Dissents in the Early Court

History of Dissents, The Marshall Court's First Dissent, and Chief Justice John Marshall's First Dissent

Before John Marshall became Chief Justice in 1801, the Supreme Court followed the custom of English appellate courts of issuing opinions "**seriatim**" whereby each justice filed his own separate opinion in a case. This led to confusion as the overall result had to be pieced together after each opinion was read. Moreover, sometimes there were different **legal rationales** for a decision. The Court's rulings were supposed to carry the same weight as congressional legislation, but without one clear **majority opinion** it was difficult to know which **holding** should be enforced. Accordingly, no dissenting opinions were issued in the first decade of the Court because there was no majority opinion to dissent from.

Although Marshall's predecessor, Chief Justice Oliver Ellsworth, had tried to move toward using a single "Opinion of the Court," Marshall was more successful in persuading his brethren to institutionalize the practice. Routinely issuing unified opinions enhanced the Court's power, clarified its rulings, and prevented its internal differences from being made public. For the first decade of the Marshall Court, the Justices spoke with one voice: as the most senior Justice, that voice was often Marshall's as he wrote most of the opinions. The Court's unanimous decisions thus reflected Marshall's pro-**Federalist** views. This approach increased the importance of bargaining and persuasion among the justices in **Conference**.

Marshall's dominance infuriated Presidents Thomas Jefferson and James Madison, both **Democratic-Republicans**, because it continued long after they appointed new Justices to the Supreme Court who came to constitute a majority. In 1804, Jefferson appointed William Johnson of South Carolina with the hope that he would challenge Marshall. While Johnson fought to have his ideas taken seriously in Conference, Marshall usually framed the discussion of a case in a way that was very persuasive to the other Associate Justices. At age 32, Johnson was younger than his colleagues, who thought he was both hot tempered and disrespectful of his elders' wisdom. Nonetheless, Johnson eventually succeeded in convincing the Chief Justice to allow others to voice and print their opinions. For example, a year after his appointment, Johnson wrote the Court's first formal dissenting opinion in *Huidekoper's Lessee v. Douglas* (1805), publishing a written opinion that disagreed with the majority decision. Justice Johnson not only established a formal method of dissent in Supreme Court procedure but would author about half the dissents issued during his tenure (1804-1834).

While some Justices worried that publicly airing the Court's differences about the law would weaken the institution, the Supreme Court's power only increased. By 1812 **dissenting** and **concurring** opinions were issued regularly, but the conservative **nationalism** of the Marshall Court continued to solidify. Moreover, Johnson ended up disappointing Jefferson by becoming more **conciliatory** to Marshall's vision of a strong federal government. In Marshall's 34 years as Chief Justice, the Court issued 1,129 opinions: only 87 were not unanimous. By the end of his career on the bench, even Chief Justice Marshall issued his own dissents, expressing alternative legal rationales than those expressed in a majority opinion, that influenced legal minds after his time.

Since the Marshall Court era, separate dissenting and concurring opinions have become more frequent. Dissents play an important role within the judicial system. A Justice voicing, drafting, and publishing their disagreement with the majority opinion may be able to persuade other justices to join their dissent. Providing an alternative analysis of a case allows for flaws in the majority opinion to be recognized and forces the majority to rationalize their decision further. The discussion between Justices of both the majority and dissenting side of a case can provide clearer published opinions that can be used in the future to maintain or change an established **precedent**.

Vocabulary

- **Seriatim**: a Latin word meaning consecutively. Justices giving their opinion one after the other.
- **Legal rationale**: an expression of the reasons behind how a decision was made that is grounded in law.
- **Majority Opinion or Opinion of the Court**: An opinion joined by a majority of the justices explaining the legal basis for the Court's decision and regarded as binding precedent in future decisions.
- **Holding**: The Court's determination in a matter of law. Also called the opinion.
- **Federalist**: a member of one of the earliest American political parties who supported a strong central government.
- **Conference**: the private meeting of the Justices during which current cases are discussed.
- **Democratic-Republicans**: a member of one of the earliest American political parties who supported personal liberty, states' rights, and agrarian interests (farming).
- **Dissenting Opinion or Dissent**: A formal written expression by a justice who has a different point of view on major or minor issues in a case that rejects the result reached by the majority.
- **Concurring Opinion or Concurrence**: An opinion that agrees with the result reached by the majority (the judgment), but that expresses a different analysis or gives the law or facts a different emphasis in reaching that result.
- **Nationalism**: identification with one's own nation and support for its interests.
- **Conciliatory**: intended to gain goodwill or reduce hostility.

- **Authority**: the power granted to a branch of government or state governments
- **Precedent**: a principle or rule established by previous legal case relevant to a court when deciding future cases with similar issues or facts. The phrase *stare decisis* is commonly used to describe this principle, which embraces the idea that precedents should stand and only be changed in extraordinary circumstances.

Discussion Questions

1. What were the problems with the practice of issuing individual opinions by each Justice?
2. Why was unity important to Chief Justice Marshall?
3. Is the ability to dissent an important aspect of Court business? Explain.
4. Can dissents improve legal understanding? Explain.

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First Dissent by Justice William Johnson in *Huidekoper's Lessee v. Douglass* (1805)

"I concur in the decision given by the Court in this case, but there was a question suggested and commented on in the argument which has not been noticed by the Court, but which appears to me to merit some consideration."

-Justice William Johnson, 1805

Summary

In 1792, the Pennsylvania Land Act opened to sale all the **unappropriated** lands lying north of the Ohio River and west of the Alegheny River and Conewango Creek. Up to 400 acres of these lands were to be sold only to people who would "cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled." The Pennsylvania legislators hoped that this act would discourage land **speculation** in the region. Investors and land companies, called warrantees, however, quickly took advantage of a weakness in the law and used other names to purchase thousands of acres of land in western Pennsylvania. As time passed, the companies struggled to meet the two-year requirement set forth by the law and faced potentially losing their claim to the land. In addition, they also encountered conflicts with local Native Nations making improvements to the land difficult. Over the years, adventurous settlers moved to the area, made minimal improvements, and argued that the land now belonged to them based on a piece of the 1792 act. The companies fought back and took their case to the Pennsylvania circuit court and then the Supreme Court. Chief Justice John Marshall issued the Court's opinion in favor of the land companies explaining that the conflict with the Native Nations excused them from the two-year time limit on making improvements to the land. While Justice Johnson agreed in part with the majority opinion, he issued the first, although brief, dissent of the Marshall Court Era expressing a different view of the Court's judicial function: *"It may appear singular that a deficiency, of a single day perhaps, should produce so material an alteration in the rights or situations of the warrantee. But the Legislature of Pennsylvania was fully competent to make what statutory provisions they thought proper upon the subject; and the court is no further responsible for the effect of the words which they had used to express their intent, than to endeavor to give a sensible and consistent operation to them in every case that can, occur."*

After issuing the dissent, Justice Johnson reported to President Jefferson: *"Some case soon occurred in which I differed from my Brethren, and I thought 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…"*

(Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), microformed on The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53.)

Vocabulary

- **Unappropriated**: not assigned or taken into possession.
- **Speculation**: purchasing land for future sale in hopes it will increase in value.

Discussion Questions

1. What was Justice Johnson's view of the Supreme Court's judicial function?
2. Why do you think the other Justices lectured Justice Johnson after his dissent?
3. How would a Justice writing the President after writing a dissenting opinion be viewed today?

Chief Justice Marshall's first (and only) Dissent in *Ogden v. Saunders* (1827)

"We have taken a different view of the very interesting question which has been discussed with so much talent as well as labor at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action."

-Chief Justice John Marshall, 1827

Summary

Saunders, a citizen of Kentucky, demanded payment for services based on an 1806 contract he had entered with Ogden, a citizen of Louisiana living in New York. Ogden, however, **defaulted** and claimed bankruptcy under an 1801 New York bankruptcy law. The case was argued twice before the Supreme Court, in 1824 and 1827. The justices were evenly divided in 1824 due to Justice Todd's absence, thus it was ordered that case be reargued for the full Court. The parties were represented by exceptional advocates—Saunders was represented by Daniel Webster and Ogden was represented by Henry Clay. The issue before the Supreme Court was if the states were allowed to pass their own bankruptcy statues. Bushrod Washington wrote the majority opinion for a divided Court and held that states could pass their own banking laws and, therefore, the New York law did not violate the **Contracts Clause** of the U.S. Constitution. Chief Justice John Marshall wrote a dissenting opinion in the case which included several key arguments. The central argument was that the Constitution's Contracts Clause gave the federal legislature, Congress, complete authority over bankruptcy laws because the states had delegated that authority to the federal government. He was joined in his dissent by Justices Gabriel Duvall and Joseph Story.

"The provision of the constitution is, that "no State shall pass any law" "impairing the obligation of contracts."

-Chief Justice John Marshall, 1827

Justice Marshall determined that several prior decisions created the precedent the Court should be using to evaluate contract decisions. The intentions of a contract entered into by two or more private persons must be honored under the terms understood by those who entered the contract, and those terms must not be ignored, or extended to something other than what was originally agreed upon. Additionally, Marshall argued that the Constitution erases the "lines of separation" between states and power was **ceded** to federal government authorities to enforce the terms of the contract, or its **remedies**, as determined by the Constitution or prior court decisions.

"Yet, when we consider the nature of our Union; that it is intended to- make us, in a great measure, one people, as to commercial objects, that, so far as respects the intercommunication of individuals, the lines of separation between States are, in many respects, obliterated, it would not be matter of surprise, if, on the delicate subject of contracts once formed, the interference of State legislation should be greatly abridged, or entirely forbidden."

-Chief Justice John Marshall, 1827

As a result, Marshall argued that the principle of federalism affirms that states cannot create laws that interfere with the obligations created by private contracts and new state laws cannot erase

conflicting terms and conditions of a contract entered before its passage. In short, Marshall's argument was that citizens need to know their contracts will be upheld uniformly even if they're from different states.

Vocabulary

- **Defaulted**: failure to repay a loan.
- **Contracts Clause**: (Article I, Section 10) No state shall pass any law impairing the obligations of contracts.
- **Ceded**: give up (power or territory).
- **Remedies**: legal methods of enforcing or correcting a contract.
- **Federalism**: a doctrine that recognizes the existence and independent powers of the federal and state governments.

Discussion Questions

1. What is the main reason Chief Justice Marshall dissented in the Ogden case?
2. Why does Chief Justice Marshall argue that according to the Constitution, "the lines of separation between States are, in many respects, obliterated."?