

THE GREAT DISSENTS OF THE “LONE DISSENTER”

*Justice Jesse W. Carter’s Twenty Tumultuous
Years on the California Supreme Court*

Edited by

David B. Oppenheimer

Allan Brotsky

Contributions by

Jessica L. Beeler • Michele Benedetto Neitz
Justice William J. Brennan, Jr. • Justice Jesse W. Carter
Helen Y. Chang • Markita D. Cooper • Janet Fischer
Judge William A. Fletcher • Marc H. Greenberg
Justice Joseph R. Grodin • J. Edward Johnson • Janice Kosel
Cliff Rechtschaffen • Susan Rutberg • Marci Seville
Marc Stickgold • Rachel A. Van Cleave • Frederic White
Michael A. Zamperini • David Zizmor

Copyright © 2010
David B. Oppenheimer
Allan Brotsky
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Carter, Jesse W., 1888-1959.

The great dissents of the "lone dissenter" : Justice Jesse W. Carter's twenty tumultuous years on the California Supreme Court / [edited by] David B. Oppenheimer, Allan Brotsky.

p. cm.

ISBN 978-1-59460-810-0 (alk. paper)

1. Carter, Jesse W., 1888-1959. 2. Dissenting opinions--California. I. Oppenheimer, David Benjamin. II. Brotsky, Allan. III. Title.

KF213.C37O67 2010
347.794'035092--dc22

2010004174

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

CONTENTS

| | |
|---|-------|
| Preface and Acknowledgments | vii |
| <i>By David B. Oppenheimer and Allan Brotsky</i> | |
| Foreword | xix |
| <i>By Joseph R. Grodin</i> | |
| Jesse W. Carter | xxi |
| <i>By J. Edward Johnson</i> | |
| In Defense of Dissents | xxxv |
| <i>By William J. Brennan, Jr.</i> | |
| Dissent | xlvii |
| <i>By William A. Fletcher</i> | |
| Justice Carter’s Role in the Caryl Chessman Cases: Due Process Matters | 3 |
| <i>By Susan Rutberg</i> | |
| Justice Carter’s Dissent in <i>People v. Gonzales</i>: Protecting Against the “Tyranny of Totalitarianism” | 17 |
| <i>By Rachel A. Van Cleave</i> | |
| Justice Carter’s Dissent in <i>People v. Crooker</i>: An Early Step Towards Miranda Warnings and the Expansion of the Fifth Amendment to Pre-Trial Confessions | 25 |
| <i>By Helen Y. Chang</i> | |
| “<i>The Hysteria of Our Times</i>”: Loyalty Oaths in California | 37 |
| <i>By Marc Stickgold</i> | |
| Justice Carter’s Dissent in <i>Hughes v. Superior Court of Contra Costa County</i>: Harbinger of the 60s Civil Rights Movement and Affirmative Action? | 59 |
| <i>By Frederic White</i> | |

| | |
|---|-----|
| <i>Payroll Guarantee Association, Inc. v. The Board of Education of the San Francisco Unified School District: Denying Hecklers the Right to Veto Unpopular Speech</i> | 71 |
| <i>By David Zizmor and Clifford Rechtschaffen</i> | |
| Justice Carter’s Dissent in <i>Takahashi v. Fish & Game Commission</i>: Taking a Stand Against Racial Discrimination | 85 |
| <i>By Jessica L. Beeler</i> | |
| Justice Jesse Carter’s Passionate Defense of Workers’ Rights: Challenging the Majority’s “Legal Legerdemain” | 97 |
| <i>By Marci Seville</i> | |
| Justice Carter, Contributory Negligence and Wrongful Death: A Call to Get Rid of a “Bad Law With Bad Results” | 111 |
| <i>By Michael A. Zamperini</i> | |
| <i>Kurlan v. CBS</i>: Justice Carter’s Prescient Dissent—A Glimpse into the Future of Copyright Protection in the Entertainment Industry | 127 |
| <i>By Marc H. Greenberg</i> | |
| Justice Carter’s Dissent in <i>Gill v. Hearst Publishing Co.</i>: Foreshadowing Privacy Concerns for an Age of Digital Cameras, Video Voyeurism, and Internet Excess | 145 |
| <i>By Markita D. Cooper</i> | |
| The Plight of the Derivative Plaintiff: Justice Carter’s Dissent in <i>Hogan v. Ingold</i> | 169 |
| <i>By Michele Benedetto Neitz</i> | |
| Carter’s Dissent in <i>Simpson v. City of Los Angeles</i>: A Precursor to the Animal Rights Movement | 187 |
| <i>By Janice Kosel</i> | |
| Appendix 1 | 195 |
| Appendix 2 | 199 |
| <i>By Janet Fischer, MLIS</i> | |
| About the Authors | 205 |
| Index | 211 |

PREFACE AND ACKNOWLEDGMENTS

By David B. Oppenheimer and Allan Brotsky

In the spring of 2004, Frederic White, the then newly appointed dean at Golden Gate University School of Law (and now the newly appointed dean at Texas Wesleyan School of Law) asked me what I could tell him about Golden Gate graduate Jesse W. Carter. As I told Fred, all I knew was that Justice Carter was the only Golden Gate graduate to have served on the California Supreme Court, where he was an Associate Justice from 1939–1959. Fred asked me to find out a little more about him; thus began this book.

I first turned to my friend, colleague, and later co-editor of this work, Allan Brotsky. Allan had been practicing law in California for the last fifteen years that Justice Carter was on the bench, and it seemed like he knew every lawyer in California. He told me that Carter had been a great progressive voice in California in the 1940s and 50s, that he had famously refused to sign a loyalty oath as a member of the Court, that he was a “mountain man” in the style of Justice William O. Douglas, that his dissenting opinions on behalf of civil rights and liberties, defendants’ rights and the rights of labor were legendary, and that he wrote so many solo dissenting opinions that he was popularly known as “the lone dissenter.”

My research assistant, Todd Handler (GGU ’06), burrowed his way into the collection of the Bancroft Library at UC Berkeley, where he found an early 1960s biography of Justice Carter’s decisions, in the form of a typewritten manuscript (with hand corrections) by Robert Kenny. Kenny had served as the Attorney General of California from 1943–1947, and then later as a Superior Court judge in Los Angeles. With help from Kenny’s manuscript, I was able to identify some of Justice Carter’s most important dissents.

Todd also found Justice Carter’s grandson and namesake, Jesse “Scott” Carter, who recently retired after many years as a history professor at Shasta College. Scott had a treasure trove of information and memorabilia, much of which he has generously donated to the Golden Gate Law Library, where it has been

archived as the Jesse W. Carter Collection by Collection Development Librarian, Janet Fischer. We also had invaluable help from our former Law Library Director, Margaret Arnold, our current Law Library Director, Michael Daw, and our Associate Law Library Directors, Mohamed Nasralla and Maryanne Gerber. Scott's materials included notes by Justice Carter indicating which of his dissents he thought were the most important, which proved to be a valuable guide in selecting cases for this volume.

In January 2005, when I moved from Associate Dean for Academic Affairs to Associate Dean for Faculty Development, Fred asked me to organize a series of lectures to honor Justice Carter. We began what is now the "Jesse Carter Distinguished Lecture Series" with a presentation on California legal history by retired California Supreme Court Justice Joseph Grodin. Justice Grodin's talk was so inspiring, we persuaded him to write a foreword to this book. That year we also sponsored presentations by Professors Barbara Babcock, Maria Ontiveros, Carrie Menkel-Meadow, and Ian Haney-Lopez. The following year our topic was "dissent," and again one of our speakers became a contributor to the book, when Judge William Fletcher of the U.S. Court of Appeals for the Ninth Circuit gave such a wonderful talk on the value of dissenting opinions that our law review editors asked to publish it; it is also reprinted herein. We have also had the privilege of sponsoring presentations by retired California Supreme Court Justice Cruz Reynoso, Ninth Circuit Judge Marsha Berzon, American Law Institute President Michael Traynor, California P.U.C. Commissioner Timothy Simon, State Bar President Jeffrey Bleich, and ACLU Northern California Executive Director Maya Harris. We are grateful to all of them for their contributions, and to Mateo Jenkins, Sandra Derian, Jill Goetz and Cynthia Childress for organizing and publicizing their visits.

In the fall of 2005, inspired by the material I had read on Justice Carter, I proposed to the Golden Gate faculty that we co-author a book of essays on Justice Carter's dissents, with each participating faculty member taking a single dissent and writing an essay about the opinion. I agreed to serve as editor; Allan Brotsky later agreed to join me as co-editor. The response was enthusiastic. In the end, 12 faculty and our 2008–2009 law review editor-in-chief each wrote a chapter. Soon after, Allan Brotsky joined me in the editing process. The preface from this point forward reflects our work together.

The book begins with a foreword by Justice Grodin. He succinctly tells us why we should care about Justice Carter's dissents, and perhaps why they have been largely forgotten. As this volume will reveal, the dissents were, in Justice Grodin's words, at times "vitriolic" and filled with "righteous indignation." But they exhibited prescience on the direction of constitutional rights, and "the expression of a fiercely independent spirit."

Following the foreword, we present a biography of Justice Carter by California lawyer and legal historian J. Edward Johnson, published in 1966 by Bancroft Whitney on behalf of the State Bar Committee on the History of Law in California. Johnson relates Justice Carter's service as a trial lawyer (having tried over 1,000 cases), district attorney, city attorney, state bar governor and member of the California Legislature before his appointment to the Supreme Court by Governor Culbert Olson. The discussion of Justice Carter's service on the Court focuses on his dissenting opinions, and on an exchange between Justice Carter and Dean Roscoe Pound of the Harvard Law School, in which Dean Pound criticized the frequency, and what he viewed as intemperate language, of Justice Carter's lone dissents. Justice Carter, of course, dissented.

Next, Justice Brennan and Judge Fletcher eloquently defend the importance of the dissenting opinion against critics like Dean Pound. Both judges assert that in addition to pointing out flaws in the majority opinion, dissents provide a roadmap for future change.

Justice Brennan's essay was delivered at Hastings College of the Law as a Mathew Tobriner Memorial Lecture. As Justice Brennan noted, Justice Tobriner, like Justice Carter before him, was a frequent dissenter on the California Supreme Court, and like Justice Carter, he saw many of his dissents embraced by the United States Supreme Court. Borrowing from Joan Didion's essay, "Why I Write," which in turn was borrowed by Didion from George Orwell, Brennan argues that the dissenter writes not as an "egoist act," but as an act of judicial necessity. He asserts that each justice "must be an active participant, and, when necessary, must write separately to record his or her thinking."

Justice Brennan explains how dissenting opinions developed and evolved from the early view that all opinions must be unanimous (which is still the rule in some systems). He describes the justification for a judge's authority to dissent as central to the nature of the Supreme Court itself, as it evolved from its brief tradition of unanimity to the first true dissent in 1806. While often judges are encouraged to yield to the view of the majority in order to present a united front, Justice Brennan's essay argues that unanimity should never be achieved through a sacrifice of conviction; it is more important for judges to maintain their independence.

In addition to allowing a dissenter to take a stand as an individual by interacting and sharing ideas among present court members, Justice Brennan explains that a dissent has the broader purpose of ensuring the relevance of the Constitution by creating a dialogue across time with future courts. Even if the dissent never ripens into a later majority opinion, it can still improve judicial decision-making by forcing a later court to reconsider fundamental questions when it revisits an issue. "A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reason-

ing can continue to be evaluated, and perhaps, in time, superseded.” In so doing, dissents prevent the judicial decision-making process from becoming stale.

In response to those who believe dissents undermine public confidence in the court, he quotes from Chief Justice Charles Evan Hughes to explain that it is more important to maintain the character and independence of the judges. He states, “where significant and deeply held disagreement exists, members of the court have a responsibility to articulate it.” This duty, as he calls it, is not limited to the judiciary. He encourages all Americans to “speak up when we are convinced that the fundamental law of our Constitution requires a given result.”

Judge Fletcher’s essay was delivered at Golden Gate University School of Law as a Jesse Carter Memorial Lecture. Fittingly, the theme of the lecture series that year was “Dissent.” Judge Fletcher argues that dissents make majority opinion writers improve their opinions, by challenging them. Even when a dissenter cannot persuade the majority to adopt his or her point of view, a dissent may still help improve the majority opinion by getting its author to change the analysis or the description of the facts. Also, dissenters force majority opinion writers to confront facts and law they would otherwise ignore, which is a dissenter’s way of keeping the majority “honest.” A dissent can also point out the legal and practical consequences of the majority opinion, which can help explain the significance of the majority opinion, and thus predict the future direction of the law. Other purposes of dissent are to make it clear to the losing party that its arguments were heard and understood, to encourage legislators to reform the law by legislative amendment, or to appeal to the judgment of other judges. And, echoing the primary justification offered by Justice Carter, dissents by intermediate appellate judges encourage higher courts to review the majority’s decision. Finally, Judge Fletcher, taking up the principal justification offered by Justice Brennan (for whom he clerked), states that “a dissent can appeal to the judgment of a later time.” In thus describing dissenting judges as “secular prophets,” Judge Fletcher explains that this is what he regards as the most important function of dissent; dissenting judges “have pointed the way to our future, showing us what we and our government can and should become.”

The remainder of the book is principally organized around Justice Carter’s leading dissenting opinions. The first chapter, by Professor Susan Rutberg of Golden Gate, concerns Justice Carter’s dissents in the several appeals and stay requests filed by Caryl Chessman. Chessman had been convicted of rape and kidnapping, and sentenced to death, in a case that galvanized support for and opposition to the death penalty. Without Justice Carter’s intervention, his 12 years on death row would undoubtedly have been much shorter. (One might speculate that if Justice Carter hadn’t died in 1959, Chessman might have lived even longer; he was executed soon after, in 1960.) As Professor Rutberg ex-

plains, “Chessman’s legal claims came before California Supreme Court Justice Jesse W. Carter five times. On two occasions, Carter dissented from the majority opinions which denied Chessman’s due process claims regarding the accuracy of the trial transcript and the fairness of his trial (Chessman I and II). In 1952, and again, in 1954 (Chessman III), Carter granted stays of Chessman’s execution. The last time Chessman’s case came before Justice Carter, in 1955, he again dissented and excoriated the majority for denying Chessman the right of access to legal materials and counsel while incarcerated (Chessman IV).” Professor Rutberg brings the Chessman controversy forward to our current debates on the death penalty and particularly the problem of wrongful conviction, pointing to the relevance of Justice Carter’s views today.

Other chapters concerned with the criminal justice system include essays by Professor and Associate Dean Rachel A. Van Cleave and Professor Helen Chang. Professor Rachel A. Van Cleave’s chapter concerns Justice Carter’s 1942 dissent in *People v. Gonzales*, 20 Cal. 2d 165 (1942). The majority rejected Mr. Gonzales’ appeal to adopt an exclusionary rule to prevent the state from using illegally seized evidence in a criminal prosecution. Professor Van Cleave explains that in his dissent Justice Carter’s “analysis provided an initial spark to the modern state constitutional law movement in California, as well as a strong caution against allowing state officials to ignore the law with impunity.” In time, the Court adopted Justice Carter’s view. As Professor Van Cleave explains, “Thirteen years after *Gonzales* the California Supreme Court adopted Justice Carter’s position in *People v. Cahan*, 44 Cal. 2d 434 (1955), in an opinion written by Justice Traynor, who had written the majority opinion in *Gonzales*.”

Professor Helen Y. Chang’s chapter tells the story of Justice Carter’s dissent in *People v. Crooker*, 47 Cal. 2d 348 (1956). Mr. Crooker was arrested as a murder suspect. He asked to speak with a lawyer, but the police denied the request and questioned him for 14 hours until he confessed. His confession was read to the jury, which convicted him. On appeal from his conviction and death sentence, the Court rejected his argument to exclude the confession, affirming his sentence. Justice Carter dissented, arguing that the confession should have been suppressed. As Professor Chang explains, Justice Carter’s dissent “marks the beginning of the judiciary’s unwillingness to allow unfettered police interrogation and sets the stage for the United States Supreme Court’s 1966 decision in *Miranda v. Arizona*” [384 U.S. 436 (1966)].

On the civil rights and civil liberties side, chapters by Professor Marc Stickgold, former Dean Frederic White, Professor Cliff Rechtschaffen, writing with David Zizmor (GGU ’07), and Golden Gate University Law Review Editor-in-Chief Jessica Beeler, illustrate the importance of Justice Carter’s dissents to the development of civil rights and liberties in California.

Professor Marc Stickgold uses Justice Carter's dissent in *Steinmetz v. Board of Education*, 44 Cal. 2d 816 (1955) to discuss Justice Carter's broad aversion to loyalty oaths, which became a ubiquitous feature of American society in the late 1940s and 1950s. Professor Stickgold discusses what Justice Carter aptly described as the "hysteria" of the period, and several cases in which Justice Carter dissented as the Court permitted civil servants and university professors to be fired, and churches to lose their tax deductions, for refusing to sign loyalty oaths. In the *Steinmetz* case, Professor Stickgold explains that, "Professor Harry Steinmetz had become a professor of psychology at San Diego State College in 1930. He had, throughout his career, been an outspoken liberal in the then strongly conservative city of San Diego. Efforts to get him fired for various political reasons dated back to before World War II. Finally, he was fired in 1954 after ostensibly failing to answer questions concerning his politics and memberships under oath." The Court upheld the termination, with only Justice Carter dissenting. Professor Stickgold continues, "In *Slochower v. Board of Education*, the [U.S. Supreme] Court reversed the dismissal of a college professor discharged under almost identical circumstances to Dr. Steinmetz. Echoing Justice Carter, the Court said, 'At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused to refuse to testify ... has been recognized as "one of the most valuable prerogatives of the citizen." ... The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as the equivalent either to a confession of guilt or a conclusive presumption of perjury.' Justice Carter's views in his *Steinmetz* dissent had been vindicated." Professor Stickgold goes on to explain how *Slochower* was the beginning of a long line of U.S. Supreme Court cases, in which the Court (and in time the California Supreme Court) began to chip away at the legal justifications for loyalty oaths, eventually adopting Justice Carter's broad objections to the logic and constitutional validity of the oaths. As Professor Stickgold concludes, "Nowhere was [Justice Carter's] forward looking view more courageous, and ultimately successful, than in his fight against the tyranny of loyalty oaths."

Former GGU Dean Frederic White has contributed an essay describing Justice Carter's dissent in *Hughes v. Superior Court of Contra Costa County*, 32 Cal. 2d 850 (1948). In *Hughes*, a group of black civil rights activists picketed at a Lucky's Stores retail grocery store, demanding that the company hire black workers in rough proportion to its percentage of black customers. The company sued to restrain the protesters, and after the Superior Court issued an injunction the picketers continued their protest, leading to their arrest for violating the injunction. The protesters offered a due process, free speech and right to peacefully picket defense, which the Court rejected, with Justice Carter as one of the two dissenters. As Dean White

writes, “Carter took the position that ‘the end result of the majority decision is to establish a rule which may be applied to prevent picketing for the purpose of publicizing the fact that an employer is discriminating against persons because of race or color in the selection of employees.... [I]f the picketing is truthful and peaceful, it may be resorted to as the exercise of the constitutional right of freedom of speech or press, and that is all petitioners did in this case.’” Carter’s position, Dean White explains, was a harbinger of the coming legal disputes over affirmative action, and his views on the right to demonstrate in the face of an injunction violating free speech remain controversial.

Professor Cliff Rechtschaffen, writing with David Zizmor (GGU ’07), has written a chapter on Justice Carter’s dissent in *Payroll Guarantee Association v. The Board of Education of the San Francisco Unified School Dist.*, 27 Cal. 2d 197 (1945). The case concerned a decision by the Board to deny a speaker’s permit to Gerald L. K. Smith, described by Justice Carter as a “master rabble-rouser of the extreme right wing” [known for his] “fiery bigotry, aimed chiefly at blacks and Jews.” The Board reasoned that Smith’s speech would provoke disruptive protests, raising the problem of the “heckler’s veto.” The Court affirmed the board’s decision, with Justice Carter again dissenting alone. In his dissent, as described by Professor Rechtschaffen and Mr. Zizmor, Justice Carter explained that “even if Smith’s speech did prove provocative, it was the job of the proper authorities to control any adverse reaction by the audience and protect Smith’s constitutional right to speak (if ‘there is a threat or assumption of noise, commotion, rioting or violence ... [it] should be and presumably will be controlled by the proper authorities.’)” Four years later, the U.S. Supreme Court affirmed Justice Carter’s position, holding in *Terminiello v. Chicago*, 337 U.S. 1 (1949), a strikingly similar case involving a supporter of Smith, that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”

In the final chapter on civil rights and liberties, Golden Gate University Law Review Editor-in-Chief Jessica L. Beeler (GGU ’09), reveals the story of *Takahashi v. Fish & Game Commission*, 30 Cal. 2d 719 (1947). Torao Takahashi immigrated to the United States from Japan in 1907, and worked as a commercial fisherman until 1941, when he was pulled off his boat along with all other Japan-

ese fishermen and imprisoned as a potential spy. In 1943 he was cleared of any suspicion of espionage and sent to the internment camp at Manzanar, where he was reunited with his wife and children, who had also been interned. In 1945 they were permitted to return home to Southern California, but Mr. Takahashi was denied a license to resume commercial fishing because of a new California statute that, in effect (and evident intent), prohibited granting such licenses to Japanese immigrants. When Mr. Takahashi challenged this racial restriction on constitutional grounds, the California Supreme Court upheld the rule, holding that it was a reasonable restriction on the use of natural resources. Justice Carter dissented, joined by Chief Justice Gibson and Justice Traynor, arguing that this was race discrimination in violation of the Fourteenth Amendment. In 1948, in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), the U.S. Supreme Court vindicated Justice Carter, reversing the California Supreme Court. In drafting her essay, Ms. Beeler was in touch with Mr. Takahashi's granddaughter Lilian Takahashi Hoffecker, who has generously donated a photo of her grandfather to the Jesse Carter collection at the GGU Law Library.

Turning to labor law issues, Justice Carter often advocated on behalf of the rights of workers. As Professor Marci Seville relates in her chapter, he expressed that support forcefully in two 1953 decisions, *Mercer-Fraser v. Indus. Accident Commission*, 40 Cal. 2d 102 (1953) and *Hawaiian Pineapple Co. Ltd. v. Indus. Accident Commission*, 40 Cal. 2d 656 (1953). In both cases, the California Supreme Court had the job of deciding how to interpret a section of the Workers Compensation Act that allowed additional monetary awards when an employee was injured because of an employer's "serious and willful misconduct." The Court pulled back from its prior expansive readings, setting forth a restrictive view that, in Justice Carter's dissent, he described as "blotting out four decades of progress in the field of social legislation for the benefit of the working men and women of this state." As Professor Seville explains, "subsequent opinions of the Supreme Court and the lower appellate courts have artfully distinguished *Mercer-Fraser* and *Hawaiian Pineapple*, in order to uphold increased awards to injured workers in certain circumstances. And, while the Court has not adopted Justice Carter's liberal interpretation of Labor Code section 4553, his eloquent dissents in *Mercer-Fraser* and *Hawaiian Pineapple* stand as a moving tribute to the sacrifices of the working men and women of California."

On the rights of consumers and personal injury victims, Professor Michael A. Zamperini's chapter concerns Justice Carter's opposition to the doctrine of contributory negligence in *Buckley v. Chadwick* 45 Cal. 2d 183 (1955). Buckley was killed when a cable broke on a crane owned by Chadwick and operated by Buckley's business partner. His widow sued the crane owner for wrongful death. Following an instruction on imputed contributory negligence as a complete defense,

the jury returned a verdict for Chadwick, which the Court affirmed. Justice Carter dissented, objecting to the application of contributory negligence in wrongful death actions. As Professor Zamperini explains, Justice Carter “criticized the use of common law contributory negligence principles in a statutory cause of action for wrongful death, [and further] he also underscored the basic unfairness of contributory negligence itself as a legal concept.” His views would be adopted by the full Court in *Li v. Yellow Cab Company of California*, 13 Cal. 3d 804 (1975), where “the California Supreme Court by judicial decision, instead of the Legislature by statute, abandoned contributory negligence, for reasons of ‘logic, practical experience, and fundamental justice’ in favor of comparative negligence, ‘a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.’” As Professor Zamperini concludes, “All of these basic tort concepts, defendant’s negligence, imputed negligence from a third party, plaintiff’s negligence (whether contributory or comparative), and the role all play in wrongful death are woven together in Justice Carter’s dissent. While on this issue he was ‘the lone dissenter,’ half a century later he is truly the voice of the majority.”

Another field where Justice Carter’s dissents have now been vindicated is intellectual property law. Professor Marc H. Greenberg’s chapter demonstrates how prescient Justice Carter was in his dissent in *Kurlan v. CBS*, 40 Cal. 2d 799 (1953). As Professor Greenberg explains, “Arthur Kurlan was a California-based independent writer and producer of motion pictures, television and radio shows during the 1940s and 50s. In the early 1940s he became interested in a popular book written by Ruth McKenny, entitled *My Sister Eileen*, which had spawned a popular theatrical production that ran on Broadway, a motion picture photoplay, as well as other copyrighted writings which had also featured the main characters from the book.... In March 1946, he entered into a license agreement with Ruth McKenny in which she assigned the radio and television rights to her stories and characters to him.... Kurlan produced ... [a pilot] and submitted it in June 1946, to the Columbia Broadcasting System (CBS) for consideration of their acquisition of the program. According to Kurlan, after extensive negotiation, CBS declined to acquire the program, and instead informed Kurlan that they “‘intended to use’” his idea, characters, and format “‘without compensation therefore by merely changing the names of the characters and describing the leading female characters as girl friends instead of sisters’; and, in this way, CBS intended to be free of any obligation to pay Kurlan for the rights to the work. A month later CBS announced its forthcoming new radio and television show, entitled *My Friend Irma*, a show CBS ultimately released in both of those formats in April 1947.” In the subsequent lawsuit, the trial court held, and the California Supreme Court agreed, that by allowing her story to be published in various formats, the story itself had

entered the public domain. Justice Carter dissented, arguing that the publication of the story did not place it in the public domain, relying on several innovative principles of intellectual property law, which have been subsequently broadly adopted. As Professor Greenberg concludes, “What is . . . rare is for a judge, in a dissenting opinion, to express prescient views regarding important issues that were in their nascent stages at the time of the drafting of his opinion. Justice Carter’s well deserved reputation for insightful and creative approaches to the law is further burnished by his dissent in the Kurlan case.”

Justice Carter’s dissenting views have not all been vindicated by time. For example, consider his views on the tort of privacy. As Professor Markita D. Cooper, now Associate Dean at Florida A & M University College of Law explains, Justice Carter’s solo dissent in *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224 (1953) remains a voice in the wilderness. As Professor Cooper explains, “John and Sheila Gill, a married couple, were photographed in an affectionate embrace at their place of business in the Los Angeles Farmer’s Market. The photograph, taken without the couple’s knowledge or consent, later appeared in the magazines *Ladies Home Journal* and *Harper’s Bazaar* as illustrations for articles about love.” When the couple sued for invasion of privacy, the Court initially found merit in their claim, but following rehearing, the Court ruled 6–1 against them, with Justice Carter dissenting. In his view, “Members of opposite sexes engaging in amorous demonstrations should be protected from broadcast of that most intimate relation. Nothing could be more intrinsically personal or more within the area of a person’s private affairs than expressions of the emotions and feelings existing between such persons. That should be true even though the display is in a public place.” Cementing the majority’s view, Professor Cooper writes, “In 1960, Dean William Prosser wrote what would become one of the definitive articles on tort privacy law. The article included the declaration that there could be no privacy in a public place, using *Hearst* as a key example. Later, the Second Restatement of Torts adopted the rule in its comments, also citing *Hearst*.” Professor Cooper concludes that if Justice Carter’s views had prevailed in *Hearst*, “tort law might have developed a different, more nuanced view of whether a right of privacy should apply in public spaces.”

Turning from privacy to stockholders’ rights, Professor Michele Benedetto Neitz has written a chapter on *Hogan v. Ingold*, 38 Cal. 2d 802 (1952). “With the current renewed focus on the ability of individual shareholders to monitor corporate governance,” Professor Benedetto Neitz writes, “Justice Jesse Carter’s focus on the substantive rights of shareholders renders his dissent in *Hogan v. Ingold* particularly relevant today.” As Professor Benedetto Neitz explains, Mr. Hogan “purchased shares in the Washington Holding Company in 1949, and subsequently became concerned that members of the board of directors had engaged

in fraud. Hogan's allegations of fraudulent activity committed by Washington's officers and directors may appear strikingly familiar to individuals living in today's post-Enron era. Among other things, Hogan accused the defendants of issuing false financial statements on behalf of the company, leasing company property to organizations under defendants' control for less than its market rental value (and subsequently failing to collect rental payments), and providing a lease with an option to purchase at below-market value to an organization controlled by defendants." As a result, he brought a shareholder's derivative action against the officers and directors. The Court held that he was required to post a substantial security bond before going forward, resulting in the dismissal of his action. Professor Benedetto Neitz writes, "Justice Carter's dissenting opinion demonstrates his concern for the plight of the derivative plaintiff. While the majority viewed a derivative plaintiff as merely a representative of the corporation, Justice Carter espoused the view that a shareholder plaintiff has much at stake in derivative litigation.... Subsequent developments in California law relating to derivative lawsuits acknowledge some, but not all, of Justice Carter's concerns.... If Justice Carter's vision of a rights-based approach for derivative plaintiffs could be realized, individual rights would be strengthened and access to justice for derivative plaintiffs would be assured."

Our final faculty chapter looks ahead to where one of Justice Carter's dissents may yet influence a growing movement in American law. Professor Janice Kosel argues that Justice Carter's dissent in *Simpson v. City of Los Angeles*, 40 Cal. 2d 271 (1953) supplies the roots of the now-blossoming animal rights movement. In *Simpson*, a group of Los Angeles dog owners sued to overturn a city ordinance that permitted the City to sell impounded dogs for medical research with minimal notice to the owners. The Court upheld the ordinance, with Justice Carter dissenting alone, on the ground that the notice provisions were insufficient to meet the requirements of due process of law. Professor Kosel argues that we should recognize a more significant argument embedded in his opinion: "The basic distinction between the majority and dissenting opinions in *Simpson* is phrased as a disagreement over what due process means for the owner of an impounded dog, what notice is due. At bottom, though, the controversy is more profound. It is rooted in Justice Carter's keen understanding of human nature and animal behavior and his appreciation of the relationship between a person and her pet. His analysis was confined by the traditional notion that animals are property—even the most activist judge is limited by the tools at hand. That was the only theory by which he could offer protection to an impounded pet and her owner. But surely Justice Carter's opinion evinces the conviction that animals are something more than property. In a very real sense, then, Justice Carter's impassioned dissent augured the birth of the animal rights movement."

Following the faculty essays, we reproduce a speech delivered by Justice Carter on the question of loyalty oaths. The speech was delivered on October 30, 1950, as the loyalty oath craze was spinning out of control. Justice Carter, with his usual common sense and uncompromising style, spoke to the absurdity of these oaths as a device for ferreting out traitors.

We conclude our volume with a contribution from Collection Development Librarian Janet Fischer of the Golden Gate Law Library, who has written a guide to the library's Jesse W. Carter Collection.

We could not have written and edited this material without the efforts of several faculty support staff at Golden Gate, including Whitney Nicoley, Benjamin Mayr, and Pat Paulson. Allan Brotsky relied on Michael Minkus (GGU '08) for additional editing help. And Rachael Buckman (GGU '08) pulled together all of the prior work, made hundreds of editing suggestions, persuaded our colleagues to approve our changes, and worked tirelessly to turn its many parts into a unified whole. Jessica Beeler and Kelly Miller did a final edit that uncovered scores of errors. Elaine Elison and Stan Yogi sent us some very helpful files on the loyalty oath controversy. Those that remain are our responsibility entirely.

We gratefully acknowledge the permissions granted to republish the following copyrighted works: Justice William J. Brennan, Jr., *In Defense of Dissents*. ©1986 by University of California, Hastings College of Law. Reprinted from *Hastings Law Journal*, Volume 37, Number 3, January 1986, 427, by permission. Judge William A. Fletcher, *Dissent*. ©2009 by Golden Gate University Law Review. Golden Gate University. Reprinted from *Golden Gate University Law Review*, Volume 39, Number 3, Spring 2009, 291, by permission. J. Edward Johnson, *Jesse W. Carter*, reprinted from *Justices of California 1900–1950 Volume II*. ©1966 by the Bancroft-Whitney Company. All rights reserved. Reprinted with permission from The State Bar of California and West, a Thomson Reuters business. No part of this work may be reproduced, stored in a retrieval system, or transmitted in any medium without prior written permission of The State Bar of California.

As we prepare the final manuscript for publication, we are also preparing to leave Golden Gate. Allan is retiring; David is moving to Berkeley Law. We are thankful to Justice Carter for inspiring us with his courage, to Dean Fred-eric White for his vision in seeing the value of the project, to Dean Alan Ramo for his commitment to continue the project, to incoming Dean Drucilla Ramey for her continuing commitment to Justice Carter's memory, to our colleagues at Golden Gate for their contributions to the book and long-standing support for the project, and to our wives Muriel Brotsky and Marcy Kates, for their love and support, and for putting up with us.

July 2009

San Francisco, California

FOREWORD

*By Joseph R. Grodin**

Until fairly recently, I have to admit, my only recollection of Justice Jesse Carter was of a newspaper story I read long ago (in 1959, it turns out) about Marin County officials ordering him to remove a dam he had constructed on his ranch, allegedly illegal and a hazard to his neighbors, and of an accompanying photo showing the Justice with a rifle and threatening to shoot “the first S.O.B. who sets foot on my property.” So when David Oppenheimer first invited me to participate in a tribute to the defiant Justice, I had some hesitation. But that was only because I didn’t know enough about him.

Carter was Governor Culbert Olson’s first appointment to the California Supreme Court, in 1939. Subsequent appointments included Phil Gibson and Roger Traynor, and it was those two who gained well-deserved national recognition, for themselves and for the court, as groundbreakers in the development of the law. Yet it was Carter who often led the way, not through majority opinions (of which he authored few) but through his dissents—more than 500 of them over a period of 20 years, if one counts his dissents from denial of hearing. He was often referred to as the “lone dissenter,” but that is not quite accurate; frequently one or two other justices signed his dissents. What is remarkable is how frequently the positions he expressed in his dissents came to be adopted by a majority of the court, or (where federal law was implicated) by the United States Supreme Court. His dissents were often vitriolic—he was taken to task by no less a personage than Roscoe Pound for his lack of collegiality—and frequently characterized by expressions of righteous indignation. But it was Jesse Carter who stubbornly, and ultimately successfully, led the battle to exclude illegally obtained evidence; it was he who blazed the trail to reliance upon state constitutional provisions independent of the federal Constitution; it was he who (joined by Traynor and Gibson) insisted that it

* Former Associate Justice, California Supreme Court; Distinguished Emeritus Professor, University of California, Hastings College of the Law.

was unconstitutional to exclude aliens from fishing off the California coast; and anticipated the U.S. Supreme Court's position on federal preemption in the field of labor relations. If one focuses upon substance, rather than style, Jesse Carter's position on the frontier of legal change is clearly discernible, and quite remarkable.

There is a pattern to his dissents. They reflect a strong willed commitment to a constellation of values that include self reliance, individual liberty, procedural fairness, distrust of the state, respect for juries, protection of the underdog, empathy for working people, and cautious support for unions and collective bargaining. It is a constellation which cannot easily be characterized as "liberal" or "conservative," but against the backdrop of Carter's life experiences, the constellation takes shape as the expression of a fiercely independent spirit.

Carter was a child of California pioneers, grew up in a log cabin on a farm along the Trinity River in northwest California, left home at the age of 14 to earn money to go to school in San Francisco, attended night classes at Y.M.C.A. (later Golden Gate) law school, became active in politics on behalf of Hiram Johnson and the Progressives, moved back to Shasta County where he became District Attorney and practiced law, represented small farmers in disputes over water rights, established a reputation as a leading litigator, fighting, as he put it "for the rights of the common man, the underdog." Elected to the first Board of Governors of the newly formed State Bar in 1927, he became active in politics, a supporter of Herbert Hoover in 1928 (because he didn't like Al Smith), then, as a delegate to the Democratic convention in 1932, a supporter of Franklin Roosevelt, and later became Northern California chairman of Culbert Olson's campaign for governor of California. Carter was elected to the state senate in 1939, and it was from that position that Olson (not without controversy) appointed him to the Supreme Court.

In an oral interview conducted for the Regional Cultural History Project at U.C. Berkeley (and now on file in the Bancroft Library) shortly before Carter's death in 1959, he expressed the hope that "a hundred years after I am dead and forgotten, men will be moving to the measure of my thought." I wouldn't want to bet against it.

JESSE W. CARTER

Seventy-Fifth Justice, September 12, 1939–March 15, 1959

*By J. Edward Johnson**

Jesse Washington Carter's beginnings were, in some respects, as humble as Lincoln's. The frontier with its meagerness of worldly means and educational opportunities was common to both. Carter found his way more or less unwittingly to the law while preparing himself educationally for the battle of life. It became the door to his most golden opportunities. His life furnishes hints as dependable as may be found anywhere as to that out of which success is made, not omitting the part iron will and sustained hard work play, not for a season, but all the way through life. Possibly the greatest contribution of the simple close-to-nature life of his youth to his success in life was the part it played in building a physical constitution that proved equal to the rigors he subjected himself to in winning his goals, including admission to the bar.

Carter was born in Carrville, Trinity County, California, on December 19, 1888, in a log cabin built by his father on their homestead, and was next to the youngest of the eight children born to his parents, Asa Manning and Josephine Amanda (Sweet) Carter. His father was born in Iowa and came as a soldier to Fort Jones in Siskiyou County about 1860, where he was mustered out in 1865. Although born in San Francisco, his mother later moved to Callahan, Siskiyou County, where she married Asa Carter in 1870. Carrville was only a small depot on the Marysville-Portland stage line and hardly a community. With the nearest school seven miles away, the older children of the family taught Carter at home from the books they had used in school. When he was eight the first school house was built on

* Member of the California Bar and author of *History of the Supreme Court Justices of California, 1900–1950*, Vol. II, published by Bancroft-Whitney in 1966 under the auspices of the State Bar Committee on the History of Law in California. This section is reprinted with permission from West Publishing and the State Bar of California.

Coffee Creek some two miles away. By that time he had read up to McGuffey's *Fifth Reader*. At this time his father died, and in 1898 the family moved to Greenfield, Siskiyou County. Later they moved again to Redding, but were back to Carrville on their farm in 1902, which year Carter graduated from the grades.

Working in the nearby mines (mostly crude hydraulic mining), logging camps, saw mills, etc., Carter had accumulated \$300 by 1905, when, aged seventeen, he went to San Francisco and entered Lick-Wilmerding School to study electricity. In a year or two he had acquired sufficient knowledge to get a job in the shops of the United Railroads at Geneva Avenue. Upon leaving Lick-Wilmerding School, he entered Drew's "Prep" School, of high school standing, taking night classes and working during the days. There was an interruption in his education as a result of the 1906 Earthquake and Fire, which catastrophe he witnessed first hand, the fire reaching within three houses of where he was living. He then left San Francisco for some months and worked at various jobs, but eventually returned and continued with his work and schooling.

At this time, the graft prosecutions of 1906–1909 got under way. Francis G. Heney's work as prosecutor as reported in the press captivated Carter. The first manifestation of his dissenting disposition came when the United Railroads passed out cards to employees to pledge their support to Charles M. Fickert for District Attorney. Carter, although he disagreed, was not old enough to vote on the matter. It was at this time that he decided on a career in law. He had just been offered a scholarship to Occidental College to study for the ministry (Presbyterian). This he considered but decided against.

In 1909, when he was twenty-one, he entered the Y.M.C.A., a night law school [editor's note: now Golden Gate University School of Law]. A year later he married Tiny Elod Gish, then residing in Walnut Creek, by whom all three of his children were born,¹ two of them while he was still in law school. He worked hard as a student² and was admitted to the bar in 1913, taking the bar examination some months before his graduation. While still attending school and working, he tried practice in San Francisco for a few months, working part time in Hugo Newhouse's office, but before the year 1913 was over, he

1. Jesse Oliver, Harlan Field, Marian (Mrs. Silvio Bui).

2. Carter commenced his first year as a law student three months late. His law course study routine was arduous. He stated that he went in for no recreation or social engagements. He maintained good grades and of the 49 who took the bar examination when he did he was one of the 19 successful ones. (*Carter Book*, 29, 30, 31.) The reference, *Carter Book*, is to a large manuscript in book form of 546 pages prepared by Corinne L. Gilb of the University of California as a cultural history project, 1959. Much of the contents are recordings of Carter's statements and material he otherwise supplied.

went to Redding to help his sister-in-law settle the estate of her late husband, Carter's older brother, William. He then decided to settle in Redding.

Along with his practice, Carter entered into the political life of the community of Redding. He ran for district attorney in 1914 but was defeated by twenty-three votes. Four years later he was elected to this position, and in 1922 re-elected, winning by only six votes. He ascribed his drop in popularity to his vigorous enforcement of the Prohibition laws. He ran for the state senate in 1926 but was defeated by James M. Allen of Yreka. In 1926 he was elected a member of the first Board of Governors of the California State Bar and was re-elected from time to time. He took this assignment seriously and became a familiar figure on a state-wide basis among the profession. In 1937 he became city attorney for the cities of Redding and Shasta. In January, 1939, he was elected a state senator at a special election to succeed John B. McColl who had been killed in an automobile accident.³ He was active from the first in the Boy Scout activities of the area.

Carter was in active practice of the law twenty-six years before becoming a member of the Court. He participated during that period in the trial of over a thousand cases in the Superior Court, with more than three hundred of them going to the appellate courts.⁴ In 1938, the year before he left practice, the firm, consisting of himself and seven other lawyers, tried fifty-two cases and won fifty of them. They won the other two on appeal.⁵ Carter explained that at this time the firm investigated carefully every case before they took it through trial, and settled the doubtful ones. He estimated that seventy-five per cent of his practice related to water cases. Throughout the years he was a thorn in the side of the Southern Pacific Railroad Company and won some twenty-five or thirty personal injury cases which he brought against that company. Two or three years before he went on the Court at the urgent invitation of the Railroad Company, all his pending cases against it were settled, and he became their lawyer. The retainer and monetary advantages involved undoubtedly dictated this course. At the height of his practice, his firm maintained offices in Redding and Yreka. Carter and three of his associates handled the cases, while the other four did office work, research, etc. Being unable to procure suitable office space for his firm in Redding, he purchased a lot a block from the Courthouse and built his own offices of eight rooms and basement. This constituted a pretentious showing in a town of possibly not over a score of lawyers.

3. While the *Carter Book* constitutes the best source of biographical material, the sketch by Edward F. O'Day in *The Recorder* of September 5, 1940, is fairly complete.

4. *Carter Book*, p. 382.

5. *Ibid.*, p. 98.

Carter was serving in the Legislature when Governor Olson appointed him a justice of the Supreme Court on July 15, 1939, to succeed Seawell. It was not entirely clear that Carter was eligible for this position. The State Constitution provided that anyone holding an elective position could not be appointed to any office other than an elective one. Since justices of the Supreme Court were appointed, subject to confirmation by the electorate by a “yes” or “no” vote at the following election, was the office elective or appointive? When Olson discussed the matter of appointing him, this obstacle was mentioned. Carter indicated he would be glad to fight the issue.

The Commission on Qualifications consisting of Chief Justice Waste, Attorney General Earl Warren, and the senior presiding justice of the District Court of Appeal, John T. Nourse, ruled Carter ineligible for the purpose of bringing about a judicial determination of the matter.⁶ It observed that State Senator William P. Rich of Marysville “had once been held ineligible for the same post.”⁷ Carter at once instituted mandamus proceedings in the Supreme Court which were argued on August 7. Robert W. Harrison from the Attorney General’s office representing the Commission argued that the post was actually appointive in that there was no element of choice, the voters merely being given the right of rejecting or ratifying a nominee.⁸ M. Mitchell Bourquin, Herbert Erskine, Edward F. Treadwell, Edward Hohfeld (one of Caner’s highly esteemed law teachers), and Max Radin represented Carter. Albert Rosenshine, Randolph V. Whiting and John L. McNab appeared as amici curiae. The court, in a six page unanimous and “history making”⁹ opinion by Shenk as acting Chief Justice, held the position elective and Carter eligible.¹⁰

The qualifications commission met again on August 28, but reached no decision. Under the commission’s rules the matter had to be referred to the State Bar for its recommendation.¹¹ At a meeting of its governors in Del Monte on September 8, the State Bar considered Carter’s eligibility and found nothing against his qualifications, whereupon the Commission the same day found to the same effect, and approved the nomination.¹²

On September 12 Carter was sworn in as associate justice in San Francisco by Chief Justice Waste. The induction ceremonies were a festive occasion, with

6. *San Francisco Chronicle*, July 25, 1939, p. 1.

7. *San Francisco News*, July 24, 1939, p. 1.

8. *San Francisco News*, August 8, 1939.

9. *San Francisco Call Bulletin*, August 15, 1939.

10. 98 California Decisions, 155 (August 15, 1939).

11. *San Francisco News*, August 28, 1939.

12. *San Francisco News*, September 8, 1939; *The Recorder*, September 12, 1939.

Chief Justice Waste presiding with his usual charm and dignity. First he called on Daniel Scott Carlton, one of Carter's partners, who reviewed the highlights of Carter's career at the bar. In closing, Mr. Carlton assured the Court that it would find Carter ever ready to assume more than his burden of the work.

The Dissenter

Since one of Carter's most distinguishing features as a member of the Court was his dissents, and since even a sketchy discussion of them gives more than a hint of his stature as a judge, this side of his life calls for a little notice of its own. It was the strong language he used that inspired comment near and far more than anything else. It caught the eye of the press and he became widely known because of it.

In 1953 Dean Roscoe Pound discussed in the *American Bar Journal*¹³ some of the language used by Carter in about a dozen of his numerous dissenting opinions, quoting freely therefrom. While he questioned denunciation of his colleagues by a judge and bursts of an outraged sense of justice, Pound nevertheless spoke of Carter as "a highly conscientious judge of long experience" from a good court. He was not indulging in undue courtesy in speaking of Carter's conscientiousness. This was amply confirmed by the great amount of extra work and labor Carter took on to prepare his dissenting opinions, some of considerable length and full of learning. Most of the time, it was a thankless task where he could expect no help from his differing associates.¹⁴ In the cases cited by Pound, each of Carter's associates on the Court as of that time wrote one or more of the majority opinions. Carter demonstrated that he was no respecter of persons, for the thinking and labors of all of them received a measure of castigation. While he was often a lone dissenter, there were times when either Gibson, Traynor, or Schauer also dissented in the same cases. Pound found that Carter had an average of six dissenting opinions in each of the ten volumes of reports examined by him, and that they ran one case in eighteen in these volumes.

13. *Cacoethes Dissendiendi: Heated Judicial Dissent*, September, p. 794. (Volume 39).

14. Said Carter in 1957: "While it is my privilege, it is not my pleasure to write dissenting opinions ... The preparation of a dissent requires extra effort ... it is an additional burden and one I choose to avoid whenever possible. But I believe it is my solemn duty ... to call attention to ... error ... in the hope that error may be corrected by a subsequent decision or by the legislature. A dissenting opinion may also be helpful in cases which are the subject of review by the Supreme Court of the United States. The latter court has held in accord with my dissent and reversed the Supreme Court of California in several cases in recent years." *Carter Book*, pp. 398–399.

Carter wrote a letter to Dean Pound dated September 14, 1953,¹⁵ expressing regret that the article in the *Bar Journal* was so limited in scope and had not called attention to many other of his dissenting opinions. However, Pound had primarily stressed intemperate language. There had been no discussion of the soundness or unsoundness of the position Carter had taken. He did mention what the subject matter of some of the cases related to in order to indicate that he did not consider them important enough to justify the strong language used. While Carter's letter was courteous, it did not breathe undue meekness. He stated that he experienced no "sense of shame or a feeling of chagrin" by reason of Pound's article. Pound was in India at the time, and Carter's letter apparently did not come to his attention until over a year later, when he finally acknowledged receipt.¹⁶ When he did write to Carter, it was primarily to commend Carter's position in the then recent case of *Cole v. Rush*. Said Pound in part: "I notice that on June 30 last the Court granted a motion for rehearing. I earnestly hope that this does not mean that the Court will go back on your opinion, which, if I may say so, appeals to me as eminently sound."¹⁷ The Court did go back on Carter's opinion, however, with Schauer writing the new opinion for the Court, leaving Carter to end up the lone dissenter.¹⁸ Carter used no strong language in this dissent.

Dean Pound's article was noted by the press. Arthur Caylor wrote an extensive piece in the *San Francisco News* which he titled "Legal Blast."¹⁹ The *Christian Science Monitor* ran a feature article entitled "An intimate message from the West Coast."²⁰ There were those who felt that Dean Pound's article was in bad taste. Erle Stanley Gardner was one of them as shown by several letters he wrote to Carter.²¹ Of the cases discussed by Pound, he picked the language from Carter's dissent in *Sanguinetti v. Moore Dry Dock Co.*, 36 C. 2d 812, as "the high water mark of judicial imitation of forensic advocacy." However, the language used there was no stronger than that used by Carter in a number of other dissents.

While Carter did not dissent in *Perez v. Sharp*, when the Court held unconstitutional Civil Code sections 60 and 69 forbidding marriage between whites and certain other races, which had been accepted as the law for nearly

15. *Carter Book*, p. 346.

16. *Carter Book*, p. 403, December 10, 1954.

17. *Carter Book*, pp. 403–404.

18. *Cole v. Rush*, 45 C 2d 345; 289 P 2d 450, October 28, 1955.

19. December 14, 1953. *Carter Book*, p. 358.

20. January 12, 1954, Harlan Trott. *Carter Book*, p. 367.

21. *Carter Book*, pp. 349, 354.

a hundred years, his concurring opinion was in the nature of a dissent to the original code sections, and he spoke of them as a product of “ignorance, prejudice and intolerance.”²² This was a four to three decision.

Taken in context some of the strong language used by Carter, including some referred to in Dean Pound’s article, is not as intemperate as it sounds when taken out of context. However, in a number of instances, the language tends to cast doubt upon the good faith as well as the common intelligence of the majority.

Concerning his use of strong language, Carter in a speech to the Lawyers’ Club in San Francisco in 1954 in part said: “I have mentioned only a few of the cases in which I have disagreed with the majority since I have been a member of the Supreme Court of California ... I have no apology to offer for any of them, notwithstanding the fact that certain isolated statements and phrases have been selected from some of them and criticized as being intemperate ... I claim the privilege of using language appropriate to the occasion to express my view and I am not disposed to permit even Dean Emeritus Pound of Harvard Law School to tell me what language I should use when depicting the gross injustices which may result from a majority decision of the Supreme Court of California. I might say right here and now that I have failed to find language strong enough to give expression to my views in some cases. The language used should be equal to the occasion. A decision which is only a mild departure from settled principles should not be dealt with in the same manner as one which outrages justice and lacks a semblance of reason or common sense to support it.” He then mentioned Franklin D. Roosevelt’s characterization of the Japanese attack on Pearl Harbor as one that would “live in infamy” and Winston Churchill using the terms “guttersnipe” and “jackal” in referring to Hitler and Mussolini, as examples of the use of strong language where the occasion called for it.²³

Carter’s associates on the Court took his language in good part. It did not lessen cordial personal relations or make for a climate of hostility. The purports of Carter’s views were respected on their own merits. His associates were impressed with the lengths to which Carter went in study and research, his phenomenal memory in oral discussions, citing book, page, line of cases he relied upon, and calling to their attention verbatim words they had uttered and written. This, with the fact that the Supreme Court of the United States might well agree with him, inspired respect and esteem, even in the heat of the battles.

22. 32 C 2d 711 (Traynor) at 732, concurring, 1948. 198 P 2d 17. *Richmond Record-Herald*, October 2, 1948.

23. *Carter Book*, pp. 399–400.

Hunting and Fishing

Carter's hunting and fishing horizons expanded from those of the nearby wild life spots until they included remote and unfrequented-by-man areas of the Canadian Rockies, Mackenzie and Frazier River expanses of Canada, and Alaska. These far away expeditions often mixed pleasure with hardships and tests of mettle, and even danger. On one hunting trip in 1941 with his good friend Roderick McArthur in Northern Canada, the difficulties included rain and snow every day for two weeks with only one small tent to provide shelter and other minimum facilities for their well-being.²⁴

On an Alaska hunting trip in company with his former partner, Samuel F. Finley, in addition to being rewarded with a large catch of fish, they killed a Sitka deer, and Finley got an Alaskan goat. For Carter, this was also a major bear hunt. He bagged a 400 pound black bear and had a session with a nine hundred pound brown bear that charged him. It took the third bullet to stop the brown bear. The brown bears of this area were notoriously vicious, as is evident from the report that nine persons had been killed by them in the two-year period before.²⁵ They also had a taste of some rough Alaska weather on this trip.

Carter's love of hunting and fishing lay deeper than only bagging game and fish, much as this excited him. Back of this was what the "great out-of doors" did to him. Appreciating what it did for him, he "as one of the humblest citizens" wanted the great public domain available for recreation and sport, an interest which he believed "most red-blooded Americans" possessed.²⁶ When the Federal Forestry Service on the ground of fire hazard pressed to have the deer hunting season shortened in the forests under State jurisdiction as practiced in those forests under Federal control, he protested with the vigor characteristic of his dissenting court opinions. He maintained that the hunters lessened the hazard.

Carter, by reason of his wide first-hand experience, was a power in the activities and proceedings of the organized sportsmen of the state (American Wildlife Institute, National Wildlife Federation, Ducks Unlimited, etc.). These organizations were spending a hundred thousand dollars of their own money, resulting in millions in appropriations by governments for refuges, restocking and food planting for the protection of wild life.

24. *Fall River Mills Tidings*, August 18, 1944.

25. *Yreka News*, September 23, 1940.

26. *Santa Rosa Herald*, September 18, 1942.

Horses

Soon after coming to the Supreme Court, Carter acquired the “lovely” old J. C. Raas-Frank Howard Allen home near San Anselmo, with an acreage ample to enable him to indulge his love of horses and other farm animals, including a few fine cattle, blooded poultry, etc. On the property was a hilltop pond which he improved from time to time, which not only supplied him with water for his garden, orchard and animals, but provided a setting for ducks, geese, wildfowl, bass, trout, etc.

One of Carter’s many interests was in the breeding of Morgan horses. This interest did not stop with ownership of some fine specimens, but he exerted himself in furthering the interests of horse lovers everywhere and served as president of the California Horseman’s Association in 1944. He joined actively in helping carry forward the State Horse Association’s various programs, one of which included developing from twenty-five hundred to three thousand miles of bridle and hiking trails running from the Mexican border to the Oregon line. These were so projected that in covering the distance the horse would not once need to set foot on pavement or breathe carbon monoxide gas. The *Oakland Tribune* of July 23, 1946, devoted a full page to these proposed trails, showing them on a map. Their course followed the old Spanish trails for distances, more or less hugging the coast at places and on the easterly side of the state followed the western foothills of the Sierras, which included the Mother Lode country. They passed through or near state and national parks wherever possible.

The Underprivileged and the Young

Carter’s concern for the helpless was aroused when he read in the paper that a minor in Burlingame by the name of William Wilkins while waiting for his parents placed a penny in the wrong meter, was arrested, taken to jail, and not given an opportunity to inform his parents what had happened. Carter prepared a proposed bill to amend Section 825 of the Penal Code to permit one arrested to get in touch with someone of his choosing forthwith.²⁷ “The idea of arresting this man—or any man—for a trivial misdemeanor, locking him in jail and depriving him of his rights is so obnoxious that the citizens of the state should take note of it and demand a change in the law to protect them,” observed

27. *San Francisco Chronicle*, January 30, 1941; *Mill Valley Record*, February, 1941.

28. *Palo Alto Times*, March 7, 1947.

Carter. “This law is not aimed at the police in general. It is just aimed at the type of men who take advantage of the fact that they have a uniform, a star and a gun!”²⁹ Other incidents could be mentioned.

Carter appeared more or less frequently through the years as a speaker before bar associations; service, recreational, and professional clubs; fraternal orders; commencement and alumni gathering; testimonials; admissions of new attorneys. He also participated as judge in law school moot courts, etc. He was a fluent and forceful speaker. Speaking to some newly admitted lawyers in Los Angeles on one occasion he said in part:

“You should not be discouraged by what appears to you for the moment [as] defeat and failure ...”³⁰

For some time Carter was a member of the American Russian Institute with headquarters at 101 Post Street in San Francisco, which was accused by the United States Attorney General of being a Communist front. In 1950 he withdrew, stating he had “decided to give up all organization connections to devote more time to his home.”³¹ He stated that Bartley Crum, a prominent lawyer of San Francisco and New York City, had asked him in the first place to become a member. There was wide publicity in connection with his withdrawing.

Carter’s Family

By the age of twenty-five Carter was the father of three children, two sons and a daughter, Marian.³² His oldest son, Jesse Oliver, was appointed a judge of the United States District Court in San Francisco. Carter administered the oath of office to him on October 9, 1950.

The naming of his second son as Harlan Field suggests the direction some of Carter’s hero worship was taking at this time. Holmes spoke of John Mar-

29. *San Francisco Call Bulletin*, February 20, 1947. See also *Palo Alto Times*, February 25, and *Redwood City Tribune*, May 31, 1947.

30. *Los Angeles Journal*, January 9, 1947.

31. *Sacramento Bee*, October 9, *Redding Record*, October 10, 1950, and many other papers.

32. Mrs. Silvio Bui of Redding. Harlan Field became a teacher and taught in the Redding High School.

shall Harlan of the United States Supreme Court as “the last of the tobacco spittin’ judges.”³³

Carter’s first wife procured a divorce from him August 7, 1939.³⁴ He married Thelma Williams, who had been an employee in his law firm, early in 1941, whereupon they named their new home in San Anselmo after the two of them, Jesselma.³⁵ They were divorced after some years. On April 18, 1952, Carter married Jean Woodward,³⁶ a member of the bar, who had assisted him as a law clerk.³⁷ The name of their home at San Anselmo was then changed to the Double J. Ranch.³⁸ Jake Ehrlich referred to it as Rancho Carter.³⁹

Carter devoted considerable time through the years to fraternal activities. He was a Mason, and received the jewel for membership therein for fifty years,⁴⁰ a member of the Native Sons of the Golden West, and belonged to the Knights of Pythias, of which order he was once the grand tribune.

“The Battle of Carter’s Dam”

One would never have suspected that Carter was entering the last year of his life by the vigor with which he opposed the authorities of Marin County in connection with draining the pond or reservoir he maintained on his San Anselmo estate.

By reason of heavy rains, the reservoir had filled until it was estimated by some that the water had reached the danger level. Immediately below, in what was known as Sleepy Hollow were some fifteen to twenty homes. A leak developed dumping water, mud, rocks, tree trunks, and small fish onto these properties. Some fifty children betook themselves in panic to higher ground. A group of home owners went to the Board of Supervisors. Said one of them: “We don’t want to be alarmists, but when bass and trout wash down on your front lawn, and the 15 foot trunk of a tree smacks your door, and the water soaks the mat-

33. Justice Oliver Wendell Holmes, *Silas Bent*, (1932) p. 19.

34. *California Blue Book*, 1958.

35. *San Francisco Chronicle*, October 31, 1941; *Redding Courier-Free Press*, February 9, 1941.

36. *The Brief Case*, May 1956.

37. *California Blue Book*, 1958.

38. *San Francisco Examiner*, March 26, 1958.

39. *A Life in my Hands*, J. W. Ehrlich, p. 66, hereafter cited as Ehrlich.

40. *San Bernardino Telegram*, February 20, 1941.

tress on your little girl's bed, you can understand why we want action.”⁴¹ Carter's response to this when he later heard about it was: “Mountain out of a mole-hill,”⁴² and to the estimate that the damage to property ran from ten to twenty thousand dollars that he would fully compensate all home owners.

The Supervisors ordered the reservoir drained and instructed the district attorney to bring an action to abate a public nuisance. Marvin Brigham, the Public Works Director, was directed to have the fire department proceed with the emptying of the reservoir.

Carter had received no notice of the hearing before the Board of Supervisors, and heard of it for the first time at his office in San Francisco from newspaper reporters. To him this was “acting like a thief in the night.”⁴³ Officials were then already upon his property taking over. “If a person's rights are affected or his property taken, he should be given the right to be heard,”⁴⁴ he said. “The Supervisors have nothing to do with it . . . If there is a public nuisance, the district attorney has the right to bring suit in court. Under due process; that means there is notice to the owner. He has the right to be heard and to present his case. A judicial determination follows. But what did they do? They went ahead and passed a resolution without notifying me.” “This Brigand would have been up here today to destroy the pond if I hadn't been notified by the press.”⁴⁵

Carter procured a temporary injunction in the Superior Court in San Francisco. The District Attorney also got an injunction in the Superior Court in Marin County restraining Carter from interfering with the draining.

Carter threatened to take the law into his own hands and defend his property with force. This, judging by the newspaper reports, led to considerable unrestrained talk by Carter. It made a field day for the reporters and front page headlines in the big dailies.

While the county authorities probably did not take Carter entirely seriously, they were nevertheless not too sure. The District Attorney, William O. Weisich, asked the Supervisors to delay emptying the reservoir until Carter could be heard and told them “he was afraid someone might be shot.” “We don't want to send anyone out there to be shot. After all he's from the backwoods of Trinity County. Imagine prosecuting Judge Carter for murder.”⁴⁶

41. *San Francisco Chronicle*, March 26, 1958.

42. *San Francisco Examiner*, March 26, 1958.

43. *San Francisco News*, March 25, 1958.

44. *Ibid.*

45. *San Francisco Chronicle*, March 26, 1958.

46. *San Francisco News*, March 25, 1958.

That Carter's bark was louder than his bite, exercised as he was, may be gathered from his statement: "Of course a situation of this kind gets pretty tense. I'd probably shoot at legs, but I wouldn't know any other way to stop them."⁴⁷

As things proceeded, Carter consented to a certain amount of water being drained and pumped away. Chief Justice Gibson assigned Thomas Coakley, Judge of the Superior Court in Mariposa County, to hear the matters pertaining to the Dam. Sufficient water was permitted to remain in the reservoir to take care of Carter's ranch needs. The Court ruled Carter could maintain ten and a half feet therein. This Carter characterized as a complete victory and took steps to compel the county to pay him for the water it had drained off below this level.

Carter himself characterized the affair as a "tragedy," as related to time cherished basic principles of law.

Although Carter was spoken of in the press at the time of the dam controversy as "a man of cantankerous disposition" and a "stormy dissenter" he was in the same breath spoken of "as one of the most conscientious and articulate of judges" whose "opinions have been widely quoted in legal literature," and who commanded "a tremendous respect from both the members of the bar and the judiciary."⁴⁸ There are those who believe the dam episode hastened his death.⁴⁹

Conclusion

Carter died in his sleep the morning of March 15, 1959, aged seventy years, in the San Rafael Hospital. He left surviving him his wife and three children. Early in January, supposing he was having attacks of indigestion, he went to the hospital for a checkup, where it was discovered he had suffered a mild coronary. A three or four-week rest in the hospital, and thereafter another two months at home were prescribed. He suffered another attack February 11, from which it was thought he was recovering, but on March 12 virus pneumonia developed and was ascribed as the cause of death.

The funeral was held in the Presbyterian Church in San Rafael, and his remains interred at Tamalpais Cemetery.

Many courts throughout the State adjourned in honor of his memory upon hearing of his death, and expressions of respect were uttered both by lawyers and judges.

47. *Oakland Tribune*, March 30, 1958.

48. *San Francisco Call Bulletin*, March 28, 1958.

49. Ehrlich, p. 68.

Memorial exercises were held in the Supreme Court in San Francisco May 6. Carlos R. Freitas of the Marin County bar and Jerome R. Lewis representing the State Bar spoke. The latter mentioned Carter's vice presidency and long service in that organization. Justice Schauer responded for the Court.

Carter was by nature friendly and approachable. Physically he was on the heavy side, and square in build, weighing a hundred and eighty or ninety pounds, of medium height—probably five feet ten—and appeared neither tall nor short. He was blond and had a fair complexion, although his hair darkened somewhat before it started graying. He looked younger than his years, retaining his youthful look to the last. His bow ties added to his youthful appearance.

What was said of him during his lifetime as a “stormy dissenter” of “cantankerous disposition” is subject to much qualification. In 1928 Gibson spoke of Carter's opinions “as reminiscent of the tall timbers of his early life, standing far above the forest and stretching heavenward to receive the full force of the elements, but rugged and determined to search for and discover new and undeveloped horizons.” “Eminently successful in the practice of law, this justice is an individualist characteristic of the frontier from which he hails. An expert hunter and horseman, on and off the bench, he is often known to ride off alone in search of a principle of law, later returning with a limit of game that usually opens the eyes of his companions, in wonderment, and presents the legal profession a feast . . . One of the truly great men in California's judicial history.”⁵⁰ Considering this was not an obituary statement it constitutes a wonderful tribute from a colleague. Gibson's informal, entirely off-the-record allusions confirmed his affection for Carter. In this regard, he expressed the sentiments of the other members. Several of them have mentioned the magic of his memory in conference. Not infrequently he would refer to a report, mention the page, and tell them on what part of the page one of them had said something they themselves had forgotten.

50. *The Recorder*, August 1, 1948.

IN DEFENSE OF DISSENTS

*By William J. Brennan, Jr.**

I am a little afraid that students may find boring the subject that I have chosen for this lecture. But stick with me until I get finished. The subject is, "In Defense of Dissents." In all candor, I ought to confess that one reason I chose that title is that the sixteen opinions I wrote some twenty-seven years ago during my first term on the Court did not include a single dissent. Of my fifty-six opinions last term, forty-two were dissents. Under the circumstances, because the great Judge Tobriner also had a view of dissents that was not much different from mine, I thought I would try to tell you why I think they serve a very important purpose indeed.

It is an enormous pleasure for me to be here today, honoring the life and great works of Mathew Tobriner. Such were his accomplishments that my good friend Judge Skelly Wright, who gave the inaugural Tobriner Lecture here two years ago, began his lecture with a confession. He said that he had not, until recently, fully appreciated the importance of state courts and state judges. Skelly and I have been friends for a great many years, and he knew that I had served on the Supreme Court of New Jersey and thus had some ideas about the value of state judges.

Mathew Tobriner was, as Chief Justice Bird described him three years ago in a moving tribute, an exceptional public servant and a great legal scholar. A full appreciation of his years on the bench is not, of course, what you who knew him so well expect from me today. But I was struck by the fact that the universally laudatory assessments of him are by no means limited to discussions of Justice Tobriner's many noteworthy opinions for the California Supreme

* Associate Justice, Supreme Court of the United States. These remarks were delivered as the Third Annual Mathew O. Tobriner Memorial Lecture at the University of California, Hastings College of the Law, on November 18, 1985. The author wishes to thank the editors and staff of *The Hastings Law Journal*, who assisted with the research for this lecture.

Court. The deservedly famous case, for example, of *People v. Dorado*¹ foreshadowed *Miranda v. Arizona*² in our Court by holding that the right to counsel in a criminal proceeding was not dependent upon the accused's request for a lawyer. But nearly every appreciation of Justice Tobriner also praises his fifty-eight dissents, notably *In re Tucker*,³ defining the due process rights of parolees; and *Swoap v. Superior Court*,⁴ which involved the constitutionality of a state statute requiring the adult offspring of a recipient of state aid to reimburse the state for the payments received by the parent; and, finally, the very famous *Bakke v. Regents of the University of California*,⁵ in which Justice Tobriner urged the court to distinguish between invidious discrimination and benign racial classifications. Now, why do we care about these dissents? After all, none of them "made" law; they did not ensure that parolees would be treated with a modicum of respect; they did not provide benefits to a needy person or advance the rights of those historically denied equal rights and treatment. The dissents are, however, critical to an understanding of the justice. Just as we judge people by their enemies, as well as their friends, their dislikes as well as their likes, the principles they reject as well as the values they affirmatively maintain, so do we look at judges' dissents, as well as their decisions for the court, as we evaluate judicial careers.

Why do judges dissent? Not many years ago, the writer Joan Didion, a Californian, wrote an elegant essay for the New York Times. The question she addressed, and the title of her essay, was "Why I Write." She said:

Of course I stole the title ... from George Orwell. One reason I stole it was that I like the sound of the words: *Why I Write*. There you have three short unambiguous words that share a sound, and the sound they share is this:

I
I
I

In many ways writing is the act of saying I, of imposing oneself upon other people, of saying *listen to me, see it my way, change your mind*.⁶

1. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

2. 384 U.S. 436 (1966).

3. 5 Cal. 3d 171, 184, 486 P.2d 657, 665, 95 Cal. Rptr. 761, 769 (1911).

4. 10 Cal. 3d 490, 511, 516 P.2d 840, 854, 111 Cal. Rptr. 136, 140 (1973).

5. 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976), *aff'd in part & rev'd in part*, 438 U.S. 265 (1978).

6. N.Y. Times, Dec. 5, 1976, §7 (Book Review), at 2 (emphasis in original).

No doubt, there are those who believe that judges—and particularly dissenting judges—write to hear themselves say, as it were, I I I. And no doubt, there are also those who believe that judges are, like Joan Didion, primarily engaged in the writing of fiction. I cannot agree with either of those propositions.

Of course, we know why judges write *opinions*. It is through the written word that decisions are communicated, that mandates issue. But why *dissent*? What does a judge, whether a Justice of the Supreme Court of the United States or the Supreme Court of California, hope to accomplish by dissenting? After all, the law is the law, and in our system, whether in the legislature or the judiciary, it is made by those who command the majority. As the distinguished legal philosopher H.L.A. Hart declared, “A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was ‘wrong’ has no consequences within the system: no one’s rights or duties are thereby altered.”⁷ In view of this reality, some contend that the dissent is an exercise in futility, or, worse still, a “cloud” on the majority decision that detracts from the legitimacy that the law requires and from the prestige of the institution that issues the law. Learned Hand complained that a dissenting opinion “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”⁸ Even Justice Holmes, the Great Dissenter himself, remarked in his first dissent on the Court that dissents are generally “useless” and “undesirable.”⁹ And more recently, Justice Potter Stewart has labeled dissents “subversive literature.” Why, then, does a judge hold out?

Very real tensions sometimes emerge when one confronts a colleague with a dissent. After all, collegiality *is* important; unanimity *does* have value; feelings *must* be respected. I doubt that many judges, however, would try to demean a dissent as did a famous Master of the Rolls in England, presiding on a three-judge panel. After hearing a half hour argument, he turned to his colleague on his right and said, “John, haven’t we heard enough of this—surely we must allow this appeal.” “Oh no, Chief,” said John, “I couldn’t possibly vote to do that.” “Oh well, John,” said the Master of the Rolls, “you’re entitled to be mistaken.” He then turned to his colleague on the left. “Tom,” he said, “surely you agree that this appeal must be allowed.” “Oh no, Chief,” said Tom, “I emphatically agree with John.” “Well then,” said the Master of the Rolls, “the appeal will be allowed and you two argue between yourselves who will write the dissent.”

7. H. HART, *THE CONCEPT OF LAW* 138 (1961).

8. L. HAND, *THE BILL OF RIGHTS* 72 (1958).

9. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904).

It seems that to explain why a dissenter holds out, we should examine some of the many different functions of dissents. Not only are all dissents not created equal, but they are not intended to be so. In other words, to answer “why write,” one must first define precisely what it is that is being written. I do not have an exhaustive list, but let me at least suggest some diverse roles that may be served by a dissent. If some of this gives you the impression that I am defending dissents, you are right.

In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority’s legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case. Oliver Cromwell captured the thrust of that type of dissent when he pleaded to the General Assembly of the Church of Scotland in 1650, “Brethren, by the bowels of Christ I beseech you, bethink you that you may be mistaken.”¹⁰ But the dissent is often more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision. Karl Llewellyn, who was critical of the frequency with which Supreme Court Justices, of all courts, dissented, grudgingly acknowledged the importance of that role, characterizing it as “rid[ing] herd on the majority.”¹¹ At the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side. In this sense, this function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court—both for majority and dissent—were the product of a judicial town meeting.

The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of “damage control” mechanism. Along the same lines, a dissent sometimes is designed to furnish litigants and lower courts with practical guidance—such as ways of distinguishing subsequent cases. It may also hint that the litigant might more fruitfully seek relief in a different forum—such as the state courts. I have done that on occasion. Moreover, in this present era of expanding state court protection of individual liberties,¹² in my view, probably the most important development in constitutional jurisprudence today, dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own state constitutions.

10. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 103 (1985).

11. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

12. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

The most enduring dissents, however, are the ones in which the authors speak, as the writer Alan Barth expressed it, as “Prophets with Honor.”¹³ These are the dissents that often reveal the perceived congruence between the Constitution and the “evolving standards of decency that mark the progress of a maturing society,”¹⁴ and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law.

While it is relatively easy to describe the principal functions of dissents, it is often difficult to classify individual dissents, particularly the great ones, as belonging to one category or another; rather, they operate on several levels simultaneously. For example, the first Justice Harlan’s remarkable dissent in *Plessy v. Ferguson*¹⁵ is at once prophetic and expressive of the Justice’s constitutional vision, and, at the same time, a careful and methodical refutation on the majority’s legal analysis in that case.

In this masterful dissent, the Justice said that “in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind...”¹⁶ Justice Harlan also foretold, with unfortunate accuracy, the consequences of the majority’s position. Said he, the *Plessy* decision would:

not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution....¹⁷

He addressed, and dismissed as erroneous, the majority’s reliance on precedents. “Those decisions,” he declared: cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments ... and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.¹⁸

13. A. BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* (1974).

14. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

15. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

16. *Id.* at 559.

17. *Id.* at 560.

18. *Id.* at 563.

Justice Harlan, in that dissent, is the quintessential voice crying in the wilderness. In rejecting the Court's view that so-called separate but equal facilities did not violate the Constitution, Justice Harlan stood alone; not a single other justice joined him. In his appeal to the future, Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* and long even after *Brown v. Board of Education*,¹⁹ to benefit from his wisdom and courage.

From what source did Justice Harlan derive the right to stand against the collective judgment of his brethren in *Plessy*? We may ask the same question of Justice Holmes in *Abrams*;²⁰ of Justice Brandeis in *Olmstead*;²¹ of Justice Stone in *Gobitis*;²² of Justice Jackson in *Korematsu*;²³ of Justice Black in *Adamson*;²⁴ or of the second Justice Harlan in *Poe v. Ullman*;²⁵ to name but a few of the most famous and powerful dissents of this century. And surely, you may ask the same question of me. How do I justify adhering to my essentially immutable positions on obscenity, the death penalty, the proper test for double jeopardy, and on the eleventh amendment? For me, the answer resides in the nature of the Supreme Court's role.

The Court is something of a paradox—it is at once the whole and its constituent parts. The very words “the Court” mean simultaneously the entity and its members. Generally, critics of dissent advocate the primacy of the unit over its members and argue that the Court is most “legitimate,” most true to its intended role, when it speaks with a single voice. Individual justices are urged to yield their views to the paramount need for unity. It is true that unanimity underscores the gravity of a constitutional imperative—witness *Brown v. Board of Education*²⁶ and *Cooper v. Aaron*.²⁷ But, unanimity is not in itself a judicial virtue.

Indeed, history shows that nearly absolute unanimity enjoyed only a brief period of preeminence in the Supreme Court. Until John Marshall became Chief Justice, the Court followed the custom of the King's Bench and an-

19. 347 U.S. 483 (1954).

20. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

21. *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

22. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

23. *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

24. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

25. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

26. 347 U.S. 483 (1954).

27. 358 U.S. 1 (1958).

nounced its decisions through the seriatim opinions of its members.²⁸ Chief Justice Marshall broke with the English tradition and adopted the practice of announcing judgments of the Court in a single opinion.²⁹ 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.³⁰

This new practice, however, was of great symbolic and practical significance at the time. Remember the context of the times when the practice was introduced. As one commentator has observed, when Marshall delivered the opinion of the Court, “[h]e did not propose to announce only the views of John Marshall, Federalist of Virginia.” Rather, “he intended that the words he wrote should bear the imprimatur of the Supreme Court of the United States. For the first time, the Court as a judicial unit had been committed to an opinion—a *ratio decidendi*—in support of its judgments.”³¹ This change in custom at the time consolidated the authority of the Court and aided in the general recognition of the Third Branch as co-equal partner with the other branches. Not surprisingly, not everyone was pleased with the new practice. Thomas Jefferson, who also was a lawyer, was, of course, conversant with the English custom, and was angrily trenchant in his criticism. He wrote that “[a]n 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

28. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192 (1959). The old English practice of issuing seriatim opinions by each judge has also had some modern supporters. Justice Frankfurter, in one of his first opinions upon joining the Court in 1939, explained in a concurring opinion that:

I join in the Court’s opinion but deem it appropriate to add a few remarks. The volume of the Court’s business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court.

Graves v. New York *ex rel.* O’Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring) (footnote omitted).

29. ZoBell, *supra* note 28, at 193.

30. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 648 n.24 (1982); Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118, 119 (1965); ZoBell, *supra* note 28, at 193 n.41.

31. ZoBell, *supra* note 28, at 193 (footnote omitted).

chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning.”³² In other words, Marshall had shut down the marketplace of ideas.

Of course, Jefferson was overstating matters a bit. In fact, unanimity remained the rule only for the first four years of Marshall’s Chief Justiceship, and during that period only one, one-sentence concurrence was delivered, and that by Justice Chase.³³ But, in 1804 Justice William Johnson arrived on the Court from the state appellate court of South Carolina. He tried to perpetuate the seriatim practice of his state court and issued a substantial concurrence in one of the first cases in which he participated. And his colleagues were stunned. Johnson later described their reaction in a letter to Jefferson. “Some Case soon occurred,” he wrote:

in which I differed from my Brethren, and I felt it a thing of Course to deliver my Opinion. But, during the rest of the Session I heard nothing but lectures on the Indecency of Judges cutting at each other, and the Loss of Reputation which the Virginia appellate Court had sustained by pursuing such a Course.³⁴

Nonetheless, the short-lived tradition of unanimity had been broken, and, in 1806, Justice Paterson delivered the first true dissent from a judgment and opinion of the Court in *Simms v. Slacum*.³⁵ As one historian has observed, considerably understating the case, since that time “dissents were never again a rarity.”³⁶ Even Chief Justice Marshall filed nine dissents from the opinions of the Court during his closing years on the Bench.³⁷

What, then, should we make of modern critics of dissents? Charles Evans Hughes answered that question sixty years ago and I think what he said then is as true today. He said:

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time [the case is announced].

32. Letter from John Marshall to Thomas Ritchie (Dec. 25, 1820), *quoted In ZoBell, supra* note 28, at 194.

33. ZoBell, *supra* note 28, at 194.

34. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), *quoted in ZoBell, supra* note 28, at 195.

35. 7 U.S. (3 Cranch) 300, 309 (1806) (Paterson, J., dissenting).

36. ZoBell, *supra* note 28, at 196.

37. *Id.*

This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.³⁸

In Chief Justice Hughes' view, and in my own, justices do have an obligation to bring their individual intellects to bear on the issues that come before the Court. This does not mean that a justice has an absolute duty to publish trivial disagreements with the majority. Dissent for its own sake has no value, and can threaten the collegiality of the bench. However, where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. This is why, when I dissent, I always say why I am doing so. Simply to say, "I dissent," I will not do.

I elevate this responsibility to an obligation because in our legal system judges have no power to declare law. That is to say, a court may not simply announce, without more, that it has adopted a rule to which all must adhere. That, of course, is the province of the legislature. Courts derive legal principles, and have a duty to explain why and how a given rule has come to be. This requirement serves a function within the judicial process similar to that served by the electoral process with regard to the political branches of government. It restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority. The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful. Dissents contribute to the integrity of the process, not only by directing attention to perceived difficulties with the majority's opinion, but, to turn one more time to metaphor, also by contributing to the marketplace of competing ideas.

This is not to say that stare decisis is of little consequence. As Justice Roberts noted in *Smith v. Allwright*,³⁹ constitutional adjudication is not in "the same class as a restricted railroad ticket, good for this day and train only."⁴⁰ An opinion of the Court does, and should, carry considerable weight in subsequent cases. But stare decisis merely provides the background for judicial development of the law. As Chief Justice Taney observed, the authority of the Court's con-

38. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67–68 (1928).

39. 321 U.S. 649 (1944) (Roberts, J., dissenting).

40. *Id.* at 669.

struction of the Constitution ultimately “depend[s] altogether on the force of the reasoning by which it is supported.”⁴¹ A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority’s reasoning can continue to be evaluated, and perhaps, in time, superseded. This supersession may take only three years, as it did when the Court overruled *Gobitis*⁴² in *Barnette*;⁴³ it may take twenty years, as it did when the Court overruled *Hammer v. Dagenhart*⁴⁴ in *Darby*;⁴⁵ it may take sixty years as it did when we overruled *Plessy in Brown*. The time periods in which dissents ripen into majority opinions depend on societal developments and the foresight of individual justices, and thus vary. Most dissents never “ripen” and do not deserve to. But it is not the hope of eventual adoption by a majority that alone justifies dissent. For simply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result.

I must add a word about a special kind of dissent: the repeated dissent in which a justice refuses to yield to the views of the majority although persistently rebuffed by them. For example, Justice Holmes adhered through the years to his views about the evils of substantive due process, as did Justices Black and Douglas to their views regarding the absolute command of the first amendment. And as I said earlier, I adhere to positions on the issues of capital punishment, the eleventh amendment, and obscenity, which I developed over many years and after much troubling thought. On the death penalty, for example, as I interpret the eighth amendment, its prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offenses. Foremost among the moral principles inherent in the constitutional prohibition is the primary principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. For, as Justice Tobriner too believed, all legal decisions should ad-

41. *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849).

42. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

43. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

44. 247 U.S. 251 (1918), *overruled*, *United States v. Darby*, 312 U.S. 100 (1941).

45. *United States v. Darby*, 312 U.S. 100 (1941).

vance, not degrade, human dignity. Death for whatever crime and under all circumstances is a truly awesome thing. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, in other words, "cruel and unusual" punishment in violation of the eighth amendment.

This is an interpretation to which a majority of my fellow justices—not to mention, it would seem, a majority of my fellow countrymen—do not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis*, obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of *stare decisis*. Because we Justices of the United States Supreme Court are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations. Of course the judge should seek out the community's interpretation of the constitutional text. Yet, in my judgment, when a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path.

This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that could be done in a single dissent and does not require repetition. Rather, this type of dissent constitutes a statement by the judge as an individual: "Here I draw the line." Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades. But it would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority. None of us, lawyer or layman, teacher or student in our society must ever feel that to express a conviction, honestly and sincerely maintained, is to violate some unwritten law of manners or decorum. We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. As law-abiders, we accept the conclusions of our de-

cision-making bodies as binding, but we also know that our right to continue to challenge the wisdom of that result must be accepted by those who disagree with us. So we debate and discuss and contend and always we argue. If we are right, we generally prevail. The process enriches all of us, and it is available to, and employed by, individuals and groups representing all viewpoints and perspectives.

I hope that what I have said does not sound like too individualistic a justification of the dissent. No one has any duty simply to make noise. Rather, the obligation that all of us, as American citizens have, and that judges, as adjudicators, particularly feel, is to speak up when we are convinced that the fundamental law of our Constitution requires a given result. I cannot believe that this is a controversial statement. The right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.

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. Writing, then, is not an egoistic act—it is duty. Saying, “listen to me, see it my way, change your mind,” is not self-indulgence—it is very hard work that we cannot shirk.

DISSENT

By William A. Fletcher*

Thank you, Professor Oppenheimer, for your generous introduction. Thank you also, Golden Gate Law School, for your invitation to participate in your lecture series on dissent. The series is in honor of your distinguished graduate, Justice Jesse Carter, who served on the California Supreme Court for twenty years, from 1939 to 1959.¹ He was known on that Court as the “great dissenter,” writing a total of 510 dissents, or an average of a little over twenty per year. At least three of those dissents were vindicated in the United States Supreme Court when that Court agreed with Justice Carter.²

Perhaps the most notable of these was Justice Carter’s 1947 dissent in *Takahashi v. Fish & Game Commission*,³ in which the California Supreme Court held that the State of California could deny a commercial fishing license to Torao Takahashi. Takahashi was born in Japan and came to the United States as a legal immigrant in 1907. From 1915 to 1942, he was licensed as a commercial fisherman by the State of California. During World War II, Takahashi was interned by the federal government as an alien Japanese. Upon his release after the war, Takahashi sought reissuance of his commercial fishing license.

In 1943, California had passed a statute prohibiting the issuance of a license to “any alien Japanese.” In 1945, in an attempt to insulate the statute from constitu-

* Judge, United States Court of Appeals for the Ninth Circuit. These remarks were delivered on February 26, 2008, at the Jesse Carter Memorial Lecture Series at Golden Gate University School of Law.

1. J. EDWARD JOHNSON, JUSTICES OF CALIFORNIA, 1900–1950, VOLUME II (1966), available at http://www.ggu.edu/lawlibrary/jesseccarter/biography/attachment/justices_of_california.pdf.

2. In addition to the *Takahashi* dissent, they were *Garmon v. San Diego Bldg. Trades Council*, 291 P.2d 1 (Cal. 1955), vacated by 353 U.S. 26 (1957); *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 187 P.2d 729 (Cal. 1947), *rev'd*, 333 U.S. 821 (1948).

3. *Takahashi v. Fish & Game Comm’n*, 185 P.2d 805, 816 (Cal. 1947) (Carter, J., dissenting), *rev'd*, 334 U.S. 410 (1948).

tional challenge, California amended it to prohibit, more broadly, the issuance of a license to any alien ineligible for citizenship. At that time, members of several racially defined groups, including Japanese, were ineligible under federal law for citizenship unless they were born in the United States. The 1945 amendment of the California statute thus had the consequence (as well as the intent) of continuing the prohibition of the issuance of licenses to alien Japanese. Justice Carter dissented from the holding of the California Supreme Court. He wrote:

[T]he statute not only discriminates against aliens solely on upon the basis of alienage but goes further and excludes only certain classes of aliens, namely, those who are ineligible for citizenship.... [I]nasmuch as the fishing involved is commercial fishing, an age-old means of livelihood, the issue is whether an alien resident may be excluded from engaging in a gainful occupation—from working—from making a living.

A mere statement of the problem should compel an answer favorable to the alien if there is any security in our constitutional guarantees.⁴

The United States Supreme Court agreed with Justice Carter, reversing the decision of the California Supreme Court in an opinion by Justice Black.⁵ Justice Carter's dissent in *Takahashi* on the California Supreme Court is an appropriate introduction to several famous dissents on the United States Supreme Court.

In the first, *Plessy v. Ferguson*,⁶ the question was whether the State of Louisiana could require, by law, that black and white American citizens ride in separate railroad cars. The majority of the Supreme Court held that the Fourteenth Amendment allowed Louisiana to do so. The first Justice Harlan disagreed:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.⁷

In the second, *Lochner v. New York*,⁸ the question was whether the State of New York could pass a law forbidding an employer to require that an employee

4. *Id.*

5. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

6. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. *Id.*

8. *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

work more than 60 hours per week. The majority of the Supreme Court held that the Fourteenth Amendment prevented New York from passing such a law. Justice Holmes disagreed:

This case is decided upon an economic theory which a large part of this country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.... The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.⁹

In the third, *Abrams v. United States*,¹⁰ the question was whether the distribution of two dissident leaflets in New York City during World War I by self-described anarchists was a crime under the federal Espionage Act. The majority of the Supreme Court held that it was. Justice Holmes, joined by Justice Brandeis, disagreed:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹¹

In the fourth, *Olmstead v. United States*,¹² the question was whether evidence obtained by illegal wiretapping by the Government was admissible in a criminal prosecution. The majority of the Court held that it was admissible. Justice Brandeis disagreed:

9. *Id.*

10. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

11. *Id.*

12. *Olmstead v. U.S.*, 277 U.S. 438, 479–80 (1928) (Brandeis, J., dissenting), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

... By the laws of Washington, wire-tapping is a crime. To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue.¹³

Finally, in *Baker v. Carr*,¹⁴ the question was whether a claim under the Equal Protection Clause of the Fourteenth Amendment brought by voters whose voting districts were malapportioned, and whose votes therefore counted less than those of voters in other districts, presented a political question beyond the competence of the federal courts. The majority of the Court held that this was not a political question. Justice Frankfurter disagreed:

Even assuming the indispensable intellectual disinterestedness on the part of judges in [reviewing apportionment schemes], they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omniscience to judges.¹⁵

Five critically important Supreme Court cases, five dissents. The first four have become law, or at least mostly so. *Plessy* was overruled in 1954 in *Brown v. Board of Education*.¹⁶ *Lochner* and substantive economic due process were repudiated by the Roosevelt Court in the late 1930s.¹⁷ *Abrams* has been mostly overruled,¹⁸ although sometimes—particularly in wartime or near-wartime, as in *Abrams* itself—it seems to revive. *Olmstead* was overruled in 1961 in *Mapp v. Ohio*,¹⁹ and evidence seized in violation of the Fourth Amendment is now inadmissible in a criminal prosecution.

13. *Id.*

14. *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

15. *Id.*

16. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

17. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

18. See *Brandenburg v. Ohio*, 395 U.S. 444, 451–52 (1969).

19. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The last dissent has not become law. *Baker v. Carr* has not been overruled. Instead, it has become an 800-pound gorilla, requiring one person-one vote in every corner of our country except in the United States Senate.²⁰ Even apportionment plans for state senates that were modeled after the United States Senate, with two senators for each county regardless of population, have been struck down.²¹ One might ask whether *Baker v. Carr* has been a good thing—do we like frequent reapportionment (and partisan gerrymanders); do we like safe seats on both sides of the aisle, such that the only challenger an elected official is likely to face will be from the far left or the far right of his or her own party; do we like the extreme partisanship thereby produced in our legislatures; do we like term limits, which sacrifice good, experienced politicians because we feel we have no other way getting rid of a bad politicians who hold safe seats? Should we have listened to Justice Frankfurter?

In these cases, the Justices have been our secular prophets, interpreting the central text of our civic faith, the United States Constitution. These Justices have pointed the way to our future, showing us what we and our government can and should become. This is a justly celebrated function—indeed, perhaps the most important function—of dissent in our judicial system.

But the function of dissent has changed over the years. The prophetic dissents are still there, though we are not in a position until sometime later fully to appreciate which dissents fall into this category. One of the reasons we may not be in a position to do this is that there are now so many dissents. Between 1789 to 1928, dissents and concurrences were filed in only 15% of all cases decided by the Supreme Court.²² Between 1930 and 1957, dissents alone (not counting concurrences) were filed in 42% of all cases decided by the Court.²³ In October Term 1992, dissents alone were filed in 71% of all cases decided by the Court.²⁴

Other functions of dissent are just as important—though perhaps not as dramatic—as the prophetic function just described. While declarations, or predictions, of high constitutional principle are important, so too is the workaday functioning of dissent.

First, somewhat paradoxically, a judge or justice may write a dissent in order not to have to write one. Sooner or later, all appellate judges have the

20. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

21. See *Reynolds*, 377 U.S. at 568.

22. Evan A. Evans, "The Dissenting Opinion—Its Use and Abuse," 3 Mo. L. REV. 120, 138–41 (1938).

23. Karl M. ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 44 CORNELL L.Q. 186, 205 (1959).

24. Antonin Scalia, "The Dissenting Opinion," 1994 J. SUP. CT. HIST. 33, 35.

experience of writing a draft dissent that ends up persuading the majority to his or her point of view. A number of Justice Brandeis's unpublished opinions were proposed dissents that performed this function.²⁵ Sometimes a draft dissent becomes the majority opinion before anything is published by the court, though a careful reader may discern signs that the published dissent had originally been written as the majority opinion.²⁶ Occasionally, a published dissent later becomes the published the majority opinion after rehearing by the court.²⁷

Second, a dissent (or threatened dissent) may make the majority opinion better. A dissent may improve a majority opinion in many small ways. For example, a dissent may persuade the majority to change its description of the facts or some point of its analysis; the result is not changed, but the resulting majority opinion is a better piece of work. I confess that I have occasionally been tempted not to point out in a dissent all of the majority's mistakes, hoping that if they are left uncorrected the world at large will see the members of the majority for the misguided and ignorant creatures that they are (or at least, for the moment, that they seem to be). But I have resisted this unworthy impulse. I do so because I am not sure that I can trust the world at large to see, unaided, the majority's mistakes. More important, I do so because when the shoe is on the other foot, as it sometimes is, I want a dissenter to help me to improve my majority opinion.

A dissent can also help an opinion in large ways. This may sometimes be seen in cases where a dissent should have been, but was not, written. Justice Scalia has put it with characteristic directness: "Ironic as it may seem, I think a higher percentage of the worst opinions of my Court—not in result but in reasoning—are unanimous ones."²⁸ An example of Justice Scalia's point is *Bonelli Cattle Co. v. Arizona*,²⁹ in which the Court held unanimously, in an opinion by Justice Marshall, that the "equal footing doctrine" required the Court to apply federal common law to determine title to land that had previously been at the bottom of the Colorado River. I think it fair to say that in *Bonelli Cattle* the Court as a whole cared little and knew less about the question it was deciding. Only three years later, in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel*

25. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957).

26. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 541 (1977) (White, J., dissenting).

27. See, e.g., *Brockmeyer v. May*, 361 F.3d 1222, 1229 (9th Cir. 2004) (Fletcher, J., dissenting), *withdrawn and replaced by* 383 F.3d 798 (9th Cir. 2004).

28. Scalia, *supra* note 23 at 41.

29. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), overruled by *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

Co.,³⁰ the Court reversed itself. Now educated by the amicus briefs of twenty-six unhappy states, the Court held that state law rather than federal common law governed questions of ownership of riverbottom land. Poor Justice Marshall, the author of *Bonelli Cattle*, was left almost alone in dissent.³¹

Third, a dissent can keep (or at least try to keep) the majority honest. Judges are not immune from the normal human temptation to ignore or to minimize inconvenient facts. A dissent can sometimes force the majority to acknowledge facts that work against the result favored by the majority. And if the dissent cannot force an acknowledgement, at least it can point out the dishonesty of the majority opinion. An example is *Demore v. Kim*,³² in which Kim, a lawful permanent resident alien who came to this country from Korea at the age of six, was placed in deportation proceedings as a result of state court convictions for burglary and petty theft with priors. Immediately upon his release from prison at age twenty-one, he was placed in federal custody pending the outcome of his deportation proceeding. Under 8 U.S.C. § 1226(c), he was not entitled to bail during the course of the proceedings. The district court held the no-bail statute unconstitutional, and the Ninth Circuit agreed.³³ There was no contention that Kim was dangerous or that he was a serious flight risk. Pending the outcome of the litigation, the Immigration and Naturalization Service released Kim on a \$5,000 bond without requesting a bail hearing.

The Supreme Court upheld the constitutionality of the no-bail statute. Chief Justice Rehnquist wrote for the majority that Kim “conceded” that he was deportable,³⁴ and that the issue in the case was whether he could be detained without bail for the “brief period necessary”³⁵ to complete removal proceedings. The no-bail statute had a very different practical and constitutional consequence depending on the length of the detention. In concluding that the detention at issue was “brief” because of Kim’s “concession,” the Court made a hard case easy. But, in fact, the case was not easy. As the record made clear, Kim had made no such concession. He vigorously contested his deportation, and his deportation proceedings (and therefore his detention) were going to

30. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

31. *Id.* at 382 (Marshall, J., dissenting). Justice White joined Justice Marshall’s dissent. Justice Brennan declined to join the dissent, noting only that he would not overrule *Bonelli Cattle*. *Id.*

32. *Demore v. Kim*, 538 U.S. 510 (2003).

33. *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), *rev’d*, *Demore v. Kim*, 538 U.S. 510 (2003). In the interest of full disclosure, I note that I was the author of the Ninth Circuit opinion.

34. *Demore v. Kim*, 538 U.S. at 514, 522 n. 6, and 531.

35. *Id.* at 513.

be lengthy. Justice Souter pointed out the Court's misrepresentation of the record, politely calling it a mistake: "At the outset, there is the Court's mistaken suggestion that Kim 'conceded' his removability. The Court cites no statement before any court conceding removability, and I can find none."³⁶

Fourth, a dissent can predict the legal and practical consequences of the majority opinion. Here, there are two schools of thought. Some judges like to point out in a parade of horrors all of the terrible consequences that will result from the majority's decision. For example, in *Stone v. Powell*,³⁷ the Court held that a federal court cannot review on habeas corpus under 28 U.S.C. § 2254 a state court's determination of the admissibility of evidence obtained through an allegedly unlawful search and seizure. Justice Brennan, in dissent, predicted that the Court's decision would lead to an evisceration of federal habeas for state prisoners on all federal constitutional claims that are not "guilt-related."³⁸ This approach has its dangers, for by pointing out the dire consequences the dissent may increase the likelihood that they occur. Other judges prefer to leave the dire consequences unstated, and if possible to concur in the judgment, while making clear the narrowness of the majority's holding. Justice Stewart was particularly fond of this technique.³⁹

Fifth, a dissent makes clear to the losing party or parties that their arguments were heard and understood. A close-to-home example for me is *Lutwak v. United States*.⁴⁰ The issue was whether marriages under the federal War Brides Act were fraudulent. After World War II, a woman legally in the United States arranged for her two brothers, European Jews who had survived the Holocaust, to marry women who had served in the American military during the war. If valid, the marriages permitted the two men to immigrate to the United States. The government brought a criminal prosecution against the woman and her brothers, charging that the marriages were fraudulent. The issue before the Supreme Court was whether the marital privilege protected the defendants from the introduction of testimony by the women to whom

36. *Id.* at 541 (Souter, J., dissenting).

37. *Stone v. Powell*, 428 U.S. 465 (1976).

38. *Id.* at 517–18 (Brennan, J., dissenting) ("I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures—that this Court later decides are not 'guilt-related.'").

39. See, e.g., *Citizens & S. Nat'l Bank v. Baugus*, 434 U.S. 35, 45 (1977) (Stewart, J., concurring).

40. *Lutwak v. U.S.*, 344 U.S. 604 (1953).

the men were purportedly married. The Court held that the testimony was admissible, despite a powerful dissent by Justice Jackson, joined by Justices Black and Frankfurter.⁴¹ The defendants were convicted and served time in federal prison. The woman was the grandmother of a college roommate and close friend. While my friend would have preferred for the Court to come out the other way, Justice Jackson's dissent gives him comfort, even some satisfaction. Three Justices heard, and understood, the argument made on behalf of his grandmother. I often think of this case when I write dissents.

Sixth, a dissent can call for law reform by the legislature. A recent example is *Ledbetter v. Goodyear Tire & Rubber Co.*,⁴² decided by the Supreme Court in 2007. Lilly Ledbetter worked for Goodyear between 1979 and 1998. She was the only woman "area manager" at her plant, and was paid substantially less than her male counterparts. The Court held that the 180-day statute of limitations for sex-based discrimination under Title VII began to run when an allegedly unlawful difference in payment occurred, with the result that when Ledbetter finally discovered that she had been paid less than her male counterparts, she could recover damages only for the 180 days before she filed suit. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, vigorously dissented. Justice Ginsburg explicitly called for legislative corrections of the "Court's parsimonious reading of Title VII."⁴³ Ms. Ledbetter spoke at the Democratic Convention in the summer of 2008, arguing for a change in the law (as well as for a change in administrations). The new Congress responded with the Lilly Ledbetter Fair Pay Act of 2009, which expressed disapproval of the Court's *Ledbetter* decision and amended Title VII and related antidiscrimination laws to allow recovery of up to two years' back pay.⁴⁴

Seventh, a dissent can appeal to the judgment of other judges. A dissenting federal appellate judge may appeal to his or her colleagues to take a case en banc because of disagreement with the majority's decision.⁴⁵ Or a judge may concur in the opinion (or the judgment) of his or her colleagues, while making clear that he or she disagrees with an earlier decision of the court that binds the panel on which the judge sits.⁴⁶ The audience for such a dissent is the ac-

41. *Id.* at 620 (Jackson, J., dissenting).

42. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

43. *Id.* at 127 S. Ct. 2162, 2188 (Ginsburg, J., dissenting).

44. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

45. See, e.g., *Vasquez v. Astrue*, 547 F.3d 1101, 1114 (9th Cir. 2008) (O'Scannlain, J., dissenting).

46. See, e.g., *U.S. v. Belgarde*, 300 F.3d 1177, 1182 (9th Cir. 2002) (Gould, J., concurring).

tive judges of the circuit, who by majority vote can decide to rehear the case en banc. If a case is taken en banc, the decision of the three-judge panel can be overridden—either because the en banc court holds the panel decision was wrong under existing law, or because the en banc court reverses earlier circuit authority that bound the panel. If an appellate judge has tried unsuccessfully to convince his or her colleagues to take a panel decision en banc, that judge may write a dissent from the failure to go en banc. Such a dissent is the functional equivalent of a petition for certiorari, but written by a judge instead of a party. Some are successful,⁴⁷ but most are not.⁴⁸

Finally, a dissent can appeal to the judgment of a later time. This brings us full circle to the famous, and prophetic, dissents with which I began. Golden Gate University Law School is justly proud to count among its alumni Justice Carter, a dissenter in this proud tradition.

47. See, e.g., *U.S. v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918 (9th Cir.) (Bea, J., dissenting from denial of rehearing en banc), *cert. granted*, 129 S. Ct. 30 (2008); *Musladin v. Lamarque*, 427 F.3d 647 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc), *vacated*, 549 U.S. 70 (2006).

48. See, e.g., *S. Or. Barter Fair v. Jackson County*, 401 F.3d 1124 (9th Cir.) (Berzon, J., dissenting from denial of rehearing en banc), *cert. denied*, 546 U.S. 826 (2005); *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 210 F.3d 1098, 1099 (9th Cir.) (O'Scannlain, J., dissenting from denial of rehearing en banc), *cert. denied*, 531 U.S. 1010 (2000).