time as important ones. Their place on the legal landscape must be acknowledged by later generations, even if they are never simply adopted. Reputation clearly plays a part here also, but in this instance it lends the dissent an authority that might otherwise be lacking. It is no accident that many of the chapters in this book nominate as 'great dissents' opinions authored not by a Great Dissenter, but simply by a great judge.

Perceptions of judicial greatness matter because reputation is inevitably an aspect of subsequent citation and influence.³⁹ This is so generally not just in respect of dissents, but the latter depend much more on an appeal to 'greatness' – or, more prosaically, 'correctness' – if they are to have some future relevance. It seems unduly cynical to suggest that 'greatness', even 'heroism', is occasionally constructed by Justices with a view to the redemption of a minority opinion to support their preferred outcome in a

³⁸ George Williams, 'Lionel Murphy and Democracy and Rights' in Coper and Williams, above n 18, 63. See also George Winterton, 'Murphy: A Maverick Reconsidered' (1997) *University of New South Wales Law Journal* 204, 206.

³⁹ Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7; and Russell Smyth, 'Judicial Prestige: A Citation Analysis of Federal Court Judges' (2001) 6 *Deakin Law Review* 120.