

IS JUDICIAL DISSENT CONSTITUTIONALLY PROTECTED?

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You cannot impose a regime of joint judgments on judges who hold conflicting views. Judicial integrity cannot be compromised.

Sir Anthony Mason¹

I INTRODUCTION

The ability of a judge to publish an opinion which rejects the reasoning of his or her colleagues and explains how the majority has fallen into error is surely one of the key indicators of a robust and independent judicial system. A neutered judiciary firmly in the grip of another arm of government would hardly require a mechanism for the airing of disagreement. Conversely, the strong tradition of individual expression which the possibility of dissent most clearly emphasises, poses a real obstacle to those who might attempt the intimidation of judicial institutions. As Justice Douglas of the United States Supreme Court dramatically argued in the middle of last century:

Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a sine qua non to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Führer, with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a communist court dissenting against the decrees of the Kremlin ...²

The presence of dissenting judgments is one factor which provides reassurance that the courts are staffed by judges beholden to nothing more powerful than their own individual appreciation of the state of the law. If the judges are prepared to disagree

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¹ Sir Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 *Constitutional Law and Policy Review* 41, 43.

² William O Douglas, 'The Dissent: A Safeguard of Democracy' (1948) 32 *Journal of American Judicature Society* 104, 105.

with each other on occasion, then it seems reasonable to presume they will have no qualms about disagreeing with the executive and legislature as well when the need arises.

However, dissenting judgments seem to have been rarely appreciated as a bulwark of judicial independence. Historically, the emergence of dissent in domestic courts seems to have occurred more at the instigation of a few determined individuals than as a feature clearly rooted in the constitutional importance of separation of powers. We would not normally conceive of an attempt to stifle dissent as an interference with the courts amounting to a breach of the separation of judicial power. This is due largely to the dominant form of the rule from the *Boilermakers' Case*³ with its focus on strict separation of judicial and non-judicial functions. Removing the independence of, say, the justices of the High Court *from each other* by requiring them to file only unanimous opinions, may not necessarily mean that *the Court itself* as part of the judicial arm of government has been compromised. As traditionally conceived, the independence which the separation of powers protects is institutional, rather than individual.⁴ A ban on dissents without more should not weaken the judiciary relative to the executive or legislature – especially when one considers that minority judgments are not binding authoritative statements of the law.⁵

³ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers' Case*').

⁴ See, eg, Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341, 344. See also, Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A decade in overview' (2000) 20 *Australian Bar Review* 283, 286, wherein she comments that, despite innovative interpretations in respect of Chapter III in recent times, cases concerned with the institutional allocation of power 'continue to be staple fare'.

⁵ I have been careful here not to say that dissents are of no legal value – which they clearly are. See, eg, John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221; Justice Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133; Alan Barth, *Prophets with Honor - Great Dissents and Great Dissenters in the Supreme Court* (1974); Matthew P Bergman, 'Dissent in the Judicial Process: Discord in Service of Harmony' (1991) 68 *Denver University Law Review* 79; Justice William J Brennan, 'In Defense of Dissents' (1986) 37 *Hastings Law Journal* 427; Douglas, above n 2; Robert G Flanders Jr, 'The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable' (1999) 4 *Roger Williams University Law Review* 401; Stanley H Fuld, 'The Voices of Dissent' (1962) 62 *Columbia Law Review* 923; Claire L'Heureux-Dubé, 'The Dissenting Opinion: Voices of the Future?' (2000) 38 *Osgoode Hall Law Journal* 495; Donald E Lively, *Foreshadows of the Law – Supreme Court Dissents and Constitutional Development* (1992); Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724; Andrew Lynch, 'Dissenting Judgments' in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 216-8; R Dean Moorhead, 'Concurring and Dissenting Opinions' (1952) 38 *American Bar Association Journal* 821; Antonin Scalia, 'The Dissenting Opinion' (1994) *Journal of Supreme Court History* 33; and Edward C Voss, 'Dissent: Sign of a Healthy Court' (1992) 24 *Arizona State Law Journal* 643.

However, this purely institutional mindset has, in more recent years, yielded to a renewed appreciation of the doctrine's purpose as providing significant protection to individual freedom. The majority in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁶ recognised that 'the separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges'.⁷ As evident from this statement, individual liberty requires, in turn, an operation of the separation of powers doctrine which extends beyond simply requiring a clear demarcation of institutional functions to affording a basic guarantee that the exercise of judicial power itself is not tainted, or perhaps even perceived to be so, by an interference in the internal workings of the courts by the executive or legislative arms of government. As shall be discussed in Part IV(b) of this paper, the apotheosis of this view to date is the decision of *Nicholas v The Queen*⁸ though it attracted support in earlier decisions also. In this light, an attempt to diminish *individual* judicial autonomy might be seen as an attack upon the free operation of judicial method generally. As such, it would challenge those ideals which justify the prohibition upon interference from the other branches of government.

The purpose of this paper is to consider whether the strict separation of judicial power implied from the Commonwealth Constitution protects the ability which judges possess to issue dissenting opinions.⁹ Can the guarantee of judicial independence which Chapter III of the Constitution offers federal courts be extended to individual judicial officers so that there is, as some judges claim, a 'right to dissent'? Consideration of the relevant case law will demonstrate that, if protection from interference is to be afforded, the delivery of such opinions will need to be characterised as an essential feature of the curial process.

II THE POSSIBILITY OF DISSENT

The tradition of the dissenting judicial opinion is a long one and, like much of our English legal inheritance, betrays little evidence of having been consciously planned or adopted. The ability to dissent developed through the English courts' willingness to accept majority judgements from the end of the 16th century.¹⁰ Alder suggests that the 'status of the Appellate Committee of the House of Lords of which each member is entitled to make a speech provides a formal constitutional basis for the practice of dissent in that forum',¹¹ though the better approach appears to simply

⁶ (1996) 189 CLR 1.

⁷ Ibid 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory – Commentary & Materials* (3rd ed, 2002) 1250; Wheeler, above n 4, 284.

⁸ (1998) 193 CLR 173.

⁹ *Boilermakers' Case* (1956) 94 CLR 254.

¹⁰ For a survey of cases wherein dissents emerged, see, Alder, above n 5, 222, 233. Alder identifies the decision of *Grindley v Barker* (1798) 1 Bos & Pul 229 as one of the earliest cases where the inevitability of disagreement was acknowledged.

¹¹ Alder, above n 5, 233; see also, Bader Ginsburg, above n 5, 135; Alan Patterson, *The Law Lords* (1982) 98. Patterson is more explicit in saying that 'since the opinion of a Law Lord is

accept that minority opinions are really the natural consequence of the seriatim practice of judgment delivery employed in the English courts. Meeting with no resistance, the practice simply spread as a matter of course to those jurisdictions founded in the Anglo-Saxon legal tradition. At around the same time, the absence of any definitive source for a right to dissent in the United States Supreme Court was demonstrated by its vulnerability to Chief Justice Marshall's determined efforts to consolidate a practice of unanimity, despite an initial favouring of the seriatim approach. Justice Johnson's successful resistance to this rested not on his ability to point to a legal basis for dissent, but simply his refusal to comply and his persistence in standing up to his Chief Justice.¹²

Orth has recently suggested that the development of judicial dissent may owe more to the challenges which faced the courts of the New World than previously recognised. He argues that the modification of the common law to the conditions of the United States, in addition to the task of construing written constitutions, provided a fertile environment for dissenting opinions which may be contrasted with '[j]udging between individual litigants on the basis of long-established common law rules ... in England in the age of Blackstone, a relatively small and homogenous society'.¹³ The American legal climate was instrumental in leading to a changed 'assumption about whether deliberation on legal subjects by trained judges is likely to result in disagreement'.¹⁴ Whether one concedes this view or not, Orth is surely right in his basic conjecture that modern efforts to staff appellate courts with an odd number of judicial officers reflects that 'we have come to expect (and accept) disagreement on legal issues'.¹⁵ That this crucial shift – so vital to modern jurisprudence – occurred largely by stealth owes much to the quiet arrival of the dissenting opinion.

The ambiguous origins of dissent in domestic tribunals may be contrasted with the situation in respect of international law courts which, being a phenomenon of the 20th century and the outcome of vigorous diplomacy, make no such assumptions and any ability to dissent is indeed a right enshrined in those documents which

in constitutional theory a speech delivered in a debate in the Upper Chamber of Parliament ... the 'encouragement' of repeated withdrawals interferes with the peer's freedom of speech'. This reflects much of the intangible quality of English constitutional law generally due to its reliance upon conventions. For, even where dissent was excluded, in the Judicial Committee of the Privy Council, this was simply a matter of convention (though the 1966 introduction of dissent in this body is found in a practice order).

¹² See, eg, John P Kelsh, 'The Opinion Delivery Practices of the United States Supreme Court 1790-1945' (1999) 77 *Washington University Law Quarterly* 137, 143-152; Meredith Kolsky, 'Justice William Johnston and the History of Supreme Court Dissent' (1995) 83 *Georgetown Law Journal* 2069; A J Levin, 'Mr Justice William Johnson, Creative Dissenter' (1944) 43 *Michigan Law Review* 497, 520-3; Donald G Morgan, 'Mr Justice Johnson and the Constitution' (1944) 57 *Harvard Law Review* 328, 331-5; and Bernard Schwartz, *A History of the Supreme Court* (1993) 39.

¹³ John V Orth, 'How many Judges does it take to make a Supreme Court' (2002) 19 *Constitutional Commentary* 681, 690.

¹⁴ *Ibid* 689.

¹⁵ *Ibid* 688.

establish them. Hussain has detailed at length the extensive negotiations which went into adoption of article 57 of the *Statute of the International Court of Justice* entitling a judge to deliver a separate opinion when not in agreement with his or her colleagues.¹⁶ A similar right to dissent was conferred by article 51 (now article 45) of the *European Convention on Human Rights* upon the European Court of Human Rights.¹⁷

The position in respect of the High Court of Australia is essentially an amalgam of the clarity of international courts with the conventions of other domestic tribunals. On the one hand, the possibility of formal disagreement amongst judges of the High Court is certainly recognised by section 23 of the *Judiciary Act 1903* (Cth) which resolves the outcome of a case where a difference of opinion exists. But in the absence of any express 'right' to dissent from a majority view, it is still probably more accurate to say that the ability to issue such an opinion is simply assumed.

III THE JUDICIAL RHETORIC OF A 'RIGHT TO A DISSENT' – AND THREATS THERETO

Despite the elusive beginnings of dissenting judgments and the absence of any authoritative basis for the practice in many domestic courts, there has been a strong tendency among contemporary members of the judiciary to insist that they have a right to differ from a majority of their colleagues on the institutions on which they serve. In the case of justices of the United States Supreme Court, this defence of dissent has unsurprisingly drawn upon its status as a crucial form of speech. Justice Brennan of that court, argued that no-one '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'.¹⁸ Indeed, Justice Brennan saw dissent as both an obligation and a right:

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. ...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.¹⁹

Justice Brennan's colleague, Justice Douglas, and his contemporary, Canada's Chief Justice Laskin shared a similar view of dissent not merely as a function but a right of judicial office.²⁰ And closer to home, and more recently, the High Court's

¹⁶ Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (1984) chapter 1.

¹⁷ Cf the prohibition on dissent in the Court of Justice of the European Communities: Protocol on the Statute of the Court of Justice, signed at Brussels on 17 April 1957. The different goals of uniformity and universality go some way towards understanding the acceptability of dissent in these international courts.

¹⁸ Brennan, above n 5, 437.

¹⁹ Ibid 438.

²⁰ See, eg, Justice William O Douglas quoted in Fuld, above n 5, 926; Bora Laskin, 'The Supreme Court of Canada: A Final Court of and for Canadians' (1951) 29 *Canadian Bar Review* 1038, 1048.

Justice Kirby has said that '[o]ne of the most distinctive features of the common law judicial system is the right of appellate judges to express dissenting opinions'.²¹

But it should be stressed that the traditional acceptance of minority opinions does not simply equate with a *right* to dissent. Sentiments such as those of Justice Kirby may be strikingly contrasted with just how fragile the ability to dissent has appeared in the face of proposals for its curtailment.

A requirement of unanimity may be imposed upon the judges of a court from an internal or external source. The former would seem most likely to arise through the efforts of the presiding Chief Justice. The classic example is, of course, that of John Marshall's tenure on the United States Supreme Court to which reference was made earlier, but it is not an isolated one. A number of the High Court of Australia's Chief Justices have quite openly sought to secure greater consensus – or at least diminish needless duplication. Dixon apparently desired less individualistic opinion-writing;²² Barwick tried unsuccessfully to establish a formal conferencing procedure;²³ and Mason also took steps with a view to increasing the number of joint judgments.²⁴ Chief Justice Gleeson has managed to achieve success where Barwick failed, but stresses that such discussions 'will not always secure agreement between the Justices and that is not their purpose'.²⁵ Clearly, despite the persistence of concern about excessive individualism, there has been little heavy-handedness about the issue in the High Court. But that is not to say that a more aggressive approach to obtaining unanimity might not be adopted by members of the bench in the future. An intriguing example is available in the suppression of an individual dissent by Justice Musmanno of the Pennsylvania Supreme Court in the 1950s by order of his Chief Justice. His Honour litigated unsuccessfully for the publication of his opinion – the final appeal being heard in the very Court of which Justice Musmanno was a member!²⁶

The more realistic, albeit seemingly unlikely, development is for unanimity to be compelled by the dictates of the legislature, rather than the judges themselves. Towards the end of the 19th century, the Canadian House of Commons debated legislation prohibiting judicial dissent²⁷ and ZoBell reported in 1959 that 'at least two [American] states have experimented with statutory control of the publication of minority judicial opinions'.²⁸ If those examples seem a little dated, consider the

²¹ Michael Kirby, 'Law at Century's End' (2001) 1 *Macquarie Law Journal* 1, 12.

²² Philip Ayres, *Owen Dixon* (2003), 262-3.

²³ See, eg, David Marr, *Barwick* (1980), 233; Gerald McGinley, 'The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts' (1987) 11 *Adelaide Law Review* 203, 207-209.

²⁴ Mason, above n 1, 42.

²⁵ High Court of Australia, *Annual Report 1998-99*, 5-6.

²⁶ See, eg, Michael Musmanno, 'Dissenting Opinions' (1956) 60 *Dickenson Law Review* 139; K M ZoBell, 'Division of Opinion in the Supreme Court: A History of Judicial Disintegration' (1959) 44 *Cornell Law Quarterly* 186, 209-10.

²⁷ L'Heureux-Dubé, above n 5, 499.

²⁸ ZoBell, above n 26, 209.

present position of the New Zealand Court of Appeal. Aside from occasions where the appeal concerns a question of law on which the Court believes ‘it would be convenient that separate judgments should be pronounced’, it is required by law to desist from the publication of separate judgments in criminal matters.²⁹

The possibility of legislative control over the individual expression of members of the judiciary was not far from the thoughts of Australia’s Justice Murphy. In the case of *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*³⁰ he expressed doubts about the validity of use of the Chief Justice’s casting vote in order to resolve deadlock on an evenly constituted bench. His Honour indicated that he would feel similar unease about other statutory devices which determined the status of judicial opinions – including a requirement of unanimity in order for the court’s resolution of a constitutional case to be binding upon the legislature.³¹

Finally, while it is probably only natural to equate the external force for unanimity simply with the legislature, it is worth noting that serious debate occurred within the Canadian profession and academy in the early 1950s about ‘whether the Supreme Court of Canada should adopt the practice of the Judicial Committee of the Privy Council and deliver only one judgment in each case’.³²

In summary, there is sufficient evidence to demonstrate that, from time to time, pressure of various kinds may be exerted with a view to curbing the practice of dissent. Sympathetic as we may be to ZoBell’s view that:

Even if a jural reincarnation of the Great Chief Justice [Marshall] were to preside, the idea of imposing judicial silence upon his Associates by external means – whether by positive law or by the fiat of the Chief Justice – would be intolerable to today’s lawyers and judges.³³

experience indicates that interference with individual judicial self-expression is not so far-fetched as to be easily dismissed as an impossibility. If we value judicial dissent, then it is necessary to know to what extent it is able to resist attack, and that requires being definite about what supports the practice and protects it as a judicial right.

²⁹ The full text of s 398(1) of the *Crimes Act* 1961 (NZ) reads as follows: ‘Unless the Court of Appeal directs to the contrary in cases where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court of Appeal on any appeal or motion under this Act, and the opinion of the Court of Appeal on any point referred to it or question of law reserved under this Act, shall be pronounced by the presiding Judge or such other member of the Court hearing the case as the presiding Judge directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.’

³⁰ *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1980) 146 CLR 336.

³¹ *Ibid* 387.

³² Maxwell Bruce, ‘The 1953 Mid-Winter Meeting of Council’ (1953) 31 *Canadian Bar Review* 178, 182.

³³ ZoBell, above n 26, 209-10.

IV CONSTITUTIONAL PROTECTIONS FOR JUDICIAL DISSENT

There are essentially two possible bases upon which constitutional protection of judicial dissent might be founded. Probably the first of these to naturally spring to mind is the notion of constitutionally protected free speech. However, the High Court has made it clear that the freedom of political communication serves only those limited instrumental purposes of representative and responsible government arising from the text of sections 7 and 24 of the Constitution.³⁴ As such, the freedom may be overly stretched in defence of dissent. A more plausible (and arguably less contentious) source for a 'right' to dissent is the repository of curial power found in Chapter III of the Constitution and the implication that the essential features of its exercise are to be protected from incursion by the other arms of government.³⁵

A Freedom of Political Communication

The assertions from US Supreme Court justices of a right to dissent appear to rest upon the strong guarantee of freedom of speech found in the American Bill of Rights. However, Little has argued that, while 'expressing disagreement to one's colleagues privately; [and] having one's disagreement with the majority's opinion publicly noted' would certainly be covered by the First Amendment, full publication of a dissenting opinion alongside the majority judgment is outside the protection offered.³⁶ This would seem largely due to the presence of, to use Australian parlance, other 'legitimate ends' which are served by denying a right for publication of dissents – such as avoiding costs 'in terms of judge time, court money, and public disrespect'.³⁷ Additionally, Little makes the point that 'the First Amendment is generally held not to require the government to subsidize publication of speech'.³⁸

Even more serious reservations must exist in this jurisdiction. The freedom of political communication constitutionally implied by a unanimous High Court of Australia in *Lange v Australian Broadcasting Corporation*³⁹ is far from simply analogous to the much broader First Amendment of the United States Constitution.⁴⁰ Several difficulties confront an attempt to use the implied freedom as a protection of judicial dissent. Firstly, can minority judicial opinions of High Court justices be characterised as a form of political communication? Although the *Lange* test simply refers to 'freedom of communication about government or political

³⁴ *Lange v Australian Broadcasting Authority* (1997) 189 CLR 520, 561 ('*Lange*').

³⁵ Of course it is erroneous to refer to any protection of dissent afforded through either the implied freedom of political communication or the Constitution's separation of judicial power as a 'right' in the strict sense. Misunderstandings can easily arise through the adoption of the rhetoric of 'rights' and so it is best to think in terms of a 'guarantee' of judicial dissent.

³⁶ Rory K Little, 'Reading Justice Brennan: Is There a "Right" to Dissent?' (1999) 50 *Hastings Law Journal* 683, 688.

³⁷ *Ibid* 699.

³⁸ *Ibid*.

³⁹ (1997) 189 CLR 520.

⁴⁰ The Court in that case could not have expressed this more clearly, see *ibid* 567.

matters',⁴¹ the potential width of that expression (as indicated by opinions in the earlier decisions of *Theophanous v Herald & Weekly Times*⁴² and *Cunliffe v The Commonwealth*⁴³) must be seen as restricted by the unanimous judgment's grounding of the freedom in sections 7 and 24 of the Constitution. The result of *Lange*'s textual focus is apparently to protect only that communication 'concerning political or government matters which enables the people to exercise a free and informed choice as electors'.⁴⁴ Having lamented the limitations of this approach upon its emergence in *Lange*,⁴⁵ Stone later observed that its application in lower courts had produced a legal meaning of 'political communication' which appeared to include 'only discussion of laws and policy of the federal Parliament, the conduct of members of parliament, and non-federal political affairs (such as the political affairs of a state) that are very closely related to federal matters'.⁴⁶

To what extent might judicial dissent be eligible for inclusion in the definition of 'political communication'? On an instinctive level, it is tempting to think that minority judgments – indeed judicial opinions generally – easily fall within the parameters. They are obviously communicative statements. They may also be said to be 'political' in a number of ways. Firstly, they frequently concern questions of the application of governmental power – either through interpretation of statutory rules or judicial review of executive action. In this sense, the courts and their judges may be seen to be key players alongside parliamentarians and bureaucrats in the overall process of government. Secondly, as every jurist or political scientist recognises, the craft of judging is inherently political and laden with public policy. It smacks of the naivety of the long-dead declaratory theory of the common law to seriously suggest otherwise.

⁴¹ *Lange* (1997) 189 CLR 520, 567.

⁴² (1994) 182 CLR 104, 124-5 (Mason CJ, Toohey and Gaudron JJ).

⁴³ (1994) 182 CLR 272 ('*Cunliffe*'). In that case, a majority of four justices (Mason CJ, Deane, Toohey and Gaudron JJ) found that the provision of legal advice to aliens seeking visas or entry permits constituted political speech. Toohey J, however, did not share their Honours' view that the legislative restrictions on this form of speech were of such a degree that the protection of the constitutional implication was invoked, and formed a majority on the result with Justices Brennan, Dawson and McHugh.

⁴⁴ *Lange* (1997) 189 CLR 520, 560.

⁴⁵ See, Adrienne Stone, 'Incomplete Theorizing In The High Court' (1998) 26 *Federal Law Review* 193, 204. Early on, Stone highlighted the problems arising from *Lange*'s purely textual focus: 'By tying the content of the freedom of political communication closely to the text of the Constitution, the High Court identified specific circumstances in which the freedom of political communication operates, without providing a theory of the freedom. Although the freedom exists to support some aspects of representative democracy, the High Court has not fully explained the nature of representative democracy nor how free political communication might support it.'

⁴⁶ Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 378. On the matter of State politics, despite the generality of expression employed in *Lange* which seems consistent with the earlier finding by majority in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ) 257 (Deane J) that the freedom applied to discussion of that topic, some judges have suggested that the question remains as to whether the freedom only pertains to the choice of electors at federal elections: *Levy v Victoria* (1997) 189 CLR 579, 596 (Brennan CJ), 626 (McHugh J).

However, compelling as those admissions are, they have very little to do with the precise task of determining the scope of ‘political communication’ as protected by the constitutionally implied freedom recognised in *Lange*. Even allowing for some governmental interconnectedness at either the highest level of abstraction⁴⁷ or the practical administration of the courts through legislation,⁴⁸ it is only realistic to acknowledge that very few, if any, members of the electorate would be exercising their choice in a way which reflects consideration of judicial opinions – especially those in dissent. The two cases since *Lange* to have considered discussion of the judicial arm give very clear indications that such communication is simply not ‘political’ in the requisite sense.

In *John Fairfax Publications Pty Ltd v Attorney-General* (NSW),⁴⁹ the New South Wales Court of Appeal did in fact use the implied freedom to invalidate amendments to the *Supreme Court Act 1970* (NSW) which provided that appeals by the Attorney-General on questions of law from an acquittal for contempt were to be held in camera and prohibited publication of the identity of the alleged contemnor and any submissions made on the appeal. But this was not on the basis of any broad view that the freedom demanded that the workings of the courts should be open and free. Instead the link to the implied constitutional freedom was found on the fairly specific and narrow ground that the actions which the State’s Attorney-General was empowered to pursue (and about which publication was to be restricted) might also relate to the exercise by the Supreme Court of federal jurisdiction.⁵⁰ This argument was seemingly not one advanced by the claimant. Its first submission was much wider and was simply that the constitutional freedom of communication about governmental and political matters encompassed discussion of the conduct of the judiciary and courts. While this is not a direct argument that judgments amount to ‘political communication’, that must arguably be a significant component of what was being put forward. This is especially so when one considers that the context of the case involved legislation seeking to obscure court processes from public view, rather than being generally about an ability to criticise or comment on judicial performance.

⁴⁷ Which may well explain Mason CJ’s claim in *Cunliffe* that the ‘freedom necessarily extends to the workings of the courts and tribunals which administer and enforce the laws of this country’: (1994) 182 CLR 272, 288.

⁴⁸ Stone, above n 45, 382.

⁴⁹ (2001) 181 ALR 694 (*Fairfax*’).

⁵⁰ *Ibid* 713 (Spigelman CJ). It seems somewhat surprising that the potential effect of the legislation upon the hearing of federal matters was used to invoke the implied freedom of communication, while a majority found that there was no basis for invalidating the legislation using the principle of incompatibility from *Kable v DPP* (NSW) (1996) 189 CLR 51. The facts seemed much more amenable to a straightforward application of *Kable* to protect federal judicial processes, rather than to achieve this through the prism of freedom of communication. This oddity is compounded by recognition that the division of the bench renders *Fairfax* a far from satisfactory authority. Spigelman CJ and Meagher JA declined to apply *Kable* whereas Spigelman CJ (with Priestley JA doing no more than agreeing, his Honour having already concluded the legislation was invalid using *Kable*) accepted the relevance of *Lange*. Only the Chief Justice’s opinion reflects entirely the final orders of the Court.

The submission – and all that might go with it – was flatly rejected. In doing so, Spigelman CJ was careful to distinguish earlier obiter statements from members of the High Court (particularly McHugh J in *Stephens v West Australian Newspapers*⁵¹) which might be seen as affirming that discussion of the performance of judicial officers in the exercise of their powers was in the public interest:

The inclusion of courts and judges in the scope of the subject matter with respect to which the public as a whole can be identified to have an interest, for purposes of applying the traditional rules of reciprocity in the context of qualified privilege for a defamatory statement, is not coextensive with the constitutional protection of freedom of communication. That protection, as *Lange* made clear, is an implication to be derived from the text and structure of the Constitution insofar as it makes provision for representative government. The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based.⁵²

The last sentence of this passage is the fundamental obstacle to extension of the *Lange* freedom to protect various forms of judicial speech. It has received greater elaboration, but ultimately confirmation, from the Victorian Court of Appeal in *Herald & Weekly Times Ltd & Bolt v Popovic*.⁵³ The facts here are along more familiar lines, concerning as they do journalistic criticism and a subsequent action for libel. However, Popovic was not a politician like Andrew Theophanous or David Lange. She was a Senior Magistrate and the criticism was directed to her behaviour during the hearing of a criminal matter in the Magistrate's Court of Victoria. At first instance, there was some debate as to whether the article in which Popovic had been defamed was communication of a political or government matter. The trial judge concluded that it did indeed bear that character as the piece could be seen as advocating Ms Popovic's removal from office, an action which only the Attorney-General could initiate. On appeal, only Gillard AJA shared this view, saying that because of the executive's role in the appointment and removal of judges and their payment from the public purse 'a discussion of the conduct of a judicial officer and the way the officer behaves in court is a government matter'.⁵⁴ This is, of course, distinguishable from a view that the judges themselves are engaged in political communication, but it might be seen as a step in that direction.

However, the other members of the Court of Appeal in *Popovic* endorsed the sweeping dismissal of Spigelman CJ in *Fairfax* of any application of the *Lange* doctrine upon the judicial arm. Warren AJA went so far as to reject the suggestion that the judiciary was included in McHugh J's comments in *Stephens* about 'public representatives and officials' by saying those remarks 'although expansive and wide ranging, [were] confined strictly to matters of government and politics ... [and

⁵¹ (1994) 182 CLR 211 at 264.

⁵² *Fairfax* (2001) 181 ALR 694, 709 (Spigelman CJ). See also, M Chesterman, 'When is a Communication "Political"?' (2000) 14 *Legislative Studies* 5, 16.

⁵³ [2003] VSCA 161.

⁵⁴ *Ibid* [251].

were] not extended to embrace the judiciary'.⁵⁵ More directly useful to our present question, was Winneke ACJ's approval of Spigelman CJ's comments in *Fairfax* and his augmentation of them with the statement that:

[T]he conduct of individual judicial officers is carried out independently of the legislative and executive branches of government, and is not to be described, in my view, as an exercise of power at a government or administrative level.⁵⁶

In short, there are strong statements in both these cases that the judiciary is outside the scope of the constitutional freedom of speech. Of the post-*Lange* cases, Stone has complained, 'even taking into account the narrow concept of "representative and responsible" that the High Court has adopted – a much wider range of communication is relevant to the proper functioning of government at the federal level'.⁵⁷ Her criticisms of the scope attributed to the freedom generally are persuasive, and I would submit that the reasoning in both *Fairfax* and *Popovic* is open to serious challenge. Nevertheless, both cases starkly illustrate the stranglehold with which the *Lange* test grips any understanding of what 'political communication' may encompass. It suffices for these purposes simply to note that, in light of the case law post-*Lange*, it would be extremely surprising were the High Court to take the view that absent access to its minority opinions, electors were denied 'a free and informed choice'.

Even assuming that dissent may be classified as speech of a governmental or political kind, does its restriction or prohibition really constitute an impermissible infringement of the freedom? Whilst the clear contribution which minority judgments make to the work of the Court through the general improvement in the quality of opinion writing, their ability to assist understanding of the majority reasoning, their demonstration of judicial process and their potential impact upon future development of the law,⁵⁸ make this a more contentious issue, there is, nevertheless, a difference between recognising the value of dissents and arguing that they are therefore protected by the implied freedom of communication.⁵⁹

The absence of judicial dissent does not prevent analysis and critique of the Court's decision – from politicians, the media and interested commentators. It may also be suggested that by the time a matter is determined by the High Court, the competing arguments surrounding it would have been fully exposed, not just through the adversarial process itself, but also by the opportunity for wider discussion by the protagonists and those with a less direct stake in the litigation. Certainly, the

⁵⁵ Ibid [500].

⁵⁶ Ibid [9].

⁵⁷ Stone, above n 46, 376.

⁵⁸ For a detailed consideration of all these strengths, see Lynch (2003) above n 5, 725-48.

⁵⁹ By contrast, in the next part of this paper, it will be argued that the various ways in which the ability to dissent enhances the judicial process of a multi-member court means that they are in fact an *essential* part of that process and are therefore protected by the Constitution's commitment to separation of judicial power. But those arguments have no parallel in the context of the *Lange* freedom.

freedom of speech of any particular Justice who wishes to dissent has been curtailed but it is otherwise difficult to say that the removal of published dissents seriously limits the general scope and quality of communication about an issue which has received the attention of the Court.

To the degree that freedom of speech is denied to individual would-be dissenters, this might well be justified as

reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ...⁶⁰

and thus fail to meet the test prescribed by the High Court for infringement of the freedom. The arguments of Little in respect of the United States First Amendment about the efficiency and costs of the Court's processes are relevant here.⁶¹ It is difficult to appreciate how a requirement of judicial unanimity through the removal of non-binding minority opinions from the curial landscape could be said to be either disproportionate to achieving the legitimate ends of simplifying the Court's judgments and obtaining savings in time and money or that such savings themselves are incompatible with representative and responsible government and thus an illegitimate end. Once again, the narrow bedrock of the freedom of political communication ensures that it is of limited assistance in guaranteeing an ability to dissent.

Lastly, while accepting that the limited jurisprudence surrounding the implied freedom of political speech means that it is difficult to move much beyond conjecture, it is appropriate to expect a cautious embrace of the freedom were the present Court faced with a situation like that being hypothesised. The unanimity in *Lange* was clearly based upon uncertain foundations⁶² and four members of the bench have since been replaced. At the time of writing, the present Court seems reticent, or in the case of Callinan J, openly hostile,⁶³ about significantly engaging with this particular part of its inheritance. Given this reluctance and the controversy which the emergence of the implied freedom attracted from political and legal commentators, it seems prudent to recognise that the Court would be unlikely to defend its own facility for dissenting opinions by recourse to the *Lange* doctrine – especially when a far more amenable source of protection lies to hand in the presence of Chapter III.⁶⁴

⁶⁰ (1997) 189 CLR 520, 567.

⁶¹ See above, n 36-8.

⁶² A Lynch, 'Unanimity in a Time of Uncertainty: The High Court settles its differences in *Lange v Australian Broadcasting Commission*' (1997) 6 *Griffith Law Review* 211.

⁶³ *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 339.

⁶⁴ George Williams, *Human Rights Under the Australian Constitution* (1999) 241-44. Williams has observed that the limitations of *Lange*'s highly textually-driven approach may be sharply contrasted with the fluidity of the Court's handling of implications derived from the separation of judicial power in Chapter III.

B The Separation of Judicial Power

Little's study of an American right to dissent resorts to the constitutional separation of judicial power in order to justify publication of minority opinions. Building cleverly on the fairly common arguments in favour of dissent on grounds of accountability and process,⁶⁵ he suggests that suppression of dissenting opinions would amount to an impermissible interference with the judiciary:

The right to issue dissenting opinions can therefore be seen as part and parcel of the constitutional conception of a federal 'court'. Courts cannot perform fully as we want them to unless dissents exist to provide a measure for public as well as internal evaluation. ... The function of 'judging' requires a right to independently report one's views to the public which the judge serves. This view is not only consistent with our received history, but can be seen as essential to the constitutional function of an independent judiciary.⁶⁶

Canada's Justice L'Heureux-Dubé supports this argument by saying that dissent strengthens judicial independence⁶⁷ – though, as shall be seen, whether dissent merely strengthens such independence, as distinct from being an unassailable feature of it, is a distinction upon which much could turn.

How might these suggestions from overseas that dissent is protected by the separation of powers doctrine, be received by the High Court of Australia? Is there within the Court's recent reinvigoration of Chapter III jurisprudence,⁶⁸ any indication as to whether a similar protection could be found in order to invalidate, to use Justice Murphy's example from *St Helens Farm*, an attempt to effectively outlaw dissent through amendment of the *Judiciary Act*?⁶⁹

⁶⁵ For recent coverage of these arguments in the Australian context, see Lynch (2003) above n 5, 737-43.

⁶⁶ Little, above n 36, 702-3.

⁶⁷ L'Heureux-Dubé, above n 5, 513.

⁶⁸ The 'doctrinal basket weaving that Chapter III has generated' as Zines described it (Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams, *The High Court at the Crossroads – Essays in Constitutional Law* (2000) 238) has continued unabated into the Gleeson era: Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years' (2003) 26 *UNSWLJ* 32, 46. For substantive summaries of this case law, see Justice Michael McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights' (2001) 21 *Australian Bar Review* 235; and Wheeler, above n 4.

⁶⁹ See above, part III. I note that Murphy J's hypothesis does not simply involve a ban on dissent, but that must be the practical effect of legislation recognising the authority of judicial power only when it is exercised unanimously. It is appropriate to note at this juncture that, unlike Little, I have not drawn a distinction in this essay between noting disagreement and the publication of a full dissenting opinion, but have chosen to hypothesise simply about a complete ban on dissent through a requirement of unanimity. Thus my comments in respect of finding a constitutional right to dissent include the right to publish the resulting opinion. In addition to the advantages this might have in avoidance of overcomplicating the issue, I would submit that if the ability to dissent is constitutionally protected, then the publication of the opinion is part and parcel of that on the basis that such publication is within the 'traditional

Throughout the relevant case law, there are repeated statements to the effect that a federal court, in order to bear the name of ‘court’, must possess certain attributes and observe certain processes which are inherent to a judicial body. The impairment of these features by another arm of government will amount to unconstitutional judicial interference. Justice Deane expressed the idea as follows in *Polyukhovich v Commonwealth*:

Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology, compel the conclusion that, in insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch III, the Constitution’s intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that notion essentially requires ... Nor can it [the Parliament] infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power.⁷⁰

This view was echoed in the same case most clearly by Justice Gaudron,⁷¹ who made generally the same observations in two other cases of 1991.⁷² The firm entrenchment of this idea came in the following year’s decision of *Chu Kheng Lim v Minister for Immigration*,⁷³ where Brennan, Deane and Dawson JJ stated that grants of Commonwealth legislative power do not ‘extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power’.⁷⁴ This fairly straightforward proposition has survived the significant changes in personnel which the High Court has undergone since.⁷⁵

Accepting then, that the constitutionally implied separation of powers demands freedom from legislative interference with those features of a federal court which give it its ‘essential character’ as such, the question becomes whether the ability to dissent is such a feature. It is possible, especially in light of Deane J’s comments in

methodology’ of which Deane J spoke in *Polyukhovich v Commonwealth* (1991) 172 CLR 501: see text accompanying n 68.

⁷⁰ (1991) 172 CLR 501, 607 (Deane J) (*Polyukhovich*). This is an expansion upon Deane J’s earlier statement in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 that criminal guilt ‘can be conclusively determined only by a Ch III court acting as such, that is to say, acting judicially’.

⁷¹ *Polyukhovich* (1991) 172 CLR 501, 703-4.

⁷² *Harris v Caladine* (1991) 172 CLR 84, 150-2; and *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496-7.

⁷³ (1992) 176 CLR 1.

⁷⁴ Ibid 27. It also received an airing in *Leeth v Commonwealth* (1992) 174 CLR 455, 486-7 (Deane and Toohey JJ).

⁷⁵ See crucially *Nicholas v The Queen* (1998) 193 CLR 173, 185 (Brennan CJ), 208 (Gaudron J), 220-1 (McHugh J), 232 (Gummow J), 265 (Kirby J); and *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Polyukhovich, to approach this question from an originalist perspective, along the lines which Little used when discussing the United States Supreme Court:

When the Framers expressly endorsed inferior federal ‘courts’ and ‘judges’ in Article III, they were familiar with the late eighteenth century practice of common law judges delivering separate opinions that might not always agree... Thus the Framers’ use of the words embodied an unarticulated, yet constitutionally enshrined, conception of ‘court’ and ‘judge’ that included a right to issue dissenting opinions ... a court is not a constitutional ‘court’, and a judge not a constitutional ‘judge’, unless statements of dissenting rationale may be issued to accompany the majority’s own opinions.⁷⁶

Whilst this seems plausible enough, I would argue that it cannot suffice by itself to justify a right to dissent in federal courts in the second century of the Australian Commonwealth. Originalist methods, while admittedly employed with healthy frequency in recent years by the High Court, do not have the level of allegiance in this country which would enable them to quell an alternative interpretation based upon some other approach. Although Wheeler is quite correct in saying that ‘the definitions of judicial power developed by the High Court have drawn largely from the historical functions of courts’⁷⁷ the limitations of a *purely* historical method have become quite apparent.⁷⁸ The case law on s 80 of the Constitution demonstrates as much. The unanimous judgment of the Court in *Cheatle v The Queen*⁷⁹ accepted Griffith CJ’s statement from *R v Snow*⁸⁰ that the phrase ‘trial by jury’ in s 80 must be read in the light of the common law history of England. The effect of this was to discover, as a matter of history, what was understood by the drafters of the Constitution as the ‘essential features’ of ‘trial by jury’ in 1900. Even then, the Court was quite clear in saying that their view that ‘trial by jury’ required a unanimous verdict from the jurors was compelled by ‘history, principle and authority combined’.⁸¹ The need to supplement a historical approach with a more functional analysis of the constitutional concept of jury had become starkly evident by the time of the decision of *Brownlee v The Queen*.⁸²

Thus, the trouble I would anticipate for this aspect of Little’s argument were it to be aired before the High Court, is that the Constitution clearly empowers the Commonwealth parliament to legislate for the federal courts in a number of

⁷⁶ Little, above n 36, 701.

⁷⁷ Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III: An Evolving Guarantee’ in *The Australian Constitution in Troubled Times – Proceedings of the Annual Public Law Weekend*, 7-9 November 2003, ANU, 33, 39.

⁷⁸ On this topic generally, see Bradley Selway, ‘The Use of History and Other Facts in the reasoning of the High Court of Australia’ (2001) 20 *University of Tasmania Law Review* 129.

⁷⁹ (1993) 177 CLR 541, 552.

⁸⁰ (1915) 20 CLR 315, 323.

⁸¹ (1993) 177 CLR 541, 562.

⁸² (2001) 207 CLR 278. See James Stellios, ‘Section 80 of the Constitution – A Bulwark of Liberty?’ in *The Australian Constitution in Troubled Times – Proceedings of the Annual Public Law Weekend*, 7-9 November 2003, ANU, 59, 89-94; and James Stellios, ‘*Brownlee v The Queen*: Method in the Madness’ (2001) 29 *Federal Law Review* 319, 326-7.

different ways (much more evidently than it enables tinkering with the specific feature of the jury as expressly guaranteed in s 80) and that is inconsistent with snap-freezing them as they were understood in 1900. If one is not to engage in this total originalism, how is it to be discerned that a capacity to deliver dissenting judgments was intended to be exempt from the legislature's constitutional powers with respect to the federal courts? The far sounder approach would seem to be to examine the requirements of the constitutional concept of judicial power as a matter of principle, practice and function rather than simply a matter of historical understanding. Is it an infringement of judicial power for the Parliament to require the High Court to exercise such power with unanimity because to do so is inconsistent with the essential requirements of a court?

The authorities, of course, do not speak directly to this question, concerned as they largely are with legislative attention to the circumstances of the criminal trial process, rather than any attempt to direct the process of adjudication itself.⁸³ In some of the judgments, however, there are remarks which go to the requirements of judicial power beyond simply the hearing of a matter. Justice Gaudron has probably been the most precise in outlining what she sees as the essential features of the judicial process as a whole

... those features include open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.⁸⁴

This description of judicial problem-solving can hardly be said to demand a facility for disagreement. Given, as has already been acknowledged, the nugatory contribution which a dissenting judgment makes to the court's resolution of the dispute before it and the law which emerges as a result, it is far from obvious that the process which Justice Gaudron describes *requires* (and surely that is the standard set by a test of 'essential features') the possibility of multiple opinions. It could be quite plausibly argued that the court as an institution imbued with judicial power should still be able to fulfil its functions absent any opportunity for individual dissent. In another context but nonetheless significantly, Justice Deane acknowledged the relevance of this distinction between the court and the individuals who comprise it:

The provisions of Ch. III are based on an assumption of traditional judicial procedures, remedies and methodology. They confer 'jurisdiction', that is, the curial

⁸³ See, eg, Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57, 58. This probably accounts for what Lacey has identified as the dominance of the "rights-based" approach' in the discussion of recent Chapter III case law over a willingness to base implications in the inherent jurisdiction and powers of the federal courts themselves.

⁸⁴ *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

power of declaration (dictio) of the law (jus) ... The jurisdiction so conferred is upon 'courts' rather than upon the judge or judges who constitute a particular court.⁸⁵

It is for this reason that statutory control or guidance of judicial discretion may not of itself represent an infringement upon the judicial power of the court. The particular parameters of the judicial function may be modified without inhibiting the essence of the judicial process. This seems to be the basis for the majority's opinion in *Nicholas v The Queen*,⁸⁶ a case concerned with the validity of a statutory provision which directed judges to disregard the criminal conduct of law enforcement officers engaged in obtaining evidence of a narcotics offence by the accused. In finding, as part of the majority, that s 15X of the *Crimes Act 1914* (Cth) was not a legislative command inconsistent with the essential character of a court and was therefore valid, Brennan CJ said:

[a] law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying the law or exercising an available discretion ... The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction but subject to overriding legislative provision governing that practice or procedure.⁸⁷

In this light, the ability to dissent from the Court's finding might be seen merely as something which has developed in association with, but which is hardly necessary for, the proper exercise of judicial power. Indeed, a law requiring unanimity would arguably be ensuring a more coherent and effective judicial process in aid of the power.

But the arguments which have traditionally supported the practice of dissent may be invoked at this point to actually evidence its compatibility with the nature of judicial power, despite the uncertainty and confusion to which it occasionally gives rise. In particular, the publication of dissenting views is seen as an important safeguard of the principled and proper exercise of judicial power. As Mathen has said:

[j]udicial decisions differ from other forms of decision-making chiefly because they rely on and reflect a pre-existing body of principles. The precise outcome matters less than the process of identifying relevant principles and applying them to the dispute at hand. If they are compatible with this process, dissents are not necessarily

⁸⁵ *Polyukhovich* (1991) 172 CLR 501, 614.

⁸⁶ (1998) 193 CLR 173.

⁸⁷ *Ibid* 188-9; see also, *Ibid* 278 (Hayne J). He conceded that this 'distinction between legislation dealing only with questions of evidence or procedure and legislation dealing with questions of guilt or innocence ... will not always be easy to draw, but it is a distinction of great importance'.

fatal to judicial authority. Instead, their presence may help to assure those who are expected to abide by the decision, that the process was indeed principled.⁸⁸

Acceptance of this contention requires due acknowledgment of the inherently deliberative nature of that particular form of power.⁸⁹ While certainly ‘identification of the applicable law, followed by an application of that law’ can occur with unanimity, the reality is that it very often does not – and to no particularly ill effect. This is because there is much legitimate scope for disagreement over the law. As Ginsburg has stated, ‘[d]isagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time’.⁹⁰ The presence of dissenting judgments provides assurance that the judges are conducting a *legal* debate in fulfilling their tasks of identification and application of the law. In short, the possibility of dissenting opinions ensures that judicial power is in fact – and is seen to be – exercised with an appropriate focus upon the law, rather than being simply a smokescreen for decisions based upon morality, economics or public policy.⁹¹

The fact that judicial power is regularly wielded by a single judge bench need not be an impediment to this argument, though it does require us to consider the role of the individual more closely. In those many instances, the distinctive line between ‘court’ and ‘judge’ to which Deane J referred⁹² is blurred and the one becomes more readily identified with the other. As a result, we can see the permeability of that division in general – judicial officers (whether sitting alone or in company) are necessarily bound up with the court as an institution.⁹³ The sheer practical impossibility of dissent in a single judge court does not simply mean, as a matter of logic, that judicial power can be said to be properly exercised by the delivery of a unanimous opinion from a multimember bench when real disagreement exists. The conditions under which the power operates are different in either case, but this need not compel an appreciation of its essential attributes as those fixed by one set of circumstantial constraints. To do so, is to lose sight of the contribution which dissenting judgments make to the deliberations and reasons of the court as a complex institution.

⁸⁸ Carissima Mathen, ‘Dissent and Judicial Authority in *Charter Cases*’ (2003) 52 *University of New Brunswick Law Journal* 321, 331; see again the quote from Little accompanying n 37.

⁸⁹ See Lynch (2003), above n 5, 726-37.

⁹⁰ ‘Disagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time’: Bader Ginsburg, above n 5, 136; see also Orth, above n 13.

⁹¹ Of course, this is not to say that those considerations can ever be excluded entirely from the judicial process, even when each judge authors his or her own opinion. My point is simply that the illegitimate use of judicial power is likely to be made more manifest in the presence of other judgments which can serve to highlight that.

⁹² See text accompanying n 85.

⁹³ Indeed, recognition of this underlies the application of the incompatibility doctrine to the *persona designata* exceptions to the separation of judicial power in cases such as *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

The giving of detailed reasons accompanying the exercise of judicial power – something which occurs in courts regardless of their composition and in which the importance of the individual to the institution is most apparent – is surely one of its most distinctive characteristics. As Wheeler concluded recently:

When the objects and purposes of the exclusive vesting of federal judicial power in Chapter III courts are examined, however, it is evident that whatever else due process may mean, judges in federal jurisdiction must resolve disputes by legal reasoning ...⁹⁴

And as Sir Anthony Mason would add, ‘the judicial obligation is to state the reasons and that means to state them fully’.⁹⁵ As the reasons of the Court are necessarily to be understood by appreciating not just what a majority of the judges think, but also what they do *not* think, as often found in the opinions of the institution’s individual members, surely Mason’s exhortation must mean that dissents, in addition to concurrences, should be made known to the public.⁹⁶

As a matter of practice, it is widely appreciated that the challenge of a potential dissent is conducive to the production of more thorough and clearer reasoning from the majority of a court.⁹⁷ And so whilst our courts do quite frequently produce cogent unanimous opinions, it might be that without the prospect ever of a separate opinion, they could fall to the practice of publishing a single bland judgment revealing neither the compromises of its various authors, nor the omissions and failings made by the court in the exercise of its judicial power. Thomas Jefferson strongly opposed Chief Justice Marshall’s enforced unanimity on the United States Supreme Court for precisely these reasons – that the power of the Court could so easily be subverted by a few of the Justices.⁹⁸

Stack explained the importance of dissent to the principled exercise of judicial power as follows:

⁹⁴ Wheeler, above n 77, 41; see also Mathen, above n 88, 331.

⁹⁵ Mason, above n 1, 45; see also Brennan, above n 5, 435.

⁹⁶ Sometimes, of course, it is literally impossible to understand the court’s order without recourse to all judgments due to only a minority of judges concurring completely in the final orders of the Court which is necessarily constructed by composite: see Andrew Lynch, ‘Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia’ (2002) 24 *Sydney Law Review* 470, 492-98.

⁹⁷ As Lauterpacht said, dissent is ‘a powerful stimulus to the maximum effort of which a tribunal is capable’: quoted in Kurt H Nadelmann, ‘The Judicial Dissent: Publication v. Secrecy’ (1959) 8 *American Journal of Comparative Law* 415, 430. See also Alder, above n 5, 240; Brennan, above n 5, 435; Fuld, above n 5, 927; Hussain, above n 14, 3; L’Heureux-Dubé, above n 5, 515; Lynch, (2003) above n 5, 740; R Dean Moorhead, ‘Concurring and Dissenting Opinions’ (1952) 38 *American Bar Association Journal* 821, 823; Scalia, above n 5, 41; and Voss, above n 5, 655-7.

⁹⁸ Letter from Thomas Jefferson to William Johnson, 27 October, 1822, quoted in Kolsky, above n 12, 2078; and extracted in full in Levin, above n 11, 513-515.

The practice of dissent shows that the formation of the Court's judgment involves not merely a principled extension of its previous decisions, but an 'argumentative interchange' among its current members. The publication of a single opinion could be sufficient to demonstrate that the Court's judgment is based on reasons, but the practice of only delivering a single opinion would not demonstrate that the Court's judgment is the product of a reasoned dialogue among the Justices. The publicity of dissenting opinions and the indication of Justices' individual endorsements of particular opinions reveal that the Justices do confront each other with their disagreements about matters of principle through the exchange of opinions and the conversation that surrounds them, if not also in their formal conferences. In this way, the practice of dissent manifests the exchange of reasons among the Justices that characterizes their process of decisionmaking; without this practice, those of us outside the Court would have no way to see the Court as embodying a deliberative process of judgment.⁹⁹

Securing the independence of the justices from each other and enabling the publication of separate opinions may be seen as crucial to ensuring an open and transparent process of adjudication *in accordance with the law* – surely an essential characteristic of a court.

There is some support for this view in the judgment of Justice Gaudron in *Re Nolan* when she stated

[t]he determination in accordance with the judicial process of controversies as to legal rights and obligations and as to the legal consequences attaching to conduct is vital to the maintenance of an open, just and free society. Quite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.¹⁰⁰

It is clear from the facts of that case (concerning the validity of military tribunals exercising judicial power) that her Honour's comments are still more targeted to the trial process itself than the deliberations of presiding justices. But the principle she is espousing is just as relevant to the latter as it is to the former – indeed, it shares much of Jefferson's concerns from almost two centuries earlier. Justice McHugh has indicated agreement with Justice Gaudron by saying that 'open justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power'.¹⁰¹ 'Open justice' need not refer simply to the hearing of a matter in public – but also the dispensing of justice itself through the giving of clear and honest reasons as to how the final determination was made. That must include the admission of dissent amongst the bench.

⁹⁹ Kevin Stack, 'The Practice of Dissent in the Supreme Court' (1996) 105 *Yale Law Journal* 2235, 2256-7.

¹⁰⁰ *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496-7.

¹⁰¹ *Grollo v Palmer* (1995) 184 CLR 348, 379. See McHugh, above n 68, 239 (n 29) where his Honour in fact connects his comments in *Grollo* with those of Gaudron J in *Nolan*.

It is perhaps tempting to overplay the importance of public confidence as a component of this argument,¹⁰² but caution is warranted. A majority of Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* described the public's perception of judicial independence from the other arms of government as 'central to the system of government as a whole'¹⁰³ and went so far as to say:

The separation of judicial function from the political functions of government is a further constitutional imperative that is designed to achieve the same end [as judicial tenure], not only by avoiding the occasions when political influence might affect judicial independence but by proscribing occasions that might sap public confidence in the independence of the judiciary.

However, two years later in *Nicholas v The Queen*,¹⁰⁴ the strength of this view had noticeably waned. While Gaudron and McHugh JJ repeated their earlier sentiments that a legislative enactment which tended to 'bring the administration of justice into disrepute'¹⁰⁵ or made it 'more difficult to maintain public confidence'¹⁰⁶ in those courts risked invalidity, and Kirby J gave his express agreement to the statements of the *Wilson* majority,¹⁰⁷ the rest of the Court gave far more qualification to those earlier views or ignored the role of public confidence altogether. The Chief Justice, with whom Hayne J expressly agreed, said:

To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would be to elevate the court's opinion about its own repute to the level of a constitutional imperative. It is the faithful adherence of the courts to the laws enacted by the parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the court's repute as the administrator of criminal justice.¹⁰⁸

¹⁰² See Charles Hughes, *The Supreme Court of the United States* (1928) 68: '[W]hat must ultimately sustain the court in public confidence is the character and independence of the judges ... 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 could be secured through its sacrifice'.

¹⁰³ (1996) 189 CLR 1, 11. Gaudron J voiced similar sentiments: (1996) 189 CLR 1, 25 (Gaudron J). In the same year, the importance of public perception was critical, yet rather more divisive, in the case of *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁰⁴ (1998) 193 CLR 173.

¹⁰⁵ (1998) 193 CLR 173, 209.

¹⁰⁶ Ibid 224.

¹⁰⁷ Ibid 265.

¹⁰⁸ Ibid 197. See also *ibid* 275-6 (Hayne J). Cf 265 (Kirby J), 230 (Toohey J). Toohey J contented himself with simply saying, 'it is not the reputation of the courts which calls for protection; it is the judicial process itself'. Gummow J, despite acknowledging the reliance of the accused on the majority statement from *Wilson* (1996) 189 CLR 1 made no direct comment on the role which public confidence had to play in the separation of judicial power.

The effect of the judgments in *Nicholas* – particularly those of Brennan CJ and Hayne J - must be to call into question any attempt to curtail legislative action on the ground that it impacts negatively upon the reputation of the courts and that this is *per se* incompatible with the requirements of Chapter III. Questions of public perception are to be put aside. As Lacey has said in her thorough assessment of *Nicholas*

... it may well be that the position endorsed by Gaudron, McHugh and Kirby JJ must be modified to focus on the power of the court to protect its processes only, rather than to protect the reputation of the court in administering justice – at least as a source of limitation on executive and legislative power.¹⁰⁹

Doing so in no way detracts from the central argument advanced here that the publication of dissenting opinions is protected simply as a valuable safeguard of the proper exercise of judicial power.

V CONCLUSION

That the Constitution's separation of judicial power provides a basis for the protection from interference with the essential characteristics of the judicial process remains a central tenet of the Chapter III jurisprudence from the last decade.¹¹⁰ The calls by Gaudron and McHugh JJ for 'open justice' in those cases preceding *Nicholas* do not rest solely upon a public confidence argument, but upon the broader base of what is an essential feature of a federal court. Thus it is possible to maintain the argument offered above: the provision of full and transparent reasons is an indispensable condition governing the exercise of judicial power, and the publication of minority judgments is included within that requirement. Therefore, Justices of federal courts have a right to issue dissenting opinions because the Constitution, in separating judicial power, guarantees the preservation of those processes essential to its proper operation and the ability to dissent is one such process.

While legislation imposing a prohibition on dissent might, on one view, seem to be merely concerned with procedure rather than 'legislation dealing with questions of guilt or innocence',¹¹¹ the protection offered by the separation of judicial power must extend to more than the most blatant usurpations of the courts' adjudicative function. Lacey suggests that 'what is protected under the provisions of [Chapter III] is the capacity of the federal courts to protect the integrity, efficiency and fairness of their own processes, as the most basic and fundamental aspect of the judicial process'.¹¹² That giving content and meaning to this protection is fraught with uncertainty and differing opinions does not lessen this 'unavoidable

¹⁰⁹ Lacey, above n 83, 76. This is essentially what Toohey J required in that case, see above n 75.

¹¹⁰ See *Chu Kheng Lim* (1992) 176 CLR 1; *Leeth v Commonwealth* (1992) 174 CLR 455, 486-7.

¹¹¹ (1998) 193 CLR 173, 278 (Hayne J).

¹¹² Lacey, above n 83, 86.

obligation'.¹¹³ But a reasonable case can be made that to speak of the integrity of the courts is to recognise that this must exist in both an institutional and individual sense. To remove individual independence is to impair the institution as one in which judicial power is exercised.

¹¹³ *Nicholas v The Queen* (1998) 193 CLR 173, 265 (Kirby J).