
Robert F. Blomquist
I. INTRODUCTION

Reflecting the American obsession with style, an eclectic body of legal scholarship has emerged on appellate judicial opinion style, focusing on opinions written for a majority of an appellate court. Prominent themes in this scholarship are the impact of burgeoning caseloads on the quality of appellate opinions; the political nature of majority opinion style; the "portable" and "abiding" quality of vivid judicial opinion writing style; the differences between the relatively formalistic and solemn "pure" judicial opinion style and the relatively relaxed and conventional "impure" opinion style; the impact of phrase-specific and concept-specific computer-assisted legal research on opinion style; the capacity for well-crafted and artfully-written appellate judicial opinions to dignify the law; the way that "poets as judges" are able to imagine a litigant's pain and pathos and give it legal significance; the link between an appellate judge's personality and the style of her opinions; and the relationship

* Professor of Law, Valparaiso University School of Law; B.S. 1973, University of Pennsylvania (Wharton School); J.D. 1977, Cornell Law School. My thanks go to William Domnarski, John Leubsdorf and Richard A. Posner for helpful comments regarding an earlier draft. I also thank my wife, Teresa Faherty Blomquist (who is both a Ph.D. in English and a J.D.) for loving constructive criticism and emotional support. I also acknowledge the superb work of my research assistant, Tom Riley. As always, my Dean, Jay Conison, has provided both intellectual support and financial support through the VUSL Research Fund; thanks, Jay.

2. See id. at 656-83.
3. Id. at 657-58 (discussing the insight of Judge Patricia M. Wald).
4. Id. at 658-59 (discussing the thinking of Judge Patricia M. Wald).
5. Id. at 660-61 (discussing the scholarship of Judge Richard A. Posner).
6. Id. at 661-65 (discussing the views of Judge Richard A. Posner).
7. Id. at 666-68 (discussing the insight of Professor Frederick Schauer).
8. Id. at 669 (discussing the thinking of Professor James Boyd White).
9. Id. at 670-73 (discussing the scholarship of Professor Martha C. Nussbaum).
10. Id. at 673-76 (discussing the writing of attorney William Domnarski).
between hard, meticulous preparatory opinion "construction" work and well-written appellate opinions.11

Style is an ambiguous concept,12 and the style of Judge Richard A. Posner, former Chief Judge of the United States Court of Appeals for the Seventh Circuit, is worth trying to pin down. In a New Yorker piece on Posner, Larissa MacFarquhar asked: "How did a judge with such subversive ideas become a leading influence on American legal opinion?"13 The reason goes beyond the popularity of his frequent deployment of law and economics principles. Posner's appeal stems from his interest in the economic motivation of litigants and the "style" he has developed that embodies this interest—a style which also reflects his underlying judicial character and legal philosophy of pragmatism. Posner's dissenting opinions from the first decade of his career, set against the foil of the majority decisions he could not agree with, allow us to illuminate his unique style of contrarian thinking.

The threefold purpose and structure of this Article is as follows. First, in Part II, before plunging into Judge Posner's dissenting opinions, I search for a preliminary description of the praxis of modern American dissenting opinion style by drawing upon previous legal scholarship and examples of judicial dissents; this discussion will include an examination of some relevant scholarly writings on opinion style by Judge Richard A. Posner himself.14 In Part III, I analyze the published dissenting opinions written by Judge Posner during 1981-1991 (his first decade on the federal appellate bench), evaluating the stylistics of these dissents including his sophisticated use of rhetorical devices.15 Finally, in Part IV I offer some conclusions about Judge Posner's early dissenting opinion style, and comment on the implications of my study for understanding the aesthetics of dissenting opinions.16

11. Id. at 676-80 (discussing the insight of Judge Frank M. Coffin).
12. Id. at 651. Contrary to speculation, I was not "one of [Judge Posner's] law clerks" and do not have "a lot of appeals in the Seventh Circuit." Thomas E. Baker, A Compendium of Clever and Amusing Law Review Writings, 51 DRAKE L. REV. 105, 135 (2002). "Judge Posner has written more books than some of us have read" and he "is not exactly Jerry Seinfeld, or even Woody Allen." Id. Yet for four reasons his judicial opinions are worthy of study. First, Posner is "probably the most famous and influential non-Supreme Court jurist in the United States." Blomquist, supra note 1, at 732. Second, he is "one of the brightest persons currently sitting on any appellate court in the world." Id. Third, he actually writes his own judicial opinions—unlike most appellate judges (using his law clerks solely for research). Id. Fourth, he is "an omnivorous reader who is inclined to reflect his reading in his opinions." Id.
14. See infra notes 17-137 and accompanying text.
15. See infra notes 138-477 and accompanying text.
16. See infra notes 478-517 and accompanying text.
II. THE PRAXIS OF DISSenting OPINIONS

A. Background

Professor, and former state supreme court justice, Robert A. Leflar collected a number of interesting quotations from published legal scholarship and dissenting appellate opinions in his 1974 book, *Appellate Judicial Opinions.*17 His work is an appropriate starting point for examining the evolution of critical American thought on the role and function of dissenting opinions. Professor Leflar noted that, consistent with English practice in the late eighteenth century at the time of America’s founding as an independent nation, “[j]udicial custom ... permitted each judge on a multi-judge court to deliver his individual opinion in each case.”18 The United States Supreme Court initially picked up on the English practice of *seriatim* judicial opinions in the first decade of the Court’s history; however, Chief Justice John Marshall, “[s]ilently and without fanfare,” prevailed upon his colleagues on the Court to abandon this practice and speak with the unified voice of a single opinion for the Court during the period of 1801 to 1823.19 The Marshall-led unity of a monolithic High Court opinion eventually cracked under pressure from ex-President Thomas Jefferson—a bitter political enemy of John Marshall—in a letter written to Associate Justice William Johnson in October of 1822.20 According to a book which discusses Jefferson’s 1822 letter to Justice Johnson, Jefferson “complained . . . about the dangers of excessive judicial nationalism, [and made a] biting attack on Marshall’s leadership that resonated with Johnson.”21 Moreover,

[t]o counter Marshall, and silently to subvert the Court’s interpretative authority, Jefferson urged Johnson to reintroduce the practice of *seriatim* opinions—which practice, incidentally, the Virginia Court of Appeals . . . had just abandoned [in conformance with Marshall’s practice for the Supreme Court]. What bothered Jefferson, what, he said, “has long weighed on my mind,” was “the habitual mode of making up and delivering the opinions of the supreme court of the US.” The practice of a single majority opinion written by one

18. *Id.* at 203; see also Karl M. Zo Bell, *Division of Opinion in the Supreme Court, A History of Judicial Disintegration,* 44 CORNELL L.Q. 186, 190-91 (1959).
20. NEWMYER, supra note 19, at 404.
21. *Id.* at 404-05.
justice—John Marshall, that is to say—Jefferson declared, obscured the real views of the justices: "For nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself. Be the opinion therefore ever so impeachable, having been done in the dark it can be proved on no one." Whether impeachable or not, he said, "the practice is certainly convenient for the lazy, the modest & the incompetent."22

In response to Jefferson’s letter, Justice Johnson “took up the challenge, announcing in his [1824] concurrence in Gibbons v. Ogden that he conceived it his public duty ‘to maintain my opinion in my own way.’”23 Thus, except for a brief period of a little over two decades, from 1801 to 1823, justices of the Supreme Court have issued separate judicial opinions, including dissenting opinions.

American appellate court judges, at the state and federal levels, have followed the lead of United States Supreme Court justices in filing dissenting opinions, albeit with a certain reluctance. Appellate judges generally dislike writing dissenting opinions.24 “Instead of having to prepare and file a dissent, they would much prefer to join the majority and thus be on the prevailing side of an appeal.”25 But, in the name of conscience and in the interests of justice, American appellate judges continue to write dissenting opinions, parting company with a majority of their colleagues in particular cases.

B. Specific Motivations for Dissenting Opinions

Given the work entailed in writing a dissenting opinion—on top of an appellate judge’s allocation of her fair pro rata share of opinions for a court26—and the increased, and usually unwanted, intellectual and media attention that attends appellate cases with dissenting opinions,27 why do judges file dissenting opinions? Justice Antonin Scalia has provided one good reason, namely that it allows an appellate judge to engage in self-expression. As he puts it:

22. Id. at 405 (quoting THE WORKS OF THOMAS JEFFERSON 246-52, 256 (Paul L. Ford ed., 1904) (a letter from Thomas Jefferson to William Johnson, Oct. 27, 1822)).
23. Id. (internal quotation marks omitted).
25. Id.
26. Id. at 403.
27. Id.
To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one’s colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority’s disposition should engender—that is indeed an unparalleled pleasure.  

Another prominent reason given for an appellate judge to craft a dissenting opinion is to advance the truth. Truthfulness is ameliorated by a dissenting opinion because, when juxtaposed with the majority opinion in a case, a reader is able to comprehend “exactly who disagrees with what and why there is disagreement as well as the extent and depth of that disagreement.”  

At least a dozen other reason have been articulated for why appellate judges bother to write dissenting opinions:

1. **Competition.** Writing a dissenting opinion allows an appellate judge to offer competing, sometimes novel, solutions and approaches to legal problems, and, therefore, to compete in the intellectual marketplace with other judges, law professors and legislators.

2. **Raising the Bar.** “Vigorous written debate of the issues in a separate appellate opinion can also serve to improve the majority’s final work product by forcing the prevailing side to deal with . . . the toughest objections that can be raised to its position as urged by the losing side and/or by the dissenting opinion.”


29. Flanders, *supra* note 24, at 406. A related truthfulness benefit of a dissenting opinion is:

[I]t un_masks the false appearance of unanimity on [a] court . . . . If dissents are discouraged or routinely buried in the interests of presenting a united judicial front of “monolithic solidarity,” then cases that are really decided by less than unanimous agreement—indeed, even by only a one-judge margin—will appear to the unsuspecting litigants, lawyers, and public as unanimous when in fact the court is divided in its legal judgment.

*Id.*

30. *Id.* at 407.

31. *Id.* at 408. In this regard, dissenting opinions may “cause the majority to hone and tighten its analysis, to omit those arguments that are most vulnerable to objections, to recast loose language . . . and to acknowledge some important limitations on the scope of its holding.” *Id.* Occasionally, the cogency and logical forcefulness of a draft dissenting opinion can persuade other appellate judges to join the dissenting opinion and, under the most favorable circumstances, gather enough support to become a majority opinion. *Id.* at 408-09.
3. Speaking to the Future. A judge can appeal to future appellate judges to adopt the reasoning of the dissenter. As expressed by Chief Justice Charles Evans Hughes: "A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."  

4. Creative Outlet. Writing a dissenting opinion affords a judge an opportunity to engage in unfettered creativity. Chief Justice William Rehnquist’s dissent in Texas v. Johnson— the American flag burning case—is illustrative: in his “blistering” opinion, hailing the American flag, he quoted excerpts of patriotic poems, including Ralph Waldo Emerson’s “Concord Hymn” and John Greenleaf Whittier’s “Barbara Frietchie.” Former Indiana Supreme Court Justice Roger O. DeBruler’s dissent in a criminal case, where he cited the Indiana State Poem, is another example of unrestricted creativity.  

5. Moral Compunction. Some dissenting opinions are motivated by an intensely personal, individualistic viewpoint, based on deep moral compunction. Justice Brennan’s repeated dissents in every case before the United States Supreme Court involving the death penalty illustrate this motivation. Brennan continued to assert, in successive dissenting opinions, that the death penalty was a per se violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. 

32. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928); see also William J. Brennan, Jr., In Defense of Dissents, 37 HASTINGS L.J. 427, 430-31 (1986), who opined that a dissenting opinion is “offered as a corrective—in the hope that the Court will mend the error of its ways in a later case” while “seek[ing] to sow seeds for future harvest.” For an analysis of Justice Brennan’s dissenting opinions and philosophy on dissenting, see Rory K. Little, Reading Justice Brennan: Is There a “Right” to Dissent?, 50 HASTINGS L.J. 683 (1999); Laura Krugman Ray, Justice Brennan and the Jurisprudence of Dissent, 61 TEMP. L. REV. 307 (1988); cf. Anita S. Krishnakumar, On the Evolution of the Canonical Dissent, 52 RUTGERS L. REV. 781, 782 (2000) (discussing the emergence of a “constitutional canon of highly authoritative ubertexts that hold a privileged place in American law,” including “a handful of judicial dissents, originally penned to record the losing, minority viewpoint—that since not only have shaken off the stigma of the losing position but have come to command a constitutional stature far superior to that accorded most majority opinions in other cases”).  


6. Political Agitation. A dissenting opinion could theoretically advance a radical judge’s conception of what Professor Jules Lobel terms “Litigation as Political Agitation,” wherein “[t]he tactic of framing radical demands in terms of established rights in order to inspire political action has a long history.” If the appellate judge expressly articulates this reason for filing a dissenting opinion, others may view it as illegitimate. As Lobel explained:

Some courts have questioned whether litigation brought for the purpose of provoking public dialogue and debate is legitimate. For example, the District of Columbia Court of Appeals imposed Rule 11 sanctions on the attorneys for fifty-five Libyan citizens and residents who sued for damages resulting from the 1986 United States air strike on Libya. Although the district court found that plaintiffs’ counsel “surely knew” that “the case offered no hope whatsoever of success,” and that it had been “brought as a public statement of protest” against President Reagan’s actions, it declined to impose Rule 11 sanctions because federal courts “serve in some respects as a forum for making such statements, and should continue to do so.” The court of appeals, however, held that Rule 11 sanctions were warranted because “[w]e do not conceive it a proper function of a federal court to serve as a forum for ‘protests.’”

7. Psychological Release. Writing a dissenting opinion may provide a psychological release—what Professor Scott C. Idleman calls “a necessary cathartic mechanism for judges.” Idleman explicates the cathartic function of dissenting opinions as follows:

Despite their trappings and mystique, judges are human beings, not machines, and the institutional psychology of the bench may often

penalty cases, Justice DeBruler dissented “based on specific legal defects in the proceeding,” but “after it became clear that the [Indiana Supreme Court] was not going to adopt his position, DeBruler cast his first vote to affirm a death sentence, thus abandoning [on grounds of stare decisis] his [earlier] position that every death sentence was per se unconstitutional.” Id.


38. Id.


compel individual judges to speak their minds on issues, or in ways, that may not be obviously necessary to a legal resolution of the case at hand. Of course, a conservative view of judicial decisionmaking would likely look unfavorably upon these judicial expressions, deeming them superfluous dicta or merely the personal opinions of judges. To the extent that we value the phenomenon of judicial catharsis, however, we would presumably be more disposed to adopt a policy of full candor as a means of encouraging both its frequency and its depth.

The most likely, and perhaps ideal, medium for catharsis is the dissenting opinion, for it is the official forum in which dissatisfied, sometimes embittered judges have full control over the strength and substance of their words (though not necessarily over the potency of their sentiments). The dissent... is much like an act of civil disobedience: it is "protestual, propositional, stipulative, and suggestive in appealing to the authority of conscience." 41

Professor Idleman illustrates the cathartic function of judicial dissents by reference to two dissenting opinions by the late United States Supreme Court Justice Harry Blackmun: (1) DeShaney v. Winnebago County Department of Social Services,42 in which the Court held that a state had no constitutional duty to thwart a parent’s physical abuse of his child, even if state officials had knowledge of the probability of such wrongdoing, and (2) Callins v. Collins,43 a Court decision which denied certiorari to a death row inmate. In his dissenting opinion in DeShaney, Justice Blackmun emoted:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondent [the state agency] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all,”—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.44

42. 489 U.S. 189 (1989).
44. DeShaney, 489 U.S. at 213 (Blackmun, J., dissenting); see also Idleman, supra note 40, at 1368-69.
In his dissent from the Court’s denial of certiorari in *Callins*—a dissenting opinion in which, as explained by Professor Idleman, Justice Blackmun “ultimately declared his change of mind on the constitutionality of executions,”—Blackmun opined:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die.

8. *Abuse.* Another motivation for filing a dissenting opinion is to attack or disparage the jurists in the majority. Although unhelpful, unconvincing and unedifying, this reason for writing a dissent is nevertheless an “increasingly common manifestation of excessive judicial [behavior],” as Judge Posner

---

45. *Id.* at 1369.

46. *Id.* (quoting *Callins*, 510 U.S. at 1143 (Blackmun, J., dissenting)). In examining the significance of Blackmun’s two dissents, Professor Idleman observed:

Needless to say, these passages in *DeShaney* and *Callins* are only marginally related to a “legal” resolution of their respective cases, and certainly they are of little or no precedential value. Nor do they obviously or significantly further any of the major rationales for candor . . . —accountability, limited discretion, improved quality of decisionmaking, and guidance to the legal community. Nevertheless, each was doubtless important to Justice Blackmun (who announced his retirement less than two months after his *Callins* dissent), and one can imagine that he would have felt judicially unfulfilled had he been unable to speak these words as fully and freely as he did. Yet, if candor were not understood to be some sort of norm, let alone some sort of obligation, then Justice Blackmun might not have felt as able to utter these words or to convey these emotions. In turn, we as readers would not have had the opportunity, through Justice Blackmun’s cathartic moment, to experience the intangible dimensions of (in the case of *Callins*) an otherwise run-of-the-mill denial of certiorari. And if none of this sounds like legal analysis, perhaps that is precisely the beauty of this rationale for candor—that it serves to infuse judicial opinion writing with the unprocessed reality of the human condition.

*Id.* at 1369-70 (footnotes omitted).


[g]ratuitous deprecations and ad hominen remarks, such as calling a fellow judge a “schmuck” or a “stealthy assassin”—displaying the occasional “vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir”—are institutionally irresponsible, causing readers to be distracted and to think less of either the abusive author or the court as a whole.

On the other hand, as Judge Posner observes, “[s]ince feelings do run high in some cases, the abusive dissent—at least the abusive dissent that conveys the judge’s real emotions—is, if inexcusable, at least understandable.”

9. *Representation of the Minority*. As illustrated by the judicial legacy of the late United States Supreme Court Justice Thurgood Marshall, a judge may be spurred to author a dissenting opinion in order to pay homage to people who are neglected, misunderstood or politically weak. In Justice Marshall’s dissenting opinions, for example, he expressed concern for, among others, “the poor, the elderly and prisoners.” Indeed, “[m]any [of Justice Marshall’s] dissents were in the areas of racial discrimination and criminal law, and [he] frequently showed concern regarding the states’ power over individuals.”

48. Id.
49. Idleman, *supra* note 40, at 1392 (footnotes omitted).
50. *Posner, supra* note 47, at 234. William Domnarski makes an important distinction between the “power” of an emotional dissent, on the one hand, and a “level of personal involvement” in a dissenting opinion which makes it too subjective and “in turn undermines its effectiveness,” on the other hand. William Domnarski, *In the Opinion of the Court* 74 (1996). Domnarski provides an insightful comparison between Justice Blackmun’s “subjective” dissenting opinions and the late Chief Justice William Burger’s “bland” style of majority opinions. *Id.* Recalling what he termed “great writers” of judicial opinions like Justices Hugo Black and Robert Jackson, Domnarski opines:

Whether the current bland style continues to dominate [United States Supreme Court opinions], or whether we will see a return to the emotional or the vitriolic is, of course, a function of the evolving Court’s membership. It is possible that there will be in the future great writers on the bench to rival giants such as Jackson and Black, who were able to combine vision and language. The chances, though, are that we will not see their likes again.

*Id.*


52. *Id.*

53. *Id.* Professor Gross cites dissenting opinions by Justice Marshall as illustrative of his concern for these people and issues, including *Rawlings v. Kentucky, 448 U.S. 98,*
10. **Foreshadowing.** An appellate judge may choose to write a dissenting opinion in an effort to give "lower courts, the parties, and interested bystanders" a guide to "the dynamic 'meaning' of a decision" by the appellate court, and how that judge will interpret particular precedent in the future.  

11. **Mental Honing.** Writing a series of dissenting opinions in a specific doctrinal area of the law, say, for example, obscenity jurisprudence, may allow an appellate judge to refine and perfect his or her disagreements with the majority’s approach.  

12. **Accountability.** A judge may utilize a dissenting opinion to hold his or her colleagues “accountable for their decisions.”  

In a sense, all of the various reasons could be organized according to Jefferson’s objection to the monolithic opinion—a dissenting judge seeks to undertake the writing of a dissenting opinion to avoid being “lazy,” “modest,” and “incompetent.”

**C. Modern American Dissenting Opinion Style: Some Preliminary Observations**

How might one begin to explain, both descriptively and normatively, modern dissenting opinion style? For starters, we can assume, for purposes of discussion, that by “modern” we mean from 1950 onward. If one were interested in tracing the historical origin of dissenting opinion style in America (which I am not), one would have to go back to the old English common law practice of appellate judges issuing separate opinions. Then, one would want to examine the manner of state and federal appellate court dissenting opinions written during the first decade or so of the nation’s history. This would need to be followed by historically probing the particular reasons why Chief Justice John Marshall initiated a custom on the United States Supreme Court of abandoning dissenting

---


55. Id.  


58. See supra note 18 and accompanying text.
opinions. Such a historical study of dissenting opinion style in America would need to analyze the various approaches of nineteenth century state and federal appellate court judges in disagreeing with their colleagues, the kinds of language used to express dissent, and the relative effectiveness and resonance of particular dissenting opinions (measured, perhaps, by another court’s eventual adoption of a dissenting opinion). This historical account of dissenting opinion style would look at similar factors present in the dissents of twentieth and twenty-first century state and federal appellate court judges. If we were interested in limning the intellectual origin of dissenting opinion style in America (which I am not), one would have to identify various schools of thought about the role of dissenting opinions over time and disparate views by leading jurists and lawyers on how dissents should be written. If one were interested in determining the psychological or social origin of dissenting opinion style in America (which I am not), one would have to analyze how, during various timeframes, various dissenting opinion styles arose in response to certain group or individual needs—say, of litigants, lawyers and judges.

Rather than a historical, an intellectual, or a psycho-social theory of the origin and development of various modern American dissenting opinion styles, I am interested in what might be called an aesthetic theory of dissenting opinion style. Given general American linguistic conventions and literary sensibilities over the last fifty years, what dissenting opinions have had power, smoothness, felicitousness, allure and panache? What dissenting opinions have lacked these stylistic qualities? Why? I begin to search for such an aesthetic theory of dissenting judicial style by examining the stylistic characteristics of Judge Posner’s first decade of dissenting opinions.

One of the attractions of focusing on Judge Posner’s dissenting opinion style is that he has theorized on the general subject of judicial opinion style himself. As he writes in the revised and enlarged edition of his book, Law and Literature:

When defined as choice among the various options for encoding the paraphrasable content of a writing, style is the smooth capsule or the flavor additive that makes the medicine easier to swallow and hold down—or that makes some readers want to throw up. But it is also the

59. See supra notes 19-23 and accompanying text.
61. Cf. id. at 13 (discussing similar intellectual origin factors involved with theories of religion). For a concise intellectual history of the role of Supreme Court dissenting opinions, see Ray, supra note 32, at 308-14.
62. Cf. PALS, supra note 60, at 12-13 (discussing similar psychological or social origin approaches involved with theories of religion).
earmark of "good" writing (that is, not "just rhetoric"), whether or not the writing has any persuasive purpose other than to keep the reader reading to the end. One judicial opinion might be better than another not because the argument was more persuasive but because by candidly disclosing the facts and authorities tugging against its result, by being tentative and concessive in tone, even by confessing doubt about the soundness of its result, it was a more credible, a more impressive judicial document, though not a more convincing defense of the outcome.63

Posner goes on to describe judicial opinion style in terms of vividness and memorableness. He writes:

Writings count as literature when they are detachable from the specific setting in which they were created. Style is one of the features of written expression that facilitates this portability; for style is often less local, less time- and place-bound, than content (though sometimes more—style can be an impediment to understanding). Rhyme and meter, the most musical features of poetry, have an appeal that, being nonverbal, is not tied to the local culture out of which the poetry emerged. We might have lost interest in a particular legal issue discussed in a judicial opinion yet the style of the opinion may make us want to read it anyway; and then the opinion will have outlived the occasion of its creation.64

Posner sees powerful, vivid style in a host of literary examples—from a poem by Yeats, to extracts from Homer’s Iliad and Odyssey, to Antony’s speech in Shakespeare’s Julius Caesar, to Philip Roth’s novel Operation Shylock.65

William Domnarski’s seminal 1996 book, In the Opinion of the Court,66 is probably the most comprehensive study of what I call general appellate judicial opinion style. Two of the book’s six chapters focus on style: one chapter is

64. Id. at 257. Posner observes:
   The effect of style on portability is a factor in judicial reputations. Even a brilliant analysis of yesterday’s legal problems is unlikely to hold much current interest, especially since a major effort at historical reconstruction may be required to determine that it was brilliant. The vivid and therefore memorable opinion is not chained to the immediate context of its creation. It can be pulled out and made to exemplify law’s abiding concerns.
   Id. at 257-58.
65. Id. at 258-66. For Posner’s specific comments about one feature of dissenting judicial style in recent years, see Posner, supra note 47, at 232-34.
66. Domnarski, supra note 50.
entitled "Style and Substance in Supreme Court Opinions"; the other is entitled "Style and Substance in Lower Federal Court Opinions." 67 Moreover, the final chapter of his book is entitled "Closing the Circle: Judge Richard A. Posner and Exploration of the Judicial Opinion"; 68 the chapter makes important contributions to understanding the general appellate opinion style of Judge Posner but does not discuss Posner's dissents. 69

Thus, this Article asks: What attributes of a dissenting opinion give it, in theory, power, panache, allure, vividness and a memorable quality? 70 Are these attributes similar to the attributes of a majority opinion, or a separate concurring opinion? What about a partial dissenting and partial concurring opinion? In Law and Literature Posner assumes, without saying why, that good judicial opinion style is generic regardless of its relationship to the majority view. In this regard, Posner concludes that Justice Holmes' dissenting opinion in Lochner v. New York 21 is "right [at] the top." 72 In spite of Posner's observation that Holmes' dissent is "not well reasoned," 73 he concludes that "it is merely the greatest judicial opinion of the last hundred years." 74 He praises Holmes' dissenting opinion in Lochner because it advances "practical reason"—a quality "[b]etween the extremes of logical persuasion and emotive persuasion" 75—and because it includes certain memorable characteristics: "appeals to common sense, to custom, to precedents and other authorities, to tradition, to empiricism, to intuition, to institutional considerations, to history, to consequences, to the social sciences, to our just or good emotions, and to the 'test of time.'" 76 Elsewhere, however, Posner cautions that frequent dissents are bad form. In Cardozo: A Study in Reputation, Posner observes, "Every dissent is an irritant to the members of the majority; hence a judge who dissents at the drop of a hat jeopardizes the esteem of his colleagues." 77 In criticizing the famous dissenting opinion of New York Court of Appeals Judge William Andrews in Palsgraf v. Long Island Railroad Co. 78—which Posner terms "inept" 79—he contends that the

67. Id. at 55-74, 90-115.
68. Id. at 116-55.
69. But see, e.g., id. at 125, 127, 128-29, 135, 149, 154 (discussing the style of a few of Judge Posner's dissenting opinions).
70. For a synthesis of existing scholarship on general judicial opinion style, see Blomquist, supra note 1, at 656-83.
71. 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).
72. POSNER, supra note 63, at 266.
73. Id. at 267 (footnote omitted).
74. Id. at 271.
75. Id. at 272.
76. Id. (internal quotation marks omitted).
79. POSNER, supra note 77, at 45.
opinion "cedes the legal high ground to [the] Cardozo [majority opinion]," and "fails to land a heavy blow on the majority opinion [thereby] strengthen[ing] that opinion by making it seem invulnerable." Here, Posner hints that the dissenting opinion must be held to a higher standard because it risks backfiring on the writer.

Surprisingly, other than Posner’s assorted ruminations, Domnarski’s occasional comments on the topic, and Professor Martha Nussbaum’s isolated oblique references to judicial dissents which embody “sympathetic attention to the special plight of people who are socially unequal," little has been written about the theory of dissenting opinion style. Laura Krugman Ray’s 1988 article, Justice Brennan and the Jurisprudence of Dissent, contains a helpful academic discussion of dissenting opinion style. In a section entitled "The Style of Dissent," Ray observes that an appellate judge “writing in dissent has the license to speak with a more distinctive voice than the author of a majority opinion." She argues that a dissenting opinion should “only rarely . . . express . . . views in language that exceeds the boundaries of the . . . legal prose” of majority judicial opinions. Ray generally limits her discussion to the stylistic qualities of Justice William Brennan’s dissenting opinions. Building on some of Ray’s insights, Professor John Leubsdorf’s 2001 article entitled The Structure of Judicial Opinions is an excellent theoretical discussion of dissenting opinion style. However, because Leubsdorf is concerned about judicial opinions in general, he provides only limited theoretical consideration of dissenting opinions.

80. Id. at 46.
81. See supra notes 71-80 and accompanying text.
82. See supra notes 68-69 and accompanying text.
83. Blomquist, supra note 1, at 672 (internal quotation marks omitted) (discussing Nussbaum’s review of a dissenting opinion by United States Supreme Court Justice John Paul Stevens in a prisoners’ rights case).
84. In my article on Judge Posner’s judicial opinion style on the U.S. Court of Appeals for the Seventh Circuit during his first year on the bench (1981-82), I devote a few pages to discussing his dissenting opinion style during that “rookie” year. See id. at 727-31, 734.
85. Ray, supra note 32.
86. Id. at 346-50.
87. Id. at 346.
88. Id.
89. Id. at 346-50 (discussing Justice Brennan’s dissenting opinions with attention to use of figurative language, metaphors, literary allusions, “works of literature in which the rational becomes irrational, the decent becomes oppressive,” “whimsical humor,” tone, rhetoric and imagery). Ray concluded that the style of Justice Brennan’s dissenting opinions can be thought of as “a barometer of his judicial discontent.” Id. at 350.
Nevertheless, what Leubsdorf says about the theory of dissenting opinion style, or what his theory implies, is provocative. In this regard, he first observes the different “voice” that a dissenting opinion shares with other “voices” found in judicial opinions:

Many voices, heard more or less directly, may tell or discuss . . . stories: the author of the [majority] opinion, concurrers and dissenters, trial judges, judges who wrote in other cases, legislatures and legislators, lawyers, and sometimes even litigants and witnesses. It would be a wild overstatement to describe the typical judicial opinion, as [one critic] describes Dostoevsky’s novels, as a “plurality of independent and unmerged voices and consciousnesses, a genuine polyphony of fully valid voices.” Often, indeed, the opinion’s author succeeds in swallowing other voices, which can be heard, if at all, only like the duck quacking from the wolf’s stomach in another Russian work, Peter and the Wolf. Still, a judicial opinion offers real opportunities for dialogue.91

In Leubsdorf’s view, it is the dissenting opinion that provides that dramatic dialogue. A second insight about judicial opinions in general that has special resonance in understanding the need for a different judicial voice in a dissenting opinion is as follows:

The characters who appear in judicial opinions are more like those in fables, epics and newspaper articles than they are like the characters of Henry James of Dostoevsky. The limited information available about them, the tendency of lawyers and judges to think about litigants in familiar and therefore plausible stereotypes, the drive to justify the decision by justifying or condemning a party’s acts, and the hope that decisions will establish models for future behavior lead to the prevalence of two-dimensional figures. That would scarcely surprise novelists who, for both artistic and competitive reasons, delight to show how the judicial process fails to perceive the complex truth about individuals.92

This analysis overlaps Nussbaum’s notion that the dissent fleshes out the total truth of a situation, illuminating the characters and ideas that the majority marginalized.

91. Id. at 448 (footnotes omitted) (emphasis added).
92. Id. at 461-62 (footnotes omitted).
Third, Leubsdorf also notes the historical valence of dissents that tell "law stories."93 As is the case regarding character elucidation,94 telling "stories about how law has changed over time,"95 often by reference to legislation,96 can be of particular theoretical importance in fashioning a dissenting opinion. For example, a dissenting opinion might "portray[] the passage of legislation: the problems that gave rise to it, proposals for resolving those problems, and the legislature's decision."97 Moreover, a dissenting opinion is often fertile ground to tell "a story of decline, in which a mistaken decision has involved the law in increasing confusion or folly."98 Indeed, "[s]ometimes it is not too late to undo the mistake, so that the story has a happy ending after all, at least in the view of its author,"99 as exemplified by Justice Louis Brandeis' dissenting opinion in Louis K. Ligget Co. v. Lee.100 But, sometimes, a dissenting opinion will portray the mistake of the majority in a tone of unbridled bitterness when the "opinion tells a story that is a prediction of the dire results the majority's decision will produce,"101 if not corrected, as Justice McReynolds's dissenting opinion in Perry v. United States illustrates.102 A dissenting opinion telling law stories can usefully rely upon "judges of times past, returning in a variety of cameo roles."103 Thus, as a judge of the Missouri Supreme Court did in a 1983 dissent,104 "[t]he opinion may . . . summon up the ghost of Holmes to warn against repeating the errors of his own day."105 Such evocations are familiar and crowd-pleasing since

93. Id. at 473 n.111 (noting that this phrase is "stolen" from the book LAW STORIES (Gary Bellow & Martha Minow eds., 1996)).
94. See supra note 92 and accompanying text.
95. Leubsdorf, supra note 90, at 473.
96. Id.
97. Id.
98. Id. at 475.
99. Id.
100. 288 U.S. 517, 548-62 (1933) (Brandeis, J., dissenting); Leubsdorf, supra note 90, at 475 n.121 ("describing the development of large corporations and the law's failure to control their dangers").
101. Leubsdorf, supra note 90, at 475. The result, according to Leubsdorf, is often "a tone of bitter satire not uncommon in literary portrayals of the law," like the tone of Dickens, "but rare in judicial opinions, whose authors do not like to admit in public that the law suffers from imperfections they cannot or will not cure." Id.
102. 294 U.S. 330, 381 (1935) (McReynolds, J., dissenting) ("Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling."); Leubsdorf, supra note 90, at 475 n.124.
103. Leubsdorf, supra note 90, at 477.
104. State v. Goddard, 649 S.W.2d 882, 892 (Mo. 1983) (Welliver, J., dissenting) (relying on Holmes). This example is made by Leubsdorf, supra note 90, at 477 n.133.
105. Leubsdorf, supra note 90, at 477.
famous judges of Anglo-American history “are stock characters that the audience knows and loves from previous encounters.”  

Leubsdorf caps his theory that opinions function as stories, satisfying literary appetites, by analogizing a dissent (or a concurrence for that matter) to a novel with several narrators, a technique used in works by Virginia Woolf and William Faulkner. Accordingly, a “crafty reader” can use a dissenting opinion “to improve his understanding of the facts, issues, or arguments.” The dissenting opinion might show, as Justice Stephen Breyer’s partial dissent in Allentown Mack Sales & Service, Inc. v. NLRB arguably shows, “that a[] [majority] appellate opinion has swept under the rug problems it should have faced.” In working toward a theory of modern appellate dissenting opinion style, Professor Leubsdorf’s discussion of the differing “voices” of the law provides us with what we might call “perspectivism”, an understanding that law is “a question of orientation, framing, and context.”

If Leubsdorf's work focuses on the judge speaking to posterity by imbuing his opinions with belletristic qualities, the latest authoritative law review commentary about appellate dissenting opinion style, by Professor Charles Fried, thinks of a style strictly in terms of a judge’s relationship with the rest of the bench. Fried’s commentary, Five to Four: Reflections on the School Voucher Case, discusses a theory of oppositional and collaborative dissenting opinions. Starting with a pastiche of “stunning exchange[s]” between justices of the United States Supreme Court in recent dissenting and concurring opinions, Fried goes on to articulate “Two Kinds of Dissent” by members of the Court:

106. Id. at 477-78.
107. Id. at 491.
108. E.g., William Faulkner, As I Lay Dying (1931); Virginia Woolf, The Waves (1931). These examples are provided by Leubsdorf, supra note 90, at 491 n.192.
109. This phrase is taken from the title of the book, Robert Scholes, The Crafty Reader (2001). Scholes argues: “One becomes a crafty reader by learning the craft of reading. I believe that it is in our interest as individuals to become crafty readers, and in the interest of the nation to educate citizens in the craft of reading.” Id. at xiii.
110. Leubsdorf, supra note 90, at 491.
111. 522 U.S. 359, 392-97 (1998) (Breyer, J., concurring in part and dissenting in part). This example is provided by Leubsdorf, supra note 90, at 491 n.194.
112. Leubsdorf, supra note 90, at 491.
114. Id. at 1117.
116. See, e.g., id. at 175-76 n.61, 177.
117. Id. at 180.
“collaborative” and “oppositional.”"118 Fried’s analytical categories are both functional and aesthetic because they describe the varying purposes of justices in employing particular dissenting opinions as well as the different styles justices exhibit with particular dissenting opinions. While formally limited to explaining dissenting opinions by Supreme Court justices, Fried’s analysis contributes to a broader understanding of dissenting opinion styles on all appellate courts—perhaps with special relevance to state supreme courts. Fried suggests that, when in a collaborative mood, judges see the common law as a discernible “way” that they must walk together. As he puts it, “The dissent, then, knowing full well that common law development is notoriously path-dependent, sees the majority as wandering off from a shared path, and warns where such a divagation may ultimately lead.”119

The collaborative dissent, in Fried’s view, “is a close relative to the concurrence, a device that Justices O’Connor and Scalia have used to great advantage in several areas.”120 In contradistinction to this kind of collaborative dissent, Fried describes the oppositional dissent as “reject[ing] the majority’s opinion as a basis for further development of the law.”121 Staying with his navigational metaphor, Fried writes that the appellate judge deploying an oppositional dissenting opinion

would take the law right back to where it was before the wrong turn and implies that the dissenter will not accept the decision even grudgingly as a premise for reasoning—even if that reasoning might not carry the doctrine even further in the wrong direction. The oppositional dissent, then, is a potential vote for overruling and thus implies a refusal to allow the decision to shelter under stare decisis. By committing to an oppositional stance, the dissenter implies she will overturn precedent when the votes are there. But just as there are principled considerations warranting a departure from stare decisis, so—in a minor key—an oppositional dissent, no less than a collaborative one, is a conscientious participation in the work of the [appellate court].122

118. Id.
119. Id. at 180-81 (footnote omitted).
120. Id. at 181. According to Fried, “[i]n each of its modalities, the collaborative dissent accords well with the values of stability and continuity that lie behind the doctrine of stare decisis. Stare decisis requires only loyalty to and collaboration in the development of doctrine, not loyalty to method.” Id. (emphasis added).
121. Id. at 182.
122. Id.
And, interestingly, the Friedian categories of collaborative and oppositional dissenting opinions "blend into each other" in some instances when an appellate "judge may not be quite sure whether she is an oppositionist or a collaborator." In such gray areas the dissenting opinion "states objections, . . . sets out markers, and the direction in which the [pertinent] doctrine moves may determine the direction in which [the judge] moves." To add to the complexity, "[a]t other times a dissenter may start out as an oppositionist but over the years move to a collaborative mode or simply give up and join the majority." In concluding his analysis of Justice Souter's dissenting opinion, which characterized the majority opinion for the Court in *Zelman v. Simmons-Harris*—the school voucher case—as resulting in "doctrinal bankruptcy," Professor Fried compares Souter's dissenting style with that of other justices in other cases where Fried found the following aesthetic features: "angry bite," "firmness," "aura of condemnation," "anomalous," "solipsistic," "touch of softness" and "a voice crying in the wilderness.

At this juncture, I will postpone my own theoretical take on dissenting opinion style until after I have reviewed, characterized and classified—as a case study of sorts—the aesthetics of Judge Richard A. Posner's dissenting opinions during his first ten years on the federal appellate bench. Then, based on the insights derived from the Posner study, I will synthesize existing theories of modern dissenting opinion style and add my own insights.

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
128. *Id.* at 688 (Souter, J., dissenting).
130. *Id.*
131. *Id.*
132. *Id.* at 189.
133. *Id.*
134. *Id.* at 190.
135. *Id.* at 189.
136. *See infra* notes 138-499 and accompanying text.
137. *See infra* notes 500-17 and accompanying text.
III. JUDGE POSNER'S DISSenting OPINIONS, 1981-1991: A STUDY IN EVOLVING CONTRARIAN PANACHE

A. Statistics

During his first twenty years as a United States Court of Appeals Judge—measured from his starting date during the autumn of 1981 until the end of 2001 (technically, a bit longer than twenty years)—Judge Richard A. Posner wrote a total of 1,808 published opinions, or an average of about ninety opinions per year. Of these 1,808 opinions, Judge Posner wrote 1,679 opinions for the Seventh Circuit majority. Posner authored a total of 129 published separate opinions during this timeframe; these separate opinions consisted of seventy dissenting opinions, forty-seven pure concurring opinions and twelve mixed concurring/dissenting opinions.139

138. See Blomquist, supra note 1, at 683-85.
139. My research assistant and I calculated these figures based on a hand count of all published authored opinions by Judge Posner on the Westlaw federal court Seventh Circuit database of published opinions. The following table summarizes this information:

<table>
<thead>
<tr>
<th>Year</th>
<th>Maj</th>
<th>Con</th>
<th>Con/Diss</th>
<th>Diss</th>
<th>Total</th>
<th>% Separate Opinions</th>
<th>% Dissenting Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>1982</td>
<td>77</td>
<td>2</td>
<td>0</td>
<td>6</td>
<td>85</td>
<td>9.41%</td>
<td>7.06%</td>
</tr>
<tr>
<td>1983</td>
<td>81</td>
<td>7</td>
<td>3</td>
<td>5</td>
<td>96</td>
<td>15.63%</td>
<td>8.33%</td>
</tr>
<tr>
<td>1984</td>
<td>77</td>
<td>4</td>
<td>1</td>
<td>5</td>
<td>87</td>
<td>11.49%</td>
<td>6.90%</td>
</tr>
<tr>
<td>1985</td>
<td>88</td>
<td>6</td>
<td>0</td>
<td>9</td>
<td>103</td>
<td>14.56%</td>
<td>8.74%</td>
</tr>
<tr>
<td>1986</td>
<td>78</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>86</td>
<td>9.30%</td>
<td>5.81%</td>
</tr>
<tr>
<td>1987</td>
<td>79</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>85</td>
<td>7.06%</td>
<td>2.35%</td>
</tr>
<tr>
<td>1988</td>
<td>72</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>80</td>
<td>10.00%</td>
<td>6.25%</td>
</tr>
<tr>
<td>1989</td>
<td>72</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>78</td>
<td>7.69%</td>
<td>3.85%</td>
</tr>
<tr>
<td>1990</td>
<td>86</td>
<td>3</td>
<td>0</td>
<td>5</td>
<td>94</td>
<td>8.51%</td>
<td>5.32%</td>
</tr>
<tr>
<td>1991</td>
<td>73</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>79</td>
<td>7.59%</td>
<td>6.33%</td>
</tr>
</tbody>
</table>
The distribution of Judge Posner’s eighty-two dissenting opinions and mixed concurring/dissenting opinions over these twenty years is instructive. From late 1981 through the end of 1986 he wrote thirty-four dissenting opinions (41.5 percent of all his dissenting opinions); from 1987 through the end of 1991 he wrote twenty dissenting opinions (24.4 percent of his dissenting opinions); from 1992 through the end of 1996 he wrote fifteen dissenting opinions (18.3 percent of his dissenting opinions); and from 1997 through the end of 2001 he wrote thirteen dissenting opinions (15.8 percent of all his dissenting opinions). Thus, as Judge Posner’s tenure on the bench lengthened he tended to write fewer dissenting opinions. A possible reason for Posner’s decreasing rate and number of dissenting opinions is his increased satisfaction with Seventh Circuit opinions. Posner’s increased satisfaction, in turn, is probably related to both his own persuasiveness in convincing his colleagues to adopt his reasoning on assorted legal issues and to the appointment of more like-minded judges to the Seventh Circuit (as well as the Supreme Court).

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Dissents</th>
<th>Concurring/Dissent</th>
<th>Total</th>
<th>Percent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>77</td>
<td>1</td>
<td>0</td>
<td>6</td>
<td>84</td>
<td>8.33%</td>
</tr>
<tr>
<td>1993</td>
<td>98</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>101</td>
<td>2.97%</td>
</tr>
<tr>
<td>1994</td>
<td>100</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>103</td>
<td>2.91%</td>
</tr>
<tr>
<td>1995</td>
<td>89</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>94</td>
<td>5.32%</td>
</tr>
<tr>
<td>1996</td>
<td>103</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>105</td>
<td>1.90%</td>
</tr>
<tr>
<td>1997</td>
<td>88</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>89</td>
<td>1.12%</td>
</tr>
<tr>
<td>1998</td>
<td>83</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>86</td>
<td>3.49%</td>
</tr>
<tr>
<td>1999</td>
<td>90</td>
<td>2</td>
<td>0</td>
<td>5</td>
<td>97</td>
<td>7.21%</td>
</tr>
<tr>
<td>2000</td>
<td>80</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>84</td>
<td>4.76%</td>
</tr>
<tr>
<td>2001</td>
<td>85</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>89</td>
<td>4.49%</td>
</tr>
<tr>
<td>Totals</td>
<td>1,679</td>
<td>47</td>
<td>12</td>
<td>70</td>
<td>1,808</td>
<td>7.13%</td>
</tr>
</tbody>
</table>

140. *Id.* My statistics do not reflect whether Judge Posner's dissenting opinions were dissents from panel majority opinions, dissents from en banc majority opinions, partial concurring and dissenting opinions, or dissents from majority opinions declining to rehear a panel opinion en banc. However, in the discussion that follows I do make these distinctions. See *infra* notes 141-477 and accompanying text.

https://scholarship.law.missouri.edu/mlr/vol69/iss1/7
B. The First Five Years, 1981-1986

1. 1981-1982

During the 1981-1982 timeframe (a little over one calendar year from his commencement of judicial duties in late 1981 through the end of 1982) Judge Posner wrote five published dissenting opinions from panel opinions and one dissenting opinion from a Seventh Circuit en banc decision denying a rehearing. During this rookie season Posner’s dissenting opinions were, in general, written in a respectful and measured tone, tinged at times with subtle sarcasm. This style is exemplified in his first-ever dissenting opinion in the Indianapolis school desegregation case, United States v. Board of School Commissioners. In that case, the dissent argued that the majority opinion demonstrated a lack of economic and practical sense by getting involved in “the tangled and recriminatory business” of financing and paying for the court-ordered busing. Sometimes, however, Posner’s dissenting opinions during this period came off as a bit shrill and self-indulgent—as in Sur v. Glidden-Durkee and McKeever v. Israel. The dissenting opinions characteristic of his best style during his rookie season were in the statutory interpretation cases, United States v. Anton and Allison v. Liberty Savings. Anton was an immigration case involving the interpretation of a federal statute that made it a crime for a once-deported alien to re-enter the United States “unless . . . the Attorney General has expressly consented to such alien’s reapplying for admission.” Throughout his dissent, Posner elegantly and persuasively utilized traditional tools of statutory construction, such as textual analysis, examination of Congress’s purpose in passing the law, the historical evolution and legislative history of the deportation statute, policy considerations and the force of other


143. Id. at 1194 (Posner, J., dissenting).

144. Sur, 681 F.2d at 499 (Posner, J., dissenting).

145. McKeever, 689 F.2d at 1324 (Posner, J., dissenting).

146. Anton, 683 F.2d at 1019 (Posner, J., dissenting).

147. Allison, 695 F.2d at 1091 (Posner, J., dissenting).

courts' interpretations of the statute.\textsuperscript{149} \textit{Allison} was a civil suit by a real estate borrower against the lender under the federal Real Estate Settlement Procedures Act ("RESPA") for allegedly requiring an excessive escrow deposit.\textsuperscript{150} The court denied rehearing en banc. In his dissent, Judge Posner observed in the rhetoric of law and economics which he savors that "[t]he panel's opinion is not only lucid and well-reasoned; it reaches an attractive result: it excludes from the federal courts a host of petty cases... which do not belong in those courts under an optimal allocation of jurisdiction between the state and federal courts."\textsuperscript{151} In the next sentence, however, Posner announced his dissent: "Nevertheless, I disagree with the decision, and believe the case should be reheard en banc."\textsuperscript{152} He also observed that "[a]lthough [the alleged statutory violation] is pretty small beer, the panel's opinion both sets forth an approach potentially of general application to deciding when federal statutes may be enforced by private damage actions and creates a conflict with another circuit,"\textsuperscript{153} while also "lend[ing] itself to en banc treatment, presenting as it does a single issue, purely of law."\textsuperscript{154} The heart of Posner's dissent is an elegant contrarian meditation on the likely purpose of Congress in passing the statute and the inadequacy of the remedy offered by the majority. As Judge Posner phrased the matter:

[W]e must ask: if the Congress that enacted RESPA had adverted to the question of remedies for violations of Section 10, would it have decided that there ought to be a private damage remedy?

Section 10 forbids the lender to force the borrower to deposit money in escrow above a certain amount. The natural remedy for the violation of such a prohibition is a suit by the borrower to get the excess deposit returned to him. Congress could not have wanted the lender to be able to retain the excess deposit in violation of the statute. True, a private suit is not the only possible remedy. Alternatively, the borrower could complain to an agency with regulatory authority over the lender, and that was done in this case. However, the panel opinion points out that some borrowers may not be able to get any relief by this route, and this should make us hesitant about concluding that Congress would not have wanted borrowers to have a right to sue in court.

\textsuperscript{149} \textit{Id.} at 1019-21 (Posner, J., dissenting). Indeed, Posner's use of analogy to probe the possible purposes of Congress in passing the Alien Re-Entry Felony Statute was striking. \textit{See} Blomquist, \textit{supra} note 1, at 728 n.368 (quoting extensively from dissenting opinion).

\textsuperscript{150} \textit{Allison}, 695 F.2d at 1087.

\textsuperscript{151} \textit{Id.} at 1091 (Posner, J., dissenting).

\textsuperscript{152} \textit{Id.} (Posner, J., dissenting).

\textsuperscript{153} \textit{Id.} (Posner, J., dissenting).

\textsuperscript{154} \textit{Id.} (Posner, J., dissenting).
More important, the administrative remedy appears to be inadequate even for those borrowers who can invoke it. In the present case, for example, the agency made the defendant return to the plaintiff the money she had overpaid into the escrow account, but (she alleges, and we must assume for purposes of this appeal) not the interest that the defendant had earned on that money. The return of the interest is not some bagatelle, inessential to the adequacy of the administrative remedy. This is not a personal injury case, where interest accrues only from the date of the judgment, and not from the date of the tort itself. It is a suit based on unjust enrichment—a suit for restitution. . . . You may not steal a man's pregnant cow and after it has given birth return the cow and keep the calf. No more should the defendant in this case be allowed to keep the increase in its wealth from investing the plaintiff's money. . . . Yet it may be the only remedy that this plaintiff has under the decision today.155

2. 1983

During 1983, Judge Posner published a total of eight dissenting opinions. Specifically, these opinions consisted of five pure dissenting opinions156 and three mixed concurring/dissenting opinions.157 In reading through these eight Posnerian dissents, one is struck by a more confident, more piercing, more academic tone in comparison to the dissenting opinions Judge Posner wrote during his rookie season on the federal appellate bench.158 More specifically, in United States v. Knop,159 a criminal bank fraud case, Posner played the role of the stern taskmaster, convinced that the Justice Department had been adequately warned about the need to prove by specific evidence that the national bank was federally insured at the time of the defendant’s fraudulent representations.

155. Id. at 1092 (Posner, J., dissenting) (emphasis added).


158. Cf. supra notes 141-55 and accompanying text.

159. Knop, 701 F.2d at 676 (Posner, J., dissenting).
In Vail v. Board of Education of Paris Union School District No. 95, a constitutional tort case against a school board that terminated a football coach’s two year contract after one year, Judge Posner’s style is characterized by an aura of condemnation—with specific criticism of his colleagues’ reasoning—that surfaces to an angry bite at certain points in the dissenting opinion. Posner backed up his anger with a scholarly exegesis on the historical distinction between property rights and contract rights, a textual analysis of the Constitution, a review of available state law remedies for the coach, occasional economic pontification, and a close reading of Supreme Court and Seventh Circuit precedent. While portions of his dissenting opinion in Vail exhibit frankness and uncertainty, the culmination of the opinion rings with an Old Testament ominatio, when Posner states:

[Forget [a specific Supreme Court holding], and my basic point remains: in a case of this sort, where one is about as far away as one can get from the gross police misconduct alleged in [the seminal Supreme Court case in this field], the requirements of due process are satisfied by the remedies that the state provides in its courts for breaches of contract by its school boards. And this is but one of my grounds for arguing that Vail has no right of relief under 42 U.S.C. § 1983; the others, it will be recalled, are that there is no property right at stake in this case and that in any event there has been no deprivation of such a right. I do not argue that any of these grounds possesses apodictic certainty but at least they show that the result in this case is not predestined by existing case law. The Supreme Court has not decided the question in this case. We do that Court a disservice to apply its 1972 decisions . . . to the very different facts of this case, ignoring all that has happened in the law relevant to section 1983 since then, reaching a result that is contrary to every principle of federalism and good sense, and putting the blame on the Court. I have tried very hard but without success to think of a reason why a football coach should be allowed to litigate his contract claim against a school board in a federal district court. I get no help in this endeavor from being told by Judge Eschbach that the case is about the “termination of a person’s livelihood,” or by Judge Wood that football coaches “are generally not second class members of a balanced school program.” We are witnessing the trivialization of the Constitution. I regret almost more than I can say that my brethren’s method of interpreting precedent has led them to take another step on the road whose

160. Vail, 706 F.2d at 1449-56 (Posner, J., dissenting).

https://scholarship.law.missouri.edu/mlr/vol69/iss1/7
terminus is the displacement of the whole of state law into the federal courts.\footnote{162}

Shifting from civil rights law to matters of tax law, in Boyle v. United States, Posner deployed the rhetorical techniques of \textit{meiosis} and \textit{effictio} in belittling Robert W. Boyle—"the decedent’s son and executor of her estate"\footnote{163} who faced a penalty for filing a federal estate tax return three months late. Judge Posner dissented from the panel majority who affirmed the district court’s order to refund the late filing penalty Boyle had paid; Posner sardonically observed that “Boyle is not J.P. Morgan or Baron Rothschild but he is an experienced businessman, and not the pathetic receptionist/telephone operator . . . inexperienced in business matters” who had received leniency under a prior Seventh Circuit decision.\footnote{164} Reverting to a professorial tone, Posner noted that his approach in interpreting the pertinent law would create proper “incentives [that] would . . . avoid a persistent problem in the enforcement of the tax laws.”\footnote{165} “Instead,” Judge Posner claimed, “the court today adopts an approach that rewards both the active negligence of the lawyer [representing the executor] and the passive negligence of his client.”\footnote{166}

Judge Posner, expressing compassion backed up by intellectual acuity, wrote a marvelous dissenting opinion in DePass v. United States,\footnote{167} which is worthy of extended analysis. He started by employing \textit{antanagoge} to state an interesting \textit{paradox}\footnote{168} about the trial court’s award of damages to a Federal Tort

\footnotesize

162. \textit{Vail}, 706 F.2d at 1456 (Posner, J., dissenting) (second emphasis added).

163. Boyle v. United States, 710 F.2d 1251, 1256 (7th Cir. 1983) (Posner, J., dissenting), \textit{rev’d}, 469 U.S. 241 (1985). “Meiosis” is “belittling, often through a trope of one word.” \textit{RHETORICAL TERMS}, \textit{supra} note 161, at 189. “Effictio” entails “a head-to-toe itemized description of a person.” \textit{Id.} at 185. While Posner did not provide a physical description of Boyle, his style focuses on a detailed functional description of Boyle’s business acumen. Curiously, while Judge Posner argued that ordinary negligence—and therefore an objective reasonable person standard—should govern interpretation of the federal regulation, he seemingly focused on the subjective competence and background of Boyle in an approach that resembles the defendant’s argument in the discredited classic torts case of \textit{Vaughan v. Menlove}, 132 Eng. Rep. 490 (1837) (where Chief Justice Tindal wrote that to judge liability for negligence based on the individual intellectual characteristics of each person would result in a standard “as variable as the length of the foot of each individual”).

164. Boyle, 710 F.2d at 1256 (Posner, J., dissenting) (internal quotation marks omitted).

165. \textit{Id.} at 1258 (Posner, J., dissenting).

166. \textit{Id.} (Posner, J., dissenting).

167. 721 F.2d 203, 206 (7th Cir. 1983) (Posner, J., dissenting).

168. “Antanagoge” consists of “balancing an unfavorable aspect with a favorable one.” \textit{RHETORICAL TERMS}, \textit{supra} note 161, at 184. A “paradox” is “a seemingly self-contradictory statement which yet is shown to be true.” \textit{Id.}
Claims Act plaintiff who was negligently struck by a car driven by an employee of the United States, suffering, among other injuries, a traumatic amputation of his left leg below the knee. 169 Judge Posner started his opinion in an informal—almost chatty—way that engages and disarms the reader:

Although this may seem like a routine personal-injury case, it raises important questions relating to the use of scientific evidence in federal trials. The plaintiff, a 37-year-old man named DePass, was hit by a car owned and operated by the government. He was seriously injured—one of his legs had to be amputated just below the knee, the other was crippled, and one eye was badly injured. He brought suit under the Federal Tort Claims Act and the district court held the government liable and awarded DePass $800,000 in damages. The entire award is for “pain and suffering,” since DePass incurred no medical expenses (he received all medical treatment free of charge from the Veterans Administration) and proved no loss of earnings from the accident. This is a generous award, maybe too generous, even though “pain and suffering” does not mean just physical pain and suffering but includes the unhappiness caused by disfiguring and crippling injuries. In any event, the judge’s failure to explain the basis of the award seems inconsistent with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

But the government has not appealed, so for purposes of this appeal we must accept that $800,000 is a reasonable estimate of DePass’s damages, assuming as the judge found that DePass’s life was not shortened by the accident. . . . Although the additional loss inflicted by shortening what is now likely to be a rather miserable life may be slight in pecuniary terms, especially after being discounted to present value, if DePass proved that the accident probably shortened his life he was entitled to some additional damages and it should be no concern of ours whether the addition would be small or large or whether as an original matter we might think $800,000 adequate or even excessive to compensate for all of his losses. 170


170. Id. at 206 (Posner, J., dissenting) (citations omitted). Posner’s citation to the O’Shea case is to a majority opinion that he wrote the year before. See Blomquist, supra note 1, at 709, 711 (discussing O’Shea opinion as “stylistically beautiful” in a case involving “the tricky question of how to account for inflation in computing lost future wages” by “weaving] a seamless web of logic and analysis” using stylistic techniques, which included analogy, computational example, case comparison, aphorism and gentle admonition).
Posner continued his dissenting opinion in *DePass* by targeting the flaws in the trial judge's reasoning process. In the passage that follows, the dissenting opinion exhibits *epicrisis*,171 as revealed by Posner's quotation of passages from the trial record and the trial judge's written findings of fact;172 after this dissection of the lower court opinion, Posner uses *apodioxis*173 in his adamant rejection of the trial judge's flawed conceptions of probabilities as evidence:

[I]t seems . . . likely from his remarks that the district judge thought that all probabilities are too uncertain to provide a basis for awarding damages. Yet most knowledge, and almost all legal evidence, is probabilistic. Even the proposition that DePass will die someday is merely empirical. It is of course highly probable that he will die but it is not certain in the way it is certain that 103 is [not] 1,000 or that I am my wife's husband—propositions that are true as a matter of definition rather than of observation. If [there had been] testi[mony] that DePass had heart disease and was therefore likely to die younger than most men in his age group, [the expert] would have been making a probabilistic statement; and the probabilities that are derived from statistical studies are no less reliable in general than the probabilities that are derived from direct observation, from intuition, or from case studies of a single person or event—all familiar sources of legal evidence.

All this has long been recognized in personal injury cases, as it is throughout the law. If a tort victim is seriously injured and will require medical attention for the rest of his life, the court in deciding how much to award him for future medical expenses will have to estimate how long he can be expected to live and it will make this estimate by consulting a mortality table, which is to say by looking at a statistical summation of the experience of thousands of millions of people none of whom is a party or a witness in the case, rather than by studying the lifelines on the victim's palms. And if a study has been made of the mortality of people with the same kind of injury as the plaintiff, the court will consult that study in addition to or instead of standard mortality tables. This is what DePass asked the district judge to do here.174

171. "Epicrisis" occurs when one "quotes a passage and comments on it." RHETORICAL TERMS, supra note 161, at 183.
173. "Apodioxis" involves "rejecting an argument indignantly as impertinent or absurdly false." RHETORICAL TERMS, supra note 161, at 186.
The DePass dissent illuminates the consequences of the decision to the undercompensated victim and also uncovers the close-mindedness of the district judge, whom Posner’s colleagues affirmed. The style of Posner’s dissent illustrates his ability to convey the underpinnings of events and people’s actions—the motives that lie even beneath economic motives.

Judge Posner ended his DePass dissent with a remarkably acute rumination on the meaning of the excluded statistical report in the trial court; he alluded to portions of the statistical study that supported the proposition that amputees enjoy a diminished probable lifespan;\(^\text{175}\) he ended with a sweeping tort law and economics polemic:

\[\text{[A] judge is not free to say, in my court we do not allow statistical inference. Knowledge increasingly is statistical, and judges must not let themselves lag too far behind the progress of knowledge. As a matter of fact they have not lagged. The kind of evidence that the district judge rejected in this case, evidence of probability of survival, invariably based on studies of a group of people rather than of just the individual plaintiff, is an increasingly common basis for awarding damages.}\]

The district judge’s rejection of such evidence, if widely followed, would lead to systematically undercompensating the victims of serious accidents and thus to systematically underdeterrenting such accidents. Accidents that require the amputation of a limb, particularly a leg, are apparently even more catastrophic than one had thought. They do not just cause a lifetime of disfigurement and reduced mobility; they create a high risk of premature death from heart disease. The goal of awarding damages in tort law is to put the tort victim as nearly as possible in the position he would have occupied if the tort had not been committed. This goal cannot be attained or even approached if judges shut their eyes to consequences that scientists have found are likely to follow from particular types of accident[s], merely because the scientists’ evidence is statistical. But unless I have mistaken the true grounds of the district judge’s decision in this case that is what he did.

The finding that DePass failed to prove a reduction in life expectancy as a result of the accident should be vacated as clearly erroneous and the case should be remanded to the district court for a determination of the amount of damages necessary to compensate DePass for an 11-year reduction in his life expectancy.\(^\text{176}\)

175. \textit{Id.} at 208-09 (Posner, J., dissenting).
Judge Posner took a tedious and extended, yet highbrow, *deliberatio* on the subject of appellate jurisdiction in his dissenting opinion in *Hayes v. Allstate Insurance Co.*, he would have held that the appellate panel lacked jurisdiction to consider the provisional stay and order for appraisal of a fire insurance claim.179

Among the three mixed concurring/dissenting opinions that Judge Posner penned during 1983,180 his opinion in *Merritt v. Faulkner*181 is the most aesthetically pleasing,182 notwithstanding Posner’s disagreement with the majority’s more compassionate view that it was an abuse of discretion for the trial court to deny a state prisoner’s request for appointed counsel to wage a civil constitutional tort suit against prison officials for deliberate indifference in allowing the prisoner to go blind.183 Posner concurred that “it was an abuse of discretion for the district judge to deny Merritt’s untimely request for a jury trial” since “[a] prisoner not represented by counsel, even one assisted as here by ‘lay advocates’ (also known as ‘jailhouse lawyers’), is entitled to every indulgence in the court’s procedural rulings.”184 However, Posner disagreed with the majority “that it was an abuse of discretion for the district court not to appoint counsel” for the prisoner.185 Elaborating on the basis of his partial dissent in

177. "Deliberatio" is a technique of argument which involves “evaluating possible courses of action; weighing arguments.” RHETORICAL TERMS, supra note 161, at 192.
178. 722 F.2d 1332, 1336 (7th Cir. 1983) (Posner, J., dissenting).
179. Id. at 1341 (Posner, J., dissenting).
180. See supra note 157 and accompanying text.
181. 697 F.2d 761, 769 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part).
182. Posner’s two other mixed concurring/dissenting opinions were *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1057 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part) (a measured, respectful, thoughtful discussion of jurisdictional and federal preemptive questions in a Railway Labor Act case), and *Roberts v. Sears, Roebuck & Co.*, 723 F.2d 1324, 1347, 1348 (7th Cir. 1983) (reh’g en banc) (Posner, J., concurring in part and dissenting in part) (reversing and remanding a patent infringement verdict) (an eccentric and unattractive opinion—complete with drawings of a socket wrench—that argued that, rather than a remand, an order to dismiss the complaint should have been entered because the socket wrench patent was obvious as a matter of law, opining, "I know that many lawyers and judges find the language of economics repulsive. Yet the policies that have given shape to the patent statute are quintessentially economic, and the language of economics is therefore the natural language in which to articulate the test for obviousness." "This circuit grants rehearing en banc very rarely; this is only our nineteenth en banc decision in the last five years, an average of fewer than four a year. The basic reason for this parsimony is that a rehearing en banc imposes a heavy burden on an already overburdened court.").
184. Id. at 769 (Posner, J., concurring in part and dissenting in part).
185. Id. (Posner, J., concurring in part and dissenting in part) (citing McKeever v.
Merritt, Posner explained the principles which supported his disagreement in terms of both oppositional dissent\textsuperscript{186} and collaborative dissent\textsuperscript{187}. In this regard, Judge Posner delineated why he continued to contend that "the presumption should be against appointment of counsel in prisoner civil rights cases":\textsuperscript{188}

[A] prisoner who has a good damages suit should be able to hire a competent lawyer and . . . by making the prisoner go this route we subject the probable merit of his case to the test of the market. Merritt alleges that the defendants are legally responsible for his blindness. If this were so, he would have a case that was attractive to many personal-injury lawyers, even apart from the fillip of an award of attorney’s fees if the plaintiff prevails that 42 U.S.C. § 1988 adds almost as a matter of course when a personal-injury case is brought under one of the civil rights acts. If Merritt cannot retain a lawyer on a contingent fee basis the natural inference to draw is that he does not have a good case.\textsuperscript{189}

Posner’s subtle and clever diasyrmus\textsuperscript{190} of the prisoner’s underlying substantive claim on the merits is artfully raised in his succeeding discourse to the level of a cohortatio\textsuperscript{191} by use of the following language, which illuminates the prisoner’s particular situation and incentives:

It is reasonably clear to me that [the prisoner] does not have a good case, so I am not surprised that he did not find a private lawyer willing to represent him. The pathetic facts recited in the majority opinion are not the facts found below. They are the facts Merritt

\textsuperscript{186} Merritt, 697 F.2d at 769 (Posner, J., concurring in part and dissenting in part) (Notwithstanding consistent Seventh Circuit opinions to the contrary, Posner stated, "I believe the presumption should be against appointment of counsel in prisoner civil rights cases.").

\textsuperscript{187} See generally supra notes 124-25 and accompanying text (discussing how collaborative and oppositional dissenting opinions blend into each other when an appellate judge is not sure what voice to assume).

\textsuperscript{188} Merritt, 697 F.2d at 769 (Posner, J., concurring in part and dissenting in part).

\textsuperscript{189} Id. at 769-70 (Posner, J., concurring in part and dissenting in part) (citation omitted).

\textsuperscript{190} “Diasyrmus” constitutes “disparagement of [an] opponent’s arguments.” RHETORICAL TERMS, supra note 161, at 187.

\textsuperscript{191} “Cohortatio” is an “amplification that moves the hearer’s indignation.” Id. at 183.
would have liked the district court to find. The district court found that the cause of Merritt’s blindness was and remains unknown, that he received continuous, competent, and in fact solicitous medical care, some of it at an outstanding university hospital, and that if this were a medical malpractice case the defendants would be entitled to a directed verdict in their favor. *A fortiori*, Merritt failed to prove a “deliberate indifference” to his medical needs, as would be necessary to show a violation of the Constitution and hence of 42 U.S.C. § 1983, the civil rights statute under which this suit was brought. 192

Continuing his opinion in *Merritt*, Judge Posner attempted to reach out to other members of the Seventh Circuit in a collaborative effort to think through the consequences of the evolving doctrine of appointed counsel in prisoner civil rights litigation. Crafting an *enargia* 193 with his words, Judge Posner observed:

We are embarking on a program of appointing counsel for prisoners as a matter of course in civil cases without even considering the practical consequences. We ought to consider the burden on the bar in areas—most of which are not populous, and do not have large numbers of lawyers—where the major prisons in this circuit are located . . . and we ought to consider the potential impact on the dockets of our busy district courts, and ultimately on our crowded docket, of “lawyerizing” prisoner civil litigation. I do not find a consideration of these issues in the majority or concurring opinion. We cannot expect Congress to dress the federal judiciary’s self-inflicted wounds. 194

Posner, thus, formulates the problem in memorable and practical terms designed to make his colleagues wake up to the human limitations that their decision presses against.

3. 1984

During 1984, Judge Posner wrote a total of six dissenting opinions: five pure dissenting opinions 195 and one mixed concurring/dissenting opinion. 196


193. An “enargia” is a “clear, lucid, vivid description.” RHETORICAL TERMS, supra note 161, at 185.


195. See Kelsay v. Consol. Rail Corp., 749 F.2d 437, 450 (7th Cir. 1984) (Posner, J., dissenting); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir.
Posner’s dissent in *Wheaton Van Lines, Inc. v. Interstate Commerce Commission*\(^\text{197}\) addressed the need for federal courts to be faithful agents of Congress in the interpretation of regulatory statutes, despite Posner’s implicit view that continuing to regulate the interstate transportation of goods by common carrier was not economically justified.\(^\text{198}\) In *Maier v. Federal Communications Commission*,\(^\text{199}\) he directed his fire at the flabbiness of the panel majority’s treatment of standing in a case brought by the mayor of Milwaukee, Wisconsin against a radio station that had aired a series of critical editorials concerning the mayor’s handling of public employee labor disputes, among other public issues. The administrative complaint, brought before the FCC, argued that the editorials violated the fairness doctrine and the personal attack rule of federal communications law. Maintaining his concern for faithful application of governing legal principles, Judge Posner dissented, saying that although he agreed with the majority that the petition should be rejected, he “would dismiss the petition for review rather than deny it.”\(^\text{200}\) Posner wrote: “I begin with the question of Mayor Maier’s standing, thus reversing the order in which the standing and reviewability issues are discussed in the majority opinion.”\(^\text{201}\) He went on to contend, in blunt and simple language, that:

\[\text{1984)}\text{(Posner, J., dissenting); United States v. Markgraf, 736 F.2d 1179, 1186 (7th Cir. 1984)}\text{(denial of reh'g en banc) (Posner, J., dissenting); Maier v. FCC, 735 F.2d 220, 235 (7th Cir. 1984)}\text{(Posner, J., dissenting); Wheaton Van Lines, Inc. v. Interstate Commerce Comm'n, 731 F.2d 1264, 1269 (7th Cir. 1984)}\text{(denial of reh'g en banc) (Posner, J., dissenting).}

196. *See Alliance to End Repression v. City of Chicago, 733 F.2d 1187, 1192 (7th Cir. 1984)}\text{(Posner, J., concurring in part and dissenting in part).}

197. *Wheaton, 731 F.2d at 1269 (Posner, J., dissenting).*

198. Judge Posner opined, in this regard:
The enforcement of this requirement [that a common carrier trucking firm must charge, for the same service, the same rates to all customers] is essential to the integrity of the [Interstate Commerce Commission Act’s] common carrier provisions; nonenforcement would allow trucking companies to offer discounts to preferred customers . . . by applying to the ICC for contract authority and describing their deal with those customers as contract rather than common carriage. *Of course the integrity of the Interstate Commerce Act may not be worth preserving. Society might well be better off allowing the prices for truck transportation to be determined by the free market, regulated only by the antitrust laws. But that is a judgment for Congress to make.*

*Id.* at 1270 (Posner, J., dissenting) (emphasis added).

199. *Maier, 735 F.2d at 235 (Posner, J., dissenting).*

200. *Id.* (Posner, J., dissenting).

201. *Id.* (Posner, J., dissenting).
[The majority] opinion, after deciding that Congress wanted decisions such as the FCC’s in this case to be judicially reviewable, argues that therefore *someone* must have standing to seek judicial review, as otherwise the congressional purpose would be thwarted. But this ignores the fact that the requirement of standing is constitutional; if any of the requirements of Article III of the Constitution for maintaining a case in federal court are not satisfied, and as a result an issue that Congress would like the court to review cannot be reviewed, that is just too bad. The approach in the majority opinion of putting reviewability before standing also ignores the fact that someone besides Maier—a listener for example—might . . . have a better claim of standing to challenge the Commission’s decision.\(^{202}\)

Continuing his remarkable, machine-gun-like attack on the majority opinion in *Maier*, Posner unpacked the relevant FCC statutory provisions and interpreted them in juxtaposition with the judicial review provisions of the Administrative Procedure Act (requiring "injury").\(^{203}\) After juxtapositioning, comparing and contrasting three different types of disappointed complainants,\(^{204}\) he concluded that Maier lacked standing based on "[t]he tort concept of remoteness of damage."\(^{205}\) As an alternative ground for his dissent, Posner analogized the complaint in the case at bar (brought before and dismissed by the FCC) to deceptive advertising complaints brought before and dismissed by the Federal Trade Commission ("FTC"); both types of cases, Posner argued, are not judicially reviewable based on principles of prosecutorial discretion and deference to administrative agency decision making regarding agency-promulgated doctrine.\(^{206}\) Striking a favorite theme of conservation of scarce judicial resources, Posner complained:

[D]espite my brethren’s remarks about the importance of preserving judicial review of agency action, we have gotten along quite nicely without judicial review of FTC decisions dismissing deceptive-advertising complaints, and would get along quite as well without judicial review of FCC decisions dismissing complaints . . . . We are busy enough as it is.\(^{207}\)

\(^{202}\) *Id.* (Posner, J., dissenting) (second emphasis added).
\(^{203}\) *Id.* at 235-36 (Posner, J., dissenting) (citing and discussing 5 U.S.C. § 702 (1982)).
\(^{204}\) *Id.* (Posner, J., dissenting).
\(^{205}\) *Id.* at 236 (Posner, J., dissenting) (citing, inter alia, Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)).
\(^{206}\) *Id.* at 238 (Posner, J., dissenting).
\(^{207}\) *Id.* (Posner, J., dissenting).
Turning from a significant administrative law case to a seemingly less significant administrative law dispute, Judge Posner filed a dissenting opinion from the denial of rehearing en banc in United States v. Markgraf— a case that, nevertheless, captured his attention because the Seventh Circuit panel decision conflicted with two other circuit courts of appeal. Posner’s partial motivation for taking the trouble to file a rare dissent from a denial of a rehearing en banc was his perennial concern with judicial economy. He stated:

At a time when the very large number of federal court of appeals decisions being issued every year (in excess of 10,000, of which about half are published opinions) makes it difficult for the Supreme Court to resolve all of the conflicts between circuits that ought to be resolved, we should hesitate before creating such a conflict.

Furthermore, “if, as in this case, the first two circuits to consider the question have reached the same result, the case for deference or at least for en banc consideration is strengthened.” However, Judge Posner also seems to have been motivated by concern for the injustice the Markgrafs, a simple farm couple, suffered. Turning his scholarly pragmatic guns on the matter, Posner wrote: “It is not a compelling reply . . . that everyone is presumed to know the contents of statutes. This is a legal fiction, and for more than 200 years we have been told that the proper office of legal fictions is to prevent, rather than to create, injustices.” Continuing, he used ethopoeia in his dissent by imagining the perspective of the farm couple in the controversy; here, he did it to illustrate human motivation again— namely, the cynicism that is motivated by laws that are applied too theoretically:

It would not be much consolation to a farmer whose farm had been foreclosed without his knowing about the relief he might have gotten under [the statute] that he ought to have studied the United States Code more carefully; it is the kind of response that breeds popular disrespect for law. There ought to be a better reason for turning down his claim, such as the administrative burden to the government . . .

208. 736 F.2d 1179, 1186 (7th Cir. 1984) (denial of reh’g en banc) (Posner, J., dissenting).
209. Id. at 1186-87 (Posner, J., dissenting).
210. Id. at 1187 (Posner, J., dissenting).
211. Id. (Posner, J., dissenting) (citing 3 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 43 (1768)).
212. “Ethopoeia” refers, in part, to “putting oneself in the place of another, so as to both understand and express the other person’s feelings more vividly.” RHETORICAL TERMS, supra note 161, at 185-86.
JUDICIAL DISSENT

All that the approach of the other circuits requires the government to do is to add a sentence to the notice of foreclosure [giving notice of the availability of legal relief before accelerating and foreclosing on the loan]. The panel opinion of this circuit acknowledges that the burden is slight; the government’s brief makes no contrary claim.213

Posner ended his dissent in Markgraf with a surprisingly obscure, but elegant skotison214 argument:

Legislators cannot foresee and solve in advance all the problems that will arise in the practical administration of the statutes they enact. The judicial duty of statutory interpretation is not a duty merely to read; it is a duty to help the legislature achieve the aims that can reasonably be inferred from the statutory design, and it requires us to pay attention to the spirit as well as the letter of the statute.215

Moving from a matter of administrative procedure to a concern of constitutional import, in Geras v. Lafayette Display Fixtures, Inc.,216 Judge Posner dissented from a panel opinion that upheld the constitutionality of the Federal Magistrate Act. Judge Posner’s opening paragraph summarized the basis of his dissent:

Although impressed by the unbroken phalanx of opposing authority in our sister circuits, and by my brethren’s reasoning, I cannot repress my conviction that 28 U.S.C. § 636(c), especially in allowing magistrates to preside and enter judgment in diversity cases (provided only that the parties consent to trial by magistrate), violates the Constitution.217

During the course of his Geras dissent, Posner cited Alexander Hamilton,218 providing colorful hypotheticals (for example: “A district judge cannot tell his law clerk, ‘You try this case—I am busy with other matters—and render judgment, and the losing party [can] if he wants appeal to the court of

---

216. 742 F.2d 1037, 1045 (7th Cir. 1984).
217. Id. (Posner, J., dissenting).
218. Id. at 1046 (Posner, J., dissenting) (citing THE FEDERALIST NO. 78).
appeals.'\textsuperscript{219} Moreover, Posner delved into intricate legal history,\textsuperscript{220} matters of statutory interpretation,\textsuperscript{221} and the considerable discretionary, and largely unreviewable, powers of a U.S. magistrate to conduct trials.\textsuperscript{222} Finally, citing statistics\textsuperscript{223} and describing the caseload crisis of the federal judiciary as the motivating force behind appellate judicial approval of the Federal Magistrate Act,\textsuperscript{224} Judge Posner crafted his dissenting opinion to conclude with—what William Domnarski describes as an "essay"\textsuperscript{225}—the following elegant epitrope,\textsuperscript{226} conceding certain points to the majority in an ironic way:

\begin{quote}
The concerns I have listed do not prove that section 636(c) is a bad statute. They are speculative, and may well be outweighed by the contribution that section 636(c) is making to relieving the federal caseload crisis. Maybe section 636(c) is superior from a practical standpoint to clearly constitutional alternatives such as appointing more judges, abolishing diversity jurisdiction, or raising the price of access to the federal courts. Maybe, indeed, the first section of Article III is archaic and should be rewritten—but not by us. My point in reviewing the concerns that lie behind the tenure and compensation provisions [of Article III] is not to evaluate those concerns but only to show that the key safeguards of trial by magistrate under 28 U.S.C. § 636(c)—requiring that the parties consent to trial by magistrate and vesting in Article III judges the power of appointing the magistrates—are not sufficiently responsive to those concerns to make
\end{quote}

\textsuperscript{219} Id. (Posner, J., dissenting) (citing U.S. CONST. art. III).

\textsuperscript{220} Id. at 1046-47 (Posner, J., dissenting).

\textsuperscript{221} Id. at 1047-48 (Posner, J., dissenting).

\textsuperscript{222} Id. at 1049 (Posner, J., dissenting). On this point, Posner wrote:
The tone in which the trial judge addresses the jurors, counsel, and witnesses; his rulings on evidence (especially evidence sought to be excluded as cumulative or prejudicial); his management of the pace of the trial; his decisions on the length and phrasing of the jury instructions; the manner in which he reads or paraphrases the instructions to the jury; his supervision of the jury's deliberations—these discretionary aspects of the trial judge's responsibility are largely beyond the power of an appellate court to correct, yet they can influence a jury's verdict.

\textit{Id.} (Posner, J., dissenting).

\textsuperscript{223} Id. (Posner, J., dissenting).

\textsuperscript{224} Id. at 1049-50 (Posner, J., dissenting) ("Since 1960, the caseload of the district courts has tripled and that of the courts of appeals has octupled, and there has not been a corresponding increase in the number of judges.").

\textsuperscript{225} DOMNARSKI, supra note 50, at 135.

\textsuperscript{226} An "epitrope" "conced[es] agreement or permission to an opponent, often ironically." RHETORICAL TERMS, supra note 161, at 193.
the statute comport with the purpose (though in any event not text) of Article III. Maybe section 636(c) is a small violation of the Constitution. But the time to deal with this small violation is now, before it sends down roots. . . . It will be harder to enforce the Constitution against the excesses of the magistrate system when magistrates try 10 or 20 or 50 percent of the nation’s federal trials. . . .

The plaintiff is entitled to have the judgment below set aside and the case remanded for a new trial, conducted by an Article III judge.227

In his dissenting opinion in Kelsay v. Consolidated Rail Corp.228—a railroad crossing wrongful death suit governed by Indiana tort law, brought in federal court by virtue of diversity jurisdiction—Judge Posner employed the rhetorical technique *diaeresis.*229 As succinctly expressed at the outset of Posner’s opinion:

There was one very serious error at trial—the exclusion of the evidence of prior accidents at the grade crossing—and one lesser error—the giving of [jury] instruction 45; and together these errors are sufficiently prejudicial to require that the judgment for the defendants be reversed and the plaintiff be given a new trial.230

With his nuanced fact-sensitivity, tort law expertise, and penchant for statistical analyses, Posner’s key attack in his Kelsay dissent was on the trial court’s exclusion of two earlier fatal accidents at the relevant railroad crossing. As he wrote:

[The two previous] accidents had also occurred early in the morning on clear days with the driver going north and the train west. True, one occurred 30 years before the accident to Kelsay and the other 13 years before. But three fatal accidents in 30 years at one crossing averages out to one fatal accident every 10 years, and though the railroad tries to argue that this isn’t very many, really it’s an enormous number. We were told at argument that there are 13,000 railroad crossings in Indiana, and if they are all as dangerous as the one at which Kelsay was killed this would imply 1,300 fatalities . . . in Indiana every year. That is a tremendous number when one considers that in 1983,

228. 749 F.2d 437, 450 (7th Cir. 1984) (Posner, J., dissenting).
229. “*Diaeresis*” is “dividing genus into species in order to amplify.” RHETORICAL TERMS, *supra* note 161, at 192.
according to the Federal Railroad Administration, there were only 542
deaths at railroad crossings in the whole United States—less than half
as many as we could expect in Indiana alone if the railroad crossing in
this case was no more dangerous than the average railroad crossing.

. . . . The issue regarding the earlier accidents would not have
been whose fault they were but what they could tell the jury about the
dangerousness of the crossing and the railroad’s duty to take some
steps to protect travelers at it. They could tell the jury plenty. The
danger of a crossing is a positive function of the probability that an
accident will occur, and one basis for estimating that probability is the
frequency of accidents in the past.231

Judge Posner “distinguishes himself as a writer by using a variety of tones
in his prose. His inquiring, expository voice dominates [his] opinions, but at
other times he becomes witty, funny, angry, sarcastic, satiric, mischievous,
biting, compassionate, and, on occasion, bored.”232 This arsenal of tones—in
conjunction with his witty use of rhetoric—helps stimulate his readers’ attention
to the human drama that underpins the decision.233 In his opinion concurring in
part and dissenting in part in *Alliance to End Repression v. City of Chicago*,234
Posner was angry:

Judge Dumbauld’s [majority] opinion for this court is
concise—one might say summary—and not without wit. I admire
witty and concise opinions, remembering Holmes’ adage that a judge
doesn’t have to be heavy in order to be weighty. But I question the
appropriateness of treating the consent decree [between the FBI and
a public interest group to monitor and control FBI investigations] as
if it were a contract between two flour dealers one of whom had
“improvidently” agreed to the provision that the other is seeking to
enforce, when in fact it is a federal court order circumscribing the
FBI’s investigative powers—and not with respect to particular
individuals or groups but across the board, and not in some
neighborhood or small town but in America’s third-largest city, and at
a time not of domestic tranquility but of justifiable public anxiety
about domestic as well as international terrorism.235

231. *Id.* at 450-51 (Posner, J., dissenting).
232. DOMNARSKI, supra note 50, at 125.
233. *Id.*
234. 733 F.2d 1187, 1192 (7th Cir. 1984) (Posner, J., concurring in part and
dissenting in part).
235. *Id.* at 1193 (Posner, J., concurring in part and dissenting in part).
The basis for Judge Posner's separate opinion in *Alliance to End Repression* was stated in language of rebuke, a kind of *meiosis*\(^{236}\) of the trial judge:

The district judge enjoined a provision of the new Department of Justice guidelines for FBI investigations as being inconsistent with a consent decree that terminated a suit which charged the FBI with abusing its investigatory powers by harassing political organizations in Chicago. . . . I agree with my brethren that the injunction should be set aside—but not that the district judge’s interpretation of the consent decree should be affirmed. I both disagree with her interpretation and think she misused her equitable powers in not waiting till there was a concrete dispute between the parties before interpreting the decree.\(^{237}\)

Judge Posner amplified his language of rebuke toward the end of his separate opinion in *Alliance to End Repression* in the following *cohortatio*:\(^{238}\)

The country has grown accustomed to federal district judges’ presiding over prison systems, school systems, and mental institutions, often pursuant to consent decrees. But to put a district judge in charge of the FBI in Chicago would write a new chapter in the annals of federal judicial enterprise, and though the decree does not go quite that far it does give the judge a great deal of power over the FBI in Chicago just by virtue of the inherent ambiguity of language—enough power to make her role in enforcing the decree an extraordinary one that if it is to be played well must be underplayed. A due regard for the separation of powers, the flexibility of equity, the ambiguity of the decree, the generality of the guidelines, the sensitivity and importance of the subject matter, and the limitations of judicial competence should have dissuaded her, and should dissuade us, from precipitating a premature confrontation between the judicial and executive branches in a setting where inevitably some people will say, with pardonable exaggeration, that the federal judiciary is playing fast and loose with the public safety.\(^{239}\)

---

236. *See supra* note 163.
238. *See supra* note 191.
239. *Alliance*, 733 F.2d at 1197 (Posner, J., concurring in part and dissenting in part).
In 1985 Judge Posner wrote nine pure dissenting opinions—by far the most dissenting opinions written in any single year during his first twenty years as a federal appellate judge. Ironically, in the same year he wrote a concurring opinion with the lament, “I hesitate to add to the pile of opinions in this case; separate opinions are the bane of the modern American judiciary.”

Posner’s dissent in Jones Dairy Farm v. Local No. P-1236, United Food & Commercial Workers International took issue with a panel decision that affirmed a district court’s decision vacating an arbitrator’s finding that the collective bargaining appeal in the case did not permit the contracting out of work. Voicing his recurring concern with efficiency, Judge Posner thought that the courts should defer to the arbitrator’s award—even if based on an error of law—because “labor disputes ought to be resolved rapidly; and, to be fast,

240. See Wilsey v. Eddingfield, 780 F.2d 614, 617 (7th Cir. 1985) (denial of reh’g en banc) (Posner, J., dissenting); Tom v. Heckler, 779 F.2d 1250, 1258 (7th Cir. 1985) (Posner, J., dissenting); Lippo v. Mobil Oil Corp., 776 F.2d 706, 722 (7th Cir. 1985) (Posner, J., dissenting), aff’d, 802 F.2d 975 (7th Cir. 1986); Britton v. S. Bend Cmty. Sch. Corp., 775 F.2d 794, 814 (7th Cir. 1985) (Posner, J., dissenting), vacated by 783 F.2d 105 (7th Cir. 1986); Prater v. U.S. Parole Comm’n, 764 F.2d 1230, 1240 (7th Cir. 1985) (Posner, J., dissenting), vacated by 775 F.2d 1157 (7th Cir. 1985); In re Crededio, 759 F.2d 589, 593 (7th Cir. 1985) (Posner, J., dissenting); Grossart v. Dinaso, 758 F.2d 1221, 1235 (7th Cir. 1985) (Posner, J., dissenting); Haffner v. United States, 757 F.2d 920, 921 (7th Cir. 1985) (Posner, J., dissenting); Jones Dairy Farm v. Local No. P-1236, United Food & Commercial Workers Int’l, 755 F.2d 583, 584 (7th Cir. 1985) (Posner, J., dissenting), vacated by 760 F.2d 173 (7th Cir. 1985).

241. See supra note 139. During 1983, Judge Posner wrote his second highest number of dissenting opinions—albeit only five were pure dissents and three were mixed concurring/dissenting opinions. Id.

242. Phelps v. Duckworth, 772 F.2d 1410, 1416 (7th Cir. 1985) (reh’g en banc) (Posner, J., concurring). Perhaps Judge Posner cannot help writing separate opinions when his intellectual interest in a problem is piqued. In Phelps he wrote:

But the case so vividly illustrates the tenuous character of the modern law of federal habeas corpus for state prisoners, and so urgently underscores the need for a fresh approach to the entire subject, that I cannot resist commenting briefly (too briefly to do full justice to an immensely complex area) on what that approach might be, though I am mindful that judges at our level are not empowered to adopt it.

Id. (Posner, J., concurring) (emphasis added). As I mentioned in my previous article, perhaps some of Judge Posner’s separate opinions were motivated by his desire to be elevated to the United States Supreme Court. See Blomquist, supra note 1, at 730 (suggesting that conservative ideological statements in a Posner dissenting opinion during his rookie season as a federal appellate judge were designed to attract attention for possible elevation to the Supreme Court).

arbitration must be final. Its finality is seriously compromised if an error of law by the arbitrator is grounds for requiring the arbitrator to start over."\(^{244}\) Posner’s "inquiring, expository voice"\(^{245}\) in his *Jones Dairy* dissent is characterized by impatient sarcasm: "Of course haste makes for error. But this is just to say that there is a tradeoff between celerity and accuracy. If an employer doesn’t like the way arbitration strikes the tradeoff he needn’t agree to an arbitration clause."\(^{246}\) His style in the concluding paragraph is cutting, as he catalogues the undesirable results that the majority’s decision is setting in motion:

> By affirming the district court without even citing the many cases that restrict the power of the courts to correct legal errors made by labor arbitrators, and without even confining its holding to clear errors, the decision today makes judicial review of labor arbitration uncertain, may encourage employers to resist enforcement of labor arbitration awards, and portends a most unwelcome expansion of the federal courts’ properly modest role in the labor field.\(^{247}\)

Judge Posner’s dissent in *Haffner v. United States*—a federal estate tax refund case which affirmed the district court’s legal conclusion that public housing agency obligations were exempt from taxation—focused on what he “respectfully suggest[ed] is an unrealistic analysis of the legislative process” by the panel majority.\(^{248}\) In his chief disagreement with the majority’s reasoning, Posner opined that even though the 1937 floor statement of a United States Senator mischaracterized “the well-settled meaning of tax-exempt bonds,”\(^{249}\) and the bill’s sponsor in the Senate did not object, this did not mean that both houses of Congress endorsed the senator’s idiosyncratic view when passing the legislation. In a humorous tone, culminating in a *prosopographia*\(^{250}\) tone, Judge Posner told a story in order to undermine the majority’s reliance on what he believed was an inconsequential fact, in light of the social and practical conventions in which the fact was embedded:

> Of course if [Senator Walsh’s] misunderstanding was enacted by Congress, that is the end of the case. But it would be unrealistic to

---

244. *Id.* at 586 (Posner, J., dissenting).
245. DOMNARSKI, *supra* note 50, at 125.
247. *Id.* at 588 (Posner, J., dissenting).
249. *Id.* at 922 (Posner, J., dissenting) (quotation marks omitted).
250. A “prosopographia” entails a “lively description of a person” or a “description of imaginary persons or bodies.” RHETORICAL TERMS, *supra* note 161, at 186.
think it was. The statement occurred in the course of a long speech by Senator Walsh explaining the provisions of the Act. The fact that no one jumped up and said, "Senator, I think you have misstated the effect of the tax-exemption language in section 5(e)," provides but weak evidence that the Senate (and House, whose concurrence was, of course, necessary for the enactment of the bill) intended to adopt a novel form of tax exemption. It is true that Senator Wagner, the author of the bill, was present and corrected Senator Walsh on some other matters; but since Homer nods, maybe Senator Wagner did too, on this occasion.\footnote{251}

In \textit{Grossart v. Dinaso} a town bookkeeper brought a civil rights case, complaining that she had been unconstitutionally discharged because of her minor role in a political power struggle between a township executive and a member of the township legislature. In his dissent, Judge Posner stated that a remand of the case to the district court judge was required because it was unclear on the record whether or not the bookkeeper was fired because she was uncooperative or because of her politics.\footnote{252} Wryly acknowledging that local government officials might have petty motivations, Posner expressed his view that since the bookkeeper’s firing may have been partly due to her displeasing one of the town’s political factions, an impermissible ground for public employment termination, a remand was required.\footnote{253} In contrast, his dissent in \textit{In re Crededio} comes off as abstract and ethereal in its contention that a district court judge was required to find that as a condition of keeping an immunized federal grand jury witness in jail for a longer period of time the witness’ continued incarceration “might yet induce him to testify before the grand

\footnote{251}{\textit{Haffner}, 757 F.2d at 922 (Posner, J., dissenting) (citation omitted).}
\footnote{252}{\textit{Grossart v. Dinaso}, 758 F.2d 1231, 1235 (7th Cir. 1985) (Posner, J., dissenting).}
\footnote{253}{\textit{Id}. at 1235-36 (Posner, J., dissenting).} Posner wrote with an insightful mention of Anglo-American political history:

The district judge thought it possible to distinguish between a struggle over power and a struggle over politics. I disagree. Nothing is more natural than for a government official to convince himself that the powers of his office ought to be greater than they are; such convictions are close to the heart of political competition. The history of English liberty is the history of a power struggle between the Crown and Parliament, each thinking it ought to be supreme; and behind the American Revolution lies a power struggle between Parliament and the colonial legislatures. Unless and until the Supreme Court decides some day that the First Amendment does not apply with full force to state and local government after all, we cannot distinguish these historical illustrations of political strife from a struggle between the executive and legislative departments of Worth Township, Illinois.

\textit{Id}. at 1236 (Posner, J., dissenting).

https://scholarship.law.missouri.edu/mlr/vol69/iss1/7
Perhaps, because he is mindful of the enormous imbalance of power between a district court judge and a prisoner, he was coldly professional in pointing out that "[a]s soon as it is clear that the inducement [of continued incarceration] won’t work, the purpose of civil contempt lapses, and the continued imprisonment of the man becomes penal, and requires a criminal proceeding." While Posner’s professorial style carried over to his dissent in *Prater v. U.S. Parole Commission*—a habeus corpus case—the gravity of the potential impact of the panel majority opinion on the functioning of the nation’s criminal justice system justified his careful limitation of the ex post facto provision of Article I, Section 9 to legislative acts of Congress and not “the practices of courts or executive agencies.” As Posner reasoned, leading up to his *ominatio* conclusion:

If judges decide to get tougher on crime, or prosecutors drive harder plea bargains, or parole boards take a more jaundiced view of applications for parole, there is no violation of the prohibition [of Article I, section 9 of the Constitution prohibiting ex post facto laws] even though a criminal’s punishment may end up being longer or harsher than he could reasonably have expected when he committed the crime.

Although my brethren only remand the case, let there be no misapprehension about the significance of this decision. Any federal prisoner who committed his crime before the enactment of the 1976 parole statute has a potential ex post facto claim under the decision today. The decision will also leave the Parole Commission in grave doubt as to whether it can apply the current statute to prisoners—who must be legion—who committed their crimes before 1976. The implications for state prisoners in this circuit are equally far-reaching, given the parallel prohibition in Article I, section 10 of the Constitution against ex post facto legislation by the states.

---

255. *Id.* at 594 (Posner, J., dissenting).
256. 764 F.2d 1230, 1240 (7th Cir. 1985) (Posner, J., dissenting), *vacated by* 775 F.2d 1157 (7th Cir. 1985).
257. *Id.* (Posner, J., dissenting). Indeed, Judge Posner had the personal gratification of having his dissenting views prevail in what became a majority opinion for the Seventh Circuit—which he wrote. *See Prater v. U.S. Parole Comm’n*, 802 F.2d 948 (7th Cir. 1986). *See generally supra* text accompanying note 32 (discussing one of the motivations of writing a dissenting opinion: to appeal to future appellate judges to adopt the reasoning of the dissenter).
258. *See supra* note 161 and accompanying text.
Jumping from criminal constitutional law to an affirmative action dispute pitting white public school teachers against an Indiana school corporation that had agreed with the teachers’ union not to lay off minority teachers in the event of a reduction-in-force, Posner filed a dissenting opinion in *Britton v. South Bend Community School Corp.*\(^{260}\) The dissent justified Judge Posner’s view that the lower court and a majority of his panel were wrong in upholding the lay off plan. Posner’s opinion is an aesthetic tour de force of logic, of rhetoric, and of emotion. Initially, he succinctly and clearly related the pertinent facts and the legal issue raised by the facts:

The public school system of South Bend, Indiana laid off 146 teachers. All were white; 48 had more seniority than blacks not laid off; two years later 20 of the 48 had not yet been recalled. The school system was carrying out a policy of not laying off any blacks. This was racially discriminatory state action and the question is whether it denied the 48 white teachers the equal protection of the laws, in violation of the Fourteenth Amendment.\(^{261}\)

With great clarity, he set forth key definitions and pivotal rules for deciding the affirmative action battle at hand. In this regard, he noted: “Discrimination against whites, when connected in some way, however tenuously, to the history of discrimination by whites, is called ‘affirmative action,’ or, less euphemistically, ‘reverse discrimination.’”\(^{262}\) Continuing, Posner observed that the debate over resolving such racial faceoffs “is bounded by two positions.”\(^{263}\) As Posner explained, deploying alliterative *anaphora*\(^{264}\) in his prose:

> The first is that, like discrimination against members of minority groups, it is illegal per se; that since rights against discrimination are personal rather than group rights membership in a racial group confers no entitlements; and that to hold that there is good racial discrimination and bad racial discrimination and that only the bad is unlawful would make the antidiscrimination principle too contingent, too empirical, too subject to judicial caprice, and at once too heedless of the legitimate rights of white people and too condescending toward

\(^{260}\) 775 F.2d 794, 814 (7th Cir. 1985) (Posner, J., dissenting), *vacated by* 783 F.2d 105 (7th Cir. 1986).

\(^{261}\) *Id.* (Posner, J., dissenting).

\(^{262}\) *Id.* (Posner, J., dissenting).

\(^{263}\) *Id.* (Posner, J., dissenting).

\(^{264}\) “Alliteration” is the “recurrence of an initial consonant sound.” *RHETORICAL TERMS, supra* note 161, at 189. “Anaphora” is the “repetition of the same word at the beginning of successive clauses or verses.” *Id.* at 190.
black people. The second position is that reverse discrimination is permissible if reasonable in all the circumstances; that the law should be capable of differentiating among types of discrimination that differ in history, motivation, and consequence; and that inflexible commitment to the idea of a color-blind Constitution would prevent black people from overcoming the effects of centuries of severe discrimination.\textsuperscript{265}

Judge Posner devoted considerable effort to evaluating what the South Bend School Corporation had done to its white and black teachers; in quickly moving from one contention to the next, he exhibited \textit{epitrochasmus}\textsuperscript{266} in his dissenting opinion style. Thus, Posner considered “two possible ends to which the laying off of these [white] teachers might conceivably be a proper means,”\textsuperscript{267} then dismissed those ends because “this is not a case that arises out of discrimination in hiring, whether against . . . particular black teachers who kept their jobs when more senior whites were laid off or against any other black candidates for teaching jobs in the South Bend public schools.”\textsuperscript{268} Posner quipped that “[m]y brethren may think that any school system that segregated blacks and whites [in school assignments] must have discriminated against blacks in hiring too,”\textsuperscript{269} then debunks this erroneous assumption and contends that “[t]he rational remedy for discrimination in which South Bend engaged—for school segregation as distinct from refusal to hire qualified black teachers—is not superseniority for black teachers but equal assignments for black teachers.”\textsuperscript{270} Posner considered the “black role model” argument for giving black teachers superseniority over white teachers as “arbitrary,”\textsuperscript{271} then he deconstructed “the point of comparing the percentage of teachers who are black with the percentage of students who are black,”\textsuperscript{272} then he moved back to analyzing the “insidious” nature of the black role model argument.\textsuperscript{273} Judge Posner ended his dissenting opinion in \textit{Britton} by

\textsuperscript{265} \textit{Britton}, 775 F.2d at 814-15 (Posner, J., dissenting) (citation omitted).
\textsuperscript{266} “Epitrochasmus” is “a swift movement from one statement to another.”
\textsuperscript{267} \textit{Britton}, 775 F.2d at 815 (Posner, J., dissenting).
\textsuperscript{268} \textit{Id.} at 816 (Posner, J., dissenting).
\textsuperscript{269} \textit{Id.} (Posner, J., dissenting).
\textsuperscript{270} \textit{Id.} (Posner, J., dissenting).
\textsuperscript{271} \textit{Id.} at 817 (Posner, J., dissenting).
\textsuperscript{272} \textit{Id.} (Posner, J., dissenting).
\textsuperscript{273} \textit{Id.} at 818 (Posner, J., dissenting). At this point in his dissenting opinion, Judge Posner asks incisive rhetorical questions:

Supposing that black male students need black male teachers as role models, should preference be given to black male over black female applicants for teaching jobs? Are whites entitled to white role models in schools where black or Asian or Hispanic teachers are overrepresented? Must the teaching
skillful use of the argumentative technique of *peristrophe*\(^{274}\) with the following language:

The harshness of the discrimination practiced in this case does not go completely unremarked by my brethren, but they do not draw the obvious conclusion, which is that the defendants ought to be required to show that this discrimination was necessary to achieve some clearly lawful end. My brethren remark [on] the painful character of what the defendants have done to the plaintiffs, yes, but the only solace they offer these plaintiffs, who have lost their jobs, is to note that the loss is, for most of them anyway, temporary; that many white teachers, though not necessarily the plaintiffs, voted to give the blacks extra seniority; and that in any event the plaintiffs, being white, have not been “stigmatized” by being laid off. Although man does not live by bread alone, neither does he live by self-esteem alone, and it is small comfort to a person who loses his job as a result of discrimination in favor of a black to be told that he has, after all, the consolation of being white, that most of the people who have discriminated against him are themselves white, and that he may get his job back some day soon—though some of these plaintiffs have been waiting for three years. I am willing to accept that the equal protection clause means as a practical matter less for whites than for blacks but not that it means nothing at all, which if this decision stands will be the approximate situation in this circuit after today.\(^{275}\)

Posner’s practical attention to the unfairly laid off workers, as he ticked off the crumbs of cold comfort they will find with the decision, again shows him dissenting from a disingenuous majority opinion that idealized the impact of its decision.

---

staff of every public school in the United States reflect the racial, ethnic, sexual, and religious composition of the student population of the school? Should a school system assign only black teachers to a school that has only black students? Would not the “role model” argument, carried to an extreme, carry us back to where Indiana was before 1949, with a system of segregated schools, in which blacks attended schools staffed (presumably) by black teachers? In order to answer these heavily rhetorical questions “no” yet accept the defendants’ role-model argument in this case we need some evidence, and have none.

*Id.* at 818-19 (Posner, J., dissenting) (citation omitted).

274. “Peristrophe” is “converting an opponent’s argument to one’s own use.”

Rhetorical Terms, *supra* note 161, at 194.

In his next dissenting opinion, *Lippo v. Mobil Oil Corp.*,276 involving a dealer’s termination of a gasoline service station supplier (deliberately selling another gasoline supplier’s gas under Mobil’s name), Judge Posner opened his opinion with a searing *sarcasmus*:\(^{277}\)

The proposition that my learned brethren embrace in this case is that a dealer can defraud his supplier and yet the supplier be helpless to terminate him. If a statute or some other source of law required this result then one could but shake one’s head in wonder at the asininity of the law. But no law requires the result. It is the contract that, in my brethren’s view, requires it; in their view the supplier, though a large and vastly experienced franchisor, empowered the dealer to commit fraud yet remain a dealer in good standing.\(^{278}\)

In Posner’s view, a provision in the Lippo-Mobil contract that allowed Mobil to terminate the contract only if a default by the franchisee went uncorrected for more than ten days had to be read to allow cure only for “unimportant and inadvertent and . . . involuntary” breaches,\(^{279}\) however, according to Posner, “[m]isbranding . . . is never that kind” of innocent, good-faith breach.\(^{280}\) Rather, in Posner’s view: “It is not possible for a dealer to find himself accidentally selling, from Mobil’s underground storage tanks and pumps, gasoline supplied by another producer. It is especially not possible in a case such as this, where the dealer handles only one brand of gas.”\(^{281}\)

Posner’s dissenting opinion in *Lippo* is worth quoting at length because it provided a penetrating law and economics take on the dispute:

> It is no answer that Mobil can sue Lippo for breach of contract. If a breach of contract is committed by conduct that is also tortious, the breach is not excused just because the victim has a right to bring a tort suit. The purpose of making a breach of contract a ground for termination by the other party is that termination—self-help—is normally a much cheaper remedy than having to bring a lawsuit, meanwhile being locked into an unwanted contractual relationship, here with someone who is not much better than a thief. The right to sue would be an especially inadequate substitute for the right to

---

276. 776 F.2d 706, 722 (7th Cir. 1985) (Posner, J., dissenting).
277. A “sarcasmus” is “a bitter gibe or taunt.” RHETORICAL TERMS, supra note 161, at 187.
279. *Id.* (Posner, J., dissenting).
280. *Id.* (Posner, J., dissenting).
281. *Id.* (Posner, J., dissenting).
terminate in this case. Not only are Mobil’s expenses of suit likely to exceed the amount of damages that can actually be collected from the owner of a gas station, but the amount of provable damages is likely to be small relative to the actual injury to Mobil. The injury is not the loss of some revenues; that is minor. The injury is the impairment of Mobil’s trademarks, and cannot readily be quantified. The fact that it cannot be readily quantified does not make it trivial; and even if what Lippo did to Mobil was a trivial harm, still we must consider the implications if every Mobil dealer may deliberately misuse Mobil’s trademarks, to his profit, without losing his franchise. The cumulative effects could be very serious, and can be prevented under the view my brethren take only if Mobil brings suit against every dealer emboldened by the majority opinion to engage in misbranding. It is (putting the matter with great restraint) unlikely that this is the only remedy that the parties meant to allow to Mobil.282

Moving from a commercial dispute to another administrative decision, in Tom v. Heckler, Judge Posner’s acerbic dissenting opinion took issue with the majority’s decision to reverse and remand a Social Security disability claim case.283 Posner severely criticized the idea of “appellate judges conceiv[ing] their duty to be to search the record in the trial court or the administrative agency for errors that the appellant’s counsel missed, and to reverse if any are found.”284 While his opinion seems harsh for condemning his brethren for straining the bounds of the law to help individuals who are in a pathetic situation, he was attentive to a larger stage of characters—the plaintiffs who do not have the resources to retain a lawyer. While his view might be criticized for second-guessing the situation of individuals who do not bring suit, his statements illustrate his dramatizing, motive-seeking style:

Granted, too, disappointed applicants for social security disability benefits are for the most part rather pathetic people whose plight tugs at the judicial heartstrings; but we are not authorized to give a fuller measure of justice to one class of lawyer-represented civil appellants than to others on grounds of sentiment or sympathy, and it is always well to bear in mind that the payment of government benefits to one applicant reduces the public moneys available for other, perhaps equally worthy, causes.285

282. Id. at 723 (Posner, J., dissenting).
284. Id. at 1259 (Posner, J., dissenting).
285. Id. at 1260 (Posner, J., dissenting). If the significance of a dissenting opinion is, at least in part, a product of its impact on the majority opinion writers, Judge Posner’s
In a dissenting opinion in *Wilsey v. Eddingfield*, Judge Posner would have "grant[ed] rehearing en banc to resolve the conflict between [the Seventh Circuit] and the other circuits over whether the citizenship of a personal representative is controlling for purposes of determining whether there is diversity of citizenship." Posner’s dissenting opinion style in *Wilsey* is somewhat pedantic; yet, his opinion raises significant legal and precedential concerns that were either of no interest to a majority of his circuit colleagues or too refined to justify the extra effort of a rehearing en banc.

5. 1986

During 1986 Judge Posner substantially cut back on the frequency of his dissenting opinions: he authored four pure dissenting opinions and one mixed concurring/dissenting opinion.

Posner’s extended dissent in *United States v. Green* was based on his fervent attention to a "boring detail," an underlying fact that the court should not have forgotten, even though the prosecution was driven by more compelling concerns to sweep it under the rug. Green—a Chicago police officer whose job was to mail letters to people suspected of leaving the scene of an accident—did not commit the crime for which he had been charged (mail fraud) and did not receive a fair trial. According to Posner, to prove federal mail fraud, "[t]he government had to show not that the fraudulent scheme would have failed if Green hadn’t mailed the letters but that he mailed them ‘for the purpose of..."
executing’ the scheme.”

Posner’s predominante style in this opinion was to amplify his point that the prosecution didn’t prove the case it brought against Green by epandos to drive home his point that the prosecution forgot one crucial thing in its zeal to put the unsavory Green behind bars. In this regard, Posner initially parsed the factual part of the case (that the cop’s “fraud consisted of extorting money from the [hapless] people interviewed [who had come in as a result of his official letters], and was a fraud on the police department”); Posner then discussed the legal part of the case — that while “[i]t is tempting in a mail fraud case to think of the fraud as the important thing, and the use of the mails as a boring detail,” by the terms of the federal statute, “it is the mailing, not the fraud, that is the crime . . . [a]nd a mailing violates the statute only when it is made for a fraudulent purpose.”

Ultimately, he linked the factual and legal parts of the case with a conclusion: “The focus of this case should have been on the purpose of the mailings; if that purpose was not proved beyond a reasonable doubt to be fraud, Green was entitled to an acquittal.” Judge Posner’s dissenting opinion in Green is vivid and persuasive because of his use of colorful metaphors (“There is no evidence that he took the job because it would give him an opportunity by use of the mails to reel in fish to shake down, or that he mailed letters to people he thought particularly susceptible to being shaken down . . . ”); his humorous antapodosis pointing out the absurd (“The majority . . . says that ‘the jury could infer that in mailing each notice Green had in mind prior episodes of extortion and contemplated future ones.’ . . . One might as well say that in brushing his teeth every morning he thought about past and upcoming extortion.”); his mention of apt analogy (“There is an illuminating analogy to the Mann Act, which forbids transporting a woman for an immoral purpose (18 U.S.C. § 2421), just as the mail fraud statute forbids mailing a letter for a fraudulent purpose”); his biting deployment of asteismus (“The majority opinion: . . . calls this a dictum [in an on point Supreme Court opinion]. The

292. Id. at 255 (Posner, J., dissenting) (quoting 18 U.S.C. § 1341 (1982)).
293. “Epondos” is “expanding a statement by discussing it part by part.”
294. Green, 786 F.2d at 255 (Posner, J., dissenting).
295. Id. (Posner, J., dissenting).
296. Id. (Posner, J., dissenting).
297. Id. (Posner, J., dissenting).
298. Id. (Posner, J., dissenting).
299. “Antapodosis” is “a simile in which the objects compared correspond in several respects.”
300. Green, 786 F.2d at 256 (Posner, J., dissenting).
301. Id. at 257 (Posner, J., dissenting).
302. “Asteismus” is a “facetious or mocking answer that plays on a word.”
operational definition of dictum is, the part of a previous opinion that the court in the current case disagrees with. If what I have quoted is dictum, then what is the holding . . . ?’');\textsuperscript{303} and his clever use of hypotheticals.\textsuperscript{304} Essentially, Posner recognized that the court, along with the prosecution, was swayed by a lack of sympathy for Green; yet, Posner dissented in \textit{Green} because he believed that the impact of the decision was damaging to society at large.

Posner’s serious attention to the rules that bind judges is evident in \textit{Forrester v. White}, where he filed a dissenting opinion from a panel ruling which held that the doctrine of judicial immunity shielded a state judge from liability for damages for alleged sex discrimination in firing a probation officer under her administrative control.\textsuperscript{305} In another bravura exercise of \textit{epandos},\textsuperscript{306} Posner deconstructed the majority’s reasoning, noting that “[t]he failure to distinguish carefully among the different kinds of acts that judges perform is, indeed, the fatal weakness in the majority opinion.”\textsuperscript{307} In his view, the majority opinion gave judges too much protection and would create uncertainty in the behavior of those who dealt with them. He wrote:

Carried to its logical extreme, the opinion would attach absolute immunity to any major decision made by a judge within the scope of his lawful powers. The proper question is whether the decision was made in the judge’s judicial capacity. Judges have both judicial and executive functions. Hiring and firing subordinates are executive functions.\textsuperscript{308}

Moreover, Posner criticized the majority’s limited holding in \textit{Forrester} as misguided because it raises more questions than it resolves. Posner’s technique on this point is a gentle, yet incisive, rebuke of the holdings, from the perspective of the foreseeable legal process:

\begin{itemize}
\item \textbf{303.} \textit{Green}, 786 F.2d at 257 (Posner, J., dissenting).
\item \textbf{304.} See id. at 259 (Posner, J., dissenting):
Suppose a clerk in a corner grocery store, as he is required by the nature of his job to do, mails hundreds of bills to customers with charge accounts, and steals from the cash register some of the checks he deposits there when the customers pay their bills—and is indicted on hundreds of counts of federal mail fraud. This hypothetical case (minus the hundreds of counts) was as a matter of fact argued to the Supreme Court [in a previous case that Posner contended was dispositive], and seems to me the type of case the Court meant to rule out of the mail fraud statute and confine to the jurisdiction of state criminal law. The present case is indistinguishable.
\item \textbf{306.} See supra note 293 and accompanying text.
\item \textbf{307.} \textit{Forrester}, 792 F.2d at 663 (Posner, J., dissenting).
\item \textbf{308.} Id. (Posner, J., dissenting).
\end{itemize}
So I think my brethren are wrong to grant Judge White absolute immunity, and I would reverse the judgment of the district court. But I also think that the protection against suit that the majority opinion creates is illusory. The majority is so intent on writing a narrow opinion that it leaves the scope of its new doctrine of absolute immunity entirely uncertain. Can it really be that the doctrine is to be limited to the firing of probation officers in Illinois juvenile courts? The logic of the opinion cuts a much broader swath, but judges cannot be (perhaps should not be) forced to apply principles in their full logical reach. The majority calls for "a critical evaluation of the concerns underlying the defense" of absolute immunity in each case; it declines to express any "opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant of immunity advances the policies behind it." It is right for judges to be cautious when they set sail on uncharted seas, but in the field of immunities this may be a reason for not leaving port in the first place. The absolute immunity for a judge's legal rulings is about as definite a rule as we have in our legal system, and the absolute immunity that the court creates today is about as indefinite, which robs the principle of its value to the judges and to the public. Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance.\(^{309}\)

Thus, in his Forrester dissent Posner imagined the rule the majority created as it would apply to real employees and job applicants to illustrate exactly how it would create problems.

In a diversity case between two corporations involved with hair care, Sally Beauty Co. v. Nexxus Products Co., Judge Posner seemed to relish using the Uniform Commercial Code to lambast the majority panel decision during the course of his succinct dissenting opinion.\(^{310}\) In a kind of *anemographia*,\(^{311}\) Posner began his dissent in Sally Beauty with the following synoptical description of the majority opinion:

---

309. *Id.* at 664 (Posner, J., dissenting).
311. "Anemographia" is a "description of the wind." RHETORICAL TERMS, supra note 161, at 185. https://scholarship.law.missouri.edu/mlr/vol69/iss1/7
My brethren have decided, with no better foundation than judicial intuition about what businessmen consider reasonable, that the Uniform Commercial Code gives a supplier an absolute right to cancel an exclusive-dealing contract if the dealer is acquired, directly or indirectly, by a competitor of the supplier. I interpret the Code differently.312

Continuing, Judge Posner used a colorful metaphor to describe the majority opinion’s weak reasoning, which relied on a precedent dealing with the ability to terminate an exclusive-dealing personal services contract that did not, in his view, conform to the facts of the case at bar. “By rejecting that characterization here [that the underlying contract was one for personal services], my brethren have sawn off the only limb on which they might have sat comfortably.”313 Skillfully deploying syncrisis,314 intermingled with law and economics analysis, he criticized the his colleagues’ logic as follows:

My brethren find this a simple case—as simple (it seems) as if a lawyer had undertaken to represent the party opposing his client. But notions of conflict of interest are not the same in law and in business, and judges can go astray by assuming that the legal-services industry is the pattern for the entire economy. The lawyerization of America has not reached that point. Sally Beauty, though a wholly owned subsidiary of Alberto-Culver, distributes “hair care” supplies made by many different companies, which so far as appears compete with Alberto-Culver as vigorously as Nexxus does. Steel companies both make fabricated steel and sell raw steel to competing fabricators. General Motors sells cars manufactured by a competitor, Isuzu. What in law would be considered a fatal conflict of interest is in business a

312. Sally Beauty, 801 F.2d at 1008 (Posner, J., dissenting) (emphasis added). While the work of French philosopher Henri Bergson (1839-1941) may have esconced intuition into the epistemic enterprise, see Gilles Deleuze, Bergsonism 14 (Hugh Tomlinson & Barbara Habberjam trans., 1988), it is not a mainstream method of judicial process. But see Oliver W. Holmes, Jr., The Common Law 1 (1881), for the following famous observation:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id. (emphasis added).

313. Sally Beauty, 801 F.2d at 1009 (Posner, J., dissenting).

314. "Syncrisis" involves “comparing contrary elements in contrasting clauses.”

Rhetorical Terms, supra note 161, at 185.
commonplace and legitimate practice. The lawyer is a fiduciary of his client; Best was not a fiduciary of Nexxus.315

Posner completed his *Sally Beauty* dissent through the strategic use of hypophora,316 mixed with erotesis.317 Some of the fact-intensive questions he posed were:

- "How likely is it that the acquisition of Best could hurt Nexxus?"318
- "Could Nexxus have canceled the contract, fearing that Best (perhaps unconsciously) would favor Alberto-Culver products over Nexxus products?"319
- "[W]hat guarantee has Alberto-Culver that consumers would be diverted from Nexxus to it, rather than to products closer in price and quality to Nexxus products?"320
- "Will these powerful competitors continue to distribute their products through Sally Beauty if Sally Beauty displays favoritism for Alberto-Culver products?"321
- "Would not such a display be a commercial disaster for Sally Beauty, and hence for its parent, Alberto-Culver?"322
- "Is it really credible that Alberto-Culver would sacrifice Sally Beauty in a vain effort to monopolize the ‘hair care’ market, in violation of section 2 of the Sherman Act?"323

316. "Hypophora" is "asking questions and immediately answering them." RHETORICAL TERMS, supra note 161, at 193.
317. "Erotesis" is the asking of "a ‘rhetorical question’ implying but not giving an answer." *Id.* Posner’s combined use of hypophora and erotesis constituted, together, the global argumentative technique of “pysma”: “asking many questions that require diverse answers.” *Id.* at 194.
319. *Id.* at 1011 (Posner, J., dissenting).
320. *Id.* at 1010 (Posner, J., dissenting).
321. *Id.* (Posner, J., dissenting).
322. *Id.* (Posner, J., dissenting).
323. *Id.* (Posner, J., dissenting). Judge Posner concluded that “[t]he judgment should be reversed and the case remanded for a trial on whether the merger so altered the conditions of performance that Nexxus is entitled to declare the contract broken.” *Id.* at
Posner also relied on a law and economics analysis to illuminate conduct in the courtroom in his dissenting opinion in Chaulk v. Volkswagen of America, Inc. In that opinion he issued a diatribe against professional expert witnesses as well as a critique of appellate over-reaching in helping plaintiffs.\textsuperscript{324} Objecting to the majority’s reversal of the directed verdict in favor of the car manufacturer on the issue of whether a negligent design had caused the plaintiff’s personal injuries in an automobile accident, Posner mounted a cutting \textit{ad hominem}\textsuperscript{325} attack on the plaintiff’s expert. In memorable prose, with a reference to an obviously absurd hypothetical, Judge Posner described the expert, Martens, as follows:

[O]n cross-examination Martens made clear that his position, whether reflecting a genuine and disinterested conviction or a pecuniary self-interest, is that almost all door latches, including one for which he holds a patent and Volkswagen’s subsequent latch design, are unreasonably dangerous: specifically, all door latches that can be sprung by inward rather than downward pressure; perhaps all automobile door latches, period, except that of Mercedes-Benz; at the very least, the door latches found in 30 million cars now on American roads. Martens was unwilling to concede that \textit{any} automobile door latch except that of the Mercedes-Benz, including latches he himself had designed, is reasonably safe.

Martens’ was the testimony either of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened; at the time of trial he was involved in 10 such cases. His testimony illustrates the age-old problem of expert witnesses who are “often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called ‘experts.’”

It is not the law . . . that the standard of care is set by the designers of [the most expensive] automobiles, so that the omission of any safety device found in such automobiles is negligent. . . . The buyer of a Mercedes 560 may be willing to pay extra for minuscule, perhaps wholly theoretical, improvements in safety, but such a buyer’s

\begin{footnotes}

\item[325] An “argumentum ad hominem” involves: “(1) abuse of your opponent’s character; (2) basing your argument on what you know of your opponent’s character.”
\end{footnotes}
willingness to buy the ultimate refinement in safety technology does not define the standard of care for the whole industry.

Ours is not a system of people’s justice, where six laymen are allowed to condemn an entire industry on the basis of absurd testimony by a professional witness. If Martens had testified that the [Volkswagen] Rabbit in which Chaulk was riding should have been equipped with radar or a force field or an ejection seat, my brethren would agree that the directed verdict was proper.326

Jumping from expert witness testimony to civil rights, Judge Posner filed a partial concurring and dissenting opinion in United States v. Town of Cicero, Illinois,327 a Title VII case brought by the federal government. The majority vacated the district court’s denial of a preliminary injunction in favor of the plaintiff, but chose to remand for further proceedings below. According to Judge Posner:

The denial of the government’s motion for a preliminary injunction against the enforcement of [Cicero’s ordinances prohibiting anyone who had not lived in the town a minimum number of years from applying for a municipal job] must be reversed for the reasons given by the majority, but since I think the government is entitled to the injunction I would remand with directions to issue it.328

Judge Posner was convinced that it made no sense to delay the matter and waste scarce judicial resources below because, as he asserted, “[t]he record compiled in the preliminary injunction hearing makes the strongest case for violation of Title VII on a ‘disparate impact’ theory that I have seen in my [then] four years of judging.”329 After extensive analysis of the record, he concluded that “[i]t goes without saying that the town should have an opportunity to convince the district court that the facts are otherwise than they appear on the basis of the . . . government’s motion for preliminary injunction”,330 however, in Posner’s view, “the government’s entitlement to the temporary relief that it has

327. 786 F.2d 331, 334 (7th Cir. 1986) (Posner, J., concurring in part and dissenting in part).
328. Id. (Posner, J., concurring in part and dissenting in part).
329. Id. (Posner, J., concurring in part and dissenting in part).
330. Id. at 338 (Posner, J., concurring in part and dissenting in part).
sought is sufficiently established to warrant our directing the entry of a preliminary injunction."\(^{331}\)


1. 1987

During 1987 Judge Posner authored only two pure dissenting opinions, with no mixed concurring and dissenting opinions.\(^{332}\) Posner’s first dissent during 1987 was in *Jordan v. Duff and Phelps, Inc.*\(^{333}\)—a case involving a closely-held corporation and a disgruntled former stockholder-employee of a securities research firm. In a dissenting opinion that was labeled “lucid[] and cogent[] (and ingenious[])” by the concurrence,\(^{334}\) Judge Posner summarized the factual essence of the case and reduced the underlying dispute to the following key issue:

Jordan does not argue that Duff and Phelps made any misleading statements. He makes nothing of the fact that when he told Hansen he was quitting, Hansen said that the firm had a good potential for growth and that Jordan’s shares would rise in value if he stayed. The target of the complaint is not misrepresentation or even misleading half-truths; it is Hansen’s omission to tell Jordan that he should think twice about quitting since the company might soon be sold at a price that would increase the value of Jordan’s stock almost 30-fold. The statement that Hansen failed to make may have been material, since it might have caused Jordan to change his mind about resigning. . . . But I shall pass this point and assume materiality, in order to reach the more fundamental question, which is duty.\(^{335}\)

Posner employed extensive law and economics analysis to review the wisdom of implying a contractual duty to disclose a potential future sale of the corporation to Jordan; in this respect he discussed the economics of information,\(^{336}\) assessed “market constraints against exploiting . . . employee

\(^{331}\) *Id.* (Posner, J., concurring in part and dissenting in part).


\(^{333}\) *Jordan*, 815 F.2d at 444 (Posner, J., dissenting).

\(^{334}\) *Id.* at 443 (Cudahy, J., concurring). Judge Cudahy also labeled the majority opinion by Judge Easterbrook “lucid[] and cogent[] (and ingenious[]).” *Id.* (Cudahy, J., concurring).

\(^{335}\) *Id.* at 445 (Posner, J., dissenting).

\(^{336}\) *Id.* (Posner, J., dissenting).
shareholders" based on the importance of business good will, and rebutted the majority opinion’s quotation of Posner’s “academic writings concerning the purpose of contract law.” Moreover, Posner continued his dissent in Jordan by opining: “Although my principal disagreement is with the majority’s holding about duty to disclose, I also have reservations about the majority’s discussion of causation and damages. The majority is rightly troubled by the issue of causation. If Hansen had made full disclosure to Jordan, what would have happened?” He uses a catachresis to offer a prediction: “The case on remand [and trial] will be a soap opera.” Finally, he ends his dissent with a hypertechnical quibble with the economic analysis of the majority opinion writer—Judge Frank Easterbrook—and a multifactor prognostication, in the nature of epiplexis, on how causation should be figured in the trial on remand.

Posner’s second dissenting opinion during 1987 was in Lauer v. Bowen—an appeal of a denial of a Social Security disability claim. Starting with a kind of thaumasmus, he gets the reader’s immediate attention: “My brethren have misread the social security ruling on which they rely, as well as the regulation on which they refuse to rely. The result is to make an easy case hard, and to

337. Id. at 448 (Posner, J., dissenting).
338. Id. at 449 (Posner, J., dissenting).
339. Id. at 451 (Posner, J., dissenting).
340. A “catachresis” is an “implied metaphor; extravagant, farfetched metaphor.”
342. “Epiplexis” consists of “asking a question [or questions] in order to reproach.”
343. Jordan, 815 F.2d at 451 (Posner, J., dissenting). According to Posner, causation would depend on answers, after trial, to the following six questions:
(1) What value would Jordan have placed on the shares, if he had known what Hansen knew? He is not an investment bank.
(2) What was Jordan’s attitude toward taking risks?
(3) How would Jordan have traded off his estimate of the value of his shares—a value he could not have realized immediately even if he had remained with Duff and Phelps—against the higher salary he was to receive [in his future job] in Houston and against freedom from domestic conflict [since his wife wanted to leave Chicago]?
(4) Would Hansen have let Jordan rescind his resignation?
(5) If so, would Jordan still have been working for Duff and Phelps two years later, when the firm was reorganized?
(6) In this connection, how would Jordan have reacted to the collapse of the Security Pacific deal? Would this have precipitated his departure?

Id. at 451-52 (Posner, J., dissenting).
345. A “thaumasmus” is “an exclamation of wonder.” RHETORICAL TERMS, supra note 161, at 188.
interfere unjustifiably with the administration of social security disability benefits."\textsuperscript{346} In Posner's view, "[t]he administrative law judge found that the applicant is capable of engaging in substantial gainful activity. That finding, which is supported by substantial evidence, is dispositive of the claim for benefits."\textsuperscript{347} After an extended parsing of what he contended was the pertinent regulatory provision, he ended his opinion on a familiar note, writing: "Cases such as this tug at the heart; but misreading the Social Security Administration's rulings and regulations can only sow confusion and reduce the funds available to pay benefits to persons entitled to them . . . ."\textsuperscript{348}

2. 1988

Judge Posner's output of dissenting opinions during 1988 increased to a total of five opinions: three pure dissenting opinions\textsuperscript{349} and two mixed concurring/dissenting opinions.\textsuperscript{350} In \textit{Smith v. Director, Office of Workers' Compensation Programs},\textsuperscript{351} Posner's dissent led off with a strident \textit{bdelygma}:\textsuperscript{352} "The administrative law judge's opinion, granting benefits under the black-lung act to William Smith's widow, is illogical and scientifically ignorant; it is a travesty of factfinding. The administrative law judge played doctor, and played it badly."\textsuperscript{353} He explained the basis for this characterization in succinct fashion: "The only medical [expert] testified that Smith had been disabled as a result of the heart disease that eventually killed him, not as a result of the mild black-lung disease shown on the only X-ray that provides any evidence of the disease."\textsuperscript{354} To Posner, "[n]ot only does the record establish that the employer carried its burden of proving that Smith was not totally disabled by black-lung disease, but the administrative law judge acted irrationally in refusing to credit [the expert's]

\begin{itemize}
\item \textit{Lauer}, 818 F.2d at 641 (Posner, J., dissenting).
\item \textit{Id.} (Posner, J., dissenting).
\item \textit{Id.} at 643 (Posner, J., dissenting).
\item \textit{See Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.}, 866 F.2d 228, 234 (7th Cir. 1988) (Posner, J., dissenting); Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc., 856 F.2d 873, 882 (7th Cir. 1988) (Posner, J., dissenting); \textit{Smith v. Dir.}, Office of Workers' Comp. Programs, 843 F.2d 1053, 1058 (7th Cir. 1988) (Posner, J., dissenting).
\item \textit{Smith}, 843 F.2d at 1058 (Posner, J., dissenting).
\item "\textit{Bdelygma} is an "expression of hatred or abhorrence." \textbf{RHETORICAL TERMS}, \textit{supra} note 161, at 186.
\item \textit{Smith}, 843 F.2d at 1058 (Posner, J., dissenting).
\item \textit{Id.} (Posner, J., dissenting).
\end{itemize}
He ended his dissent with a proverb: "Corporations, even mining corporations, are entitled to equal justice under law, no less than widows. We should not allow sympathy for Smith's family to blind us to our duty . . . ."

In *Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc.*, Judge Posner took vigorous issue with his colleagues for reversing the grant of a default judgment by the district court judge in "a routine commercial suit" for collection of the price of goods sold and delivered. Deploying *ethopoeia* by putting himself in the position of the lower court judge, Posner trumpeted the notes of separation of powers and of judicial efficiency, stating:

The district judge did not exceed her authority in granting a default judgment and then refusing to set it aside. In deciding otherwise, my brethren cross the line that separates the powers and responsibilities of an appellate court from those of a trial court. This decision will be resented by our district judges and is a setback to the cause of efficient judicial administration. The threat of default is one of the district judges' most important tools for obtaining compliance with litigation schedules. We blunt it by our decision today.

Continuing with language of *indignatio*, Posner declared: "For a corporate litigant to show up in court on the day of trial and announce (without forewarning) that it cannot proceed because it has not retained counsel . . . is inexcusable conduct that merits swift and sharp punishment up to and including the entry of a default judgment." He even went to the extent of *commiseratio* by evoking pity for the lower court judge, noting that the judge was "one of the ablest district judges in this circuit before her recent and much regretted resignation from the bench," even if she "ran a tight ship" and "reacted to the defendant's shenanigans more harshly than some judges would have done."

---

355. *Id.* at 1059 (Posner, J., dissenting).
356. *Id.* (Posner, J., dissenting).
358. *See supra* note 212.
360. "Indignatio" entails "arousing the audience's scorn and indignation."
Antitrust analysis predominated the substance of Judge Posner’s dissenting opinion in *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.* He encapsulated the basis of his disagreement with the panel majority in a few elegant lines at the outset of his dissent: “The decision to affirm this antitrust judgment for $3.7 million . . . ratifies a miscarriage of justice. There was no antitrust violation, and the defendant has been denied its right of appellate review.” Posner elaborated on his claim of a miscarriage of justice by observing, in vivid terms: “The result of all this strictissimi juris is to uphold a jury verdict that is based on a cockeyed view of law and fact, resulting in a windfall for [the plaintiff] that is both sizeable and undeserved.” He chastized the jury and offered an interpretation of why the commercial case went so badly by concluding:

The jury’s verdict was against the manifest weight of the evidence on an essential element of the tie-in offense—that the seller have market power in the market of the tying product. In fact, the verdict was irrational, a distressingly frequent occurrence in complex commercial cases, where the issues are remote from the experience and understanding of jurors. So clear is the verdict’s unreasonableness that we can order a new trial even though [the trial court judge], perhaps out of pique at our [earlier] decision reversing him, refused to do so.

Even his attention to the motives of the indignant trial court judge spoke to Posner’s attention to the motives that surge in and through decision-making. Among Judge Posner’s two mixed concurring/dissenting opinions filed during 1988, his opinion in *Reilly v. Blue Cross and Blue Shield United of Wisconsin* is the most striking for its sarcastic *peristrophe,* turning the majority opinion writer’s (Judge Will) arguments around for Posner’s own purpose. *Reilly* involved a claim against a group health medical insurer for bad-faith failure to pay benefits for an *in vitro* fertilization procedure. In criticizing the panel opinion’s reversal of the district court’s summary judgment in favor of the insurer, Judge Posner mocked the author of the panel opinion in the following language:

---

364. 866 F.2d 228, 234 (7th Cir. 1988) (Posner, J., dissenting).
365. Id. (Posner, J., dissenting).
366. Id. at 236 (Posner, J., dissenting).
367. Id. (Posner, J., dissenting).
368. 846 F.2d 416, 427 (7th Cir. 1988) (Posner, J., concurring in part and dissenting in part).
369. See supra note 274 and accompanying text.
The denial of benefits . . . is a reasonable interpretation of the plan, and that should be the end of the case. Judge Will, skilled lawyer that he is, is able to find a number of holes in the defendant's case—hearsay, lack of expert evidence to counter Mrs. Reilly's experts (with their impressive credentials), and the implausibility of classifying a procedure as experimental merely because it has a low success rate (implying, if pushed to a logical extreme, that all treatments for the terminally ill are experimental). And he is able to conjure up a host of unanswered questions concerning the qualifications of members of the advisory committees . . . . Judge Will even questions the validity, as well as the defendant's interpretation, of the "experimental/investigative" provision . . . .

All this probing and questioning would be fine if this were a suit for breach of contract of insurance rather than an action for judicial review of the denial of a claim for employee benefits, if the burden of proof in a breach of contract suit were on the defendant rather than the plaintiff, and if the plaintiff in such a suit were arguing unconscionability. None of these things is true. Not only has Judge Will disregarded our role in this proceeding, the nature of the proceeding, the standard of review, and the burden of proof, but he has gone beyond the issues framed by the parties . . . .

In Judge Posner's other mixed concurring/dissenting opinion written during 1988—Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.—he provided a scholarly, but dry, multi-faceted analysis of pertinent law and economic policy considerations replete with case hypotheticals.371

3. 1989

In 1989 Judge Posner filed three dissenting opinions—all pure dissents.372 In G. Heileman Brewing Co. v. Joseph Oat Corp., Posner dissented from a Seventh Circuit en banc opinion issued after rehearing, which held that a federal district court judge acting through a magistrate could properly sanction a corporate defendant for failing to send a corporate representative to a settlement

---

Posner's dissent consisted of an initial nuanced weighing of the relative advantages of a broad interpretation of a trial judge's settlement powers against the disadvantages of such an interpretation. Concerned that the appellate court did not have sufficient information about the practical consequences of a ruling interpreting a district court's settlement powers broadly or narrowly, Posner chose to focus on the particular facts of the case at bar, in a style that Professor Cass Sunstein has characterized as deciding "one case at a time." As Judge Posner reasoned:

There is no federal judicial power to coerce settlement. Oat had made clear that it was not prepared to settle the case on any terms that required it to pay money. That was its prerogative, which once

374. According to Posner:

[D]ie Not bricht Eisen ["necessity breaks iron"]. Attorneys often are imperfect agents of their clients, and the workload of our district courts is so heavy that we should hesitate to deprive them of a potentially useful tool for effecting settlement, even if there is some difficulty in finding a legal basis for the tool. Although few attorneys will defy a district court's request to produce the client, those few cases may be the very ones where the client's presence would be most conducive to settlement. If I am right that Rule 16(a) empowers a district court to summon unrepresented parties to a pretrial conference only because their presence may be necessary to get ready for trial, we need not infer that the draftsman meant to forbid the summoning of represented parties for purposes of exploring settlement. The draftsmen may have been unaware that district courts were asserting a power to command the presence of a represented party to explore settlement. We should hesitate to infer inadvertent prohibitions.

*Id.* (Posner, J., dissenting).
375. According to Posner:

[N]othing in [Federal Rule of Civil Procedure] 16 or in any other rule or statute confers such a power, and there are obvious dangers in too broad an interpretation of the federal courts' inherent power to regulate their procedure. One danger is that it encourages judicial high-handedness ("power corrupts"); several years ago one of the district judges in this circuit ordered Acting Secretary of Labor Brock to appear before him for settlement discussions on the very day Brock was scheduled to appear before the Senate for his confirmation hearing. The broader concern illustrated by the Brock episode is that in their zeal to settle cases judges may ignore the value of other people's time. One reason people hire lawyers is to economize on their own investment of time in resolving disputes. It is pertinent to note in this connection that Oat is a defendant in this case; it didn't want its executives' time occupied with this litigation.

*Id.* (Posner, J., dissenting).
exercised made the magistrate’s continued insistence on Oat’s sending an executive to [court] arbitrary, unreasonable, willful, and indeed petulant.  

Judge Posner issued another dissenting opinion from an en banc decision after rehearing in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.  

In Johnson Controls, the district court found that a company’s refusal to employ a woman, capable of becoming pregnant, to make batteries because of the potential of toxic injury to her fetus was not a Title VII violation. Reiterating his fact-sensitive concern and focus on the case at hand, Posner voiced his opinion that it was wrong for the Seventh Circuit, on “so meager a record,” to either affirm the summary judgment below or, in the alternative, to reverse with directions to the lower court to enter judgment for the plaintiffs.  

Posner’s dissenting opinion in Johnson Controls is a marvelous example of judicial craftsmanship in its attention to relevant detail. It properly focused on the procedural context of the case; it rightly emphasized the narrow scope of a bona fide occupational qualification as a defense to a claim of sex discrimination; it brilliantly examined the economics of discrimination; it incisively evaluated the need for following other circuit precedent in judicially rewriting the federal employment discrimination statute to create “a new defense expressly for fetal protection cases”; it masterfully anticipated and commented on a variety of theoretical

---

377. Heileman Brewing, 871 F.2d at 658 (Posner, J., dissenting). Posner ended his dissenting opinion with the following analysis, alluding to a biblical injunction: “Sufficient unto the day is the evil thereof: We should reverse the district court without reaching the question whether there are any circumstances in which a district court may compel a party represented by counsel to attend a pretrial conference.” Id. (Posner, J., dissenting).


379. See supra notes 375-76 and accompanying text.


382. Johnson Controls, 886 F.2d at 902 (Posner, J., dissenting).

383. Id. at 902-03 (Posner, J., dissenting).

384. Id. at 903 (Posner, J., dissenting) (citing GARRY BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971)).

385. Id. (Posner, J., dissenting). In a scholarly aside, in this regard, Posner observed:

I am not myself deeply shocked that courts sometimes rewrite statutes to address problems that the legislators did not foresee—a notable but not isolated example being the judicial interpolation of the word “reasonable” into section 1 of the Sherman Act to prevent the atomization of society that Justice Holmes so feared.
tort law liability issues involving future claims by individuals exposed to harmful lead while in their mother-employees’ wombs;\(^\text{386}\) and, it sensitively legitimizes the moral and legal concerns of many Americans for the rights of the unborn.\(^\text{387}\) At the end of his dissent in *Johnson Controls*, Posner identified what he called “a host of unanswered questions” that did not appear in the frozen, summary judgment record of the case.\(^\text{388}\) These record deficiencies included (1) “the feasibility of warnings as a substitute for a blanket exclusion of all fertile women”;\(^\text{389}\) (2) “what other manufacturers of batteries do about the hazards of airborne lead to the fetus—whether they are content to rely on warnings, for example, and if so of what kind and with what effect”;\(^\text{390}\) (3) “the potential hazard to the fetus through a father exposed to airborne lead”;\(^\text{391}\) (4) the “lack [of] up-to-date information on the hazards of airborne lead to the fetus”;\(^\text{392}\) (5) a “blank [record] on the wages and alternative employment opportunities of the women employed in *Johnson Control’s* battery operation”;\(^\text{393}\) (6) the “profitab[ility] [of] the business of manufacturing batteries” and its “vulnerab[ility] . . . to fears, as yet speculative, of litigation arising from fetal damage”;\(^\text{394}\) and (7) the justification for *Johnson Controls*’ fetal protection policy given instances when the policy is “excessively cautious.”\(^\text{395}\) In closing, Posner wrote:

The issue of the legality of fetal protection is as novel and difficult as it is contentious and the most sensible way to approach it at this early stage is on a case-by-case basis, involving careful examination of the facts as developed by the full adversary process of a trial. The record in this case is too sparse. The district judge jumped the gun. By affirming on this scanty basis we may be encouraging incautious employers to adopt fetal protection policies that could

\(^\text{Id.}\) (Posner, J., dissenting).

386. *Id.* at 904-05 (Posner, J., dissenting) (discussing such tort issues as non-preemption of workers’ compensation laws; the joint tortfeasor status of the mother and the employer; whether the standard for liability would be negligence or strict liability; whether compliance by the employer with OSHA’s rules on airborne lead levels would be a defense; and the “mass tort” possibility of fetal lead exposure suits bankrupting the battery industry).

387. *Id.* at 905-06 (Posner, J., dissenting).

388. *Id.* at 906 (Posner, J., dissenting).

389. *Id.* (Posner, J., dissenting).

390. *Id.* at 907 (Posner, J., dissenting).

391. *Id.* (Posner, J., dissenting).

392. *Id.* (Posner, J., dissenting).

393. *Id.* (Posner, J., dissenting).

394. *Id.* (Posner, J., dissenting).

395. *Id.* at 907-08 (Posner, J., dissenting).
endanger the jobs of millions of women for minor gains in fetal safety and health.\textsuperscript{396}

Posner’s third dissenting opinion written in 1989 was in \textit{Camden v. Circuit Court of the Second Judicial Circuit, Crawford County, Illinois}, because he objected to the panel majority’s conclusion that a criminal defense attorney’s silence in the face of the judge’s declaration of a mistrial constituted consent, and, therefore, was not a violation of the defendant’s constitutional entitlement to be free from double jeopardy.\textsuperscript{397} At the very end of his dissent, Posner forcefully summarized the impact of his disagreement with the majority opinion, crafting the following \textit{brevitas}:\textsuperscript{398} “Camden is entitled to her freedom.”\textsuperscript{399} The gravamen of his dissent was a \textit{diasyrmus}\textsuperscript{400} expressed by way of \textit{auxesis}\textsuperscript{401} in a theatrical recounting of the facts as they would need to be to justify the majority’s opinion:

The first [the defense counsel] learned of the judge’s intention to declare a mistrial was when the judge declared the mistrial and excused the jurors. The lawyer could hardly have been expected to interrupt the judge while he was addressing the jury and say, “Wait a minute, judge, I don’t want a mistrial.” And once the judge had thanked the jurors and told them that they were excused and could go home, the lawyer could not jump up and say, “Wait a minute, judge, don’t let them go.” And after they were gone he could not shout, “Bring them back! Bring them back!”\textsuperscript{402}

4. 1990

During 1990, Judge Posner authored five dissenting opinions—all pure dissents.\textsuperscript{403} In a bankruptcy case involving a prior divorce decree, \textit{In re
Sanderfoot, Posner vehemently objected to the reasoning and result of the panel decision which held that a former spouse's lien on the marital home, granted pursuant to a divorce decree for the purpose of securing payment of equitable distribution of assets acquired during the marriage, was avoidable as impairing the former husband's homestead exemption.\textsuperscript{404} Posner's dissent in Sanderfoot commenced with eloquent \textit{pathopoeia}:	extsuperscript{405} "the fact that a judicial decision offends the moral sense of laymen does not prove the decision wrong. Institutional or systemic considerations, themselves morally significant, but invisible to the laity, may outweigh the tug of simple of justice. But they do not do so here."\textsuperscript{406} Next, his dissent uses \textit{philophronesis}\textsuperscript{407} to softly express Posner's palpable anger at the majority decision. Appealing to common sense and the law, he analyzed the husband's "vicious" tactics—and the court's paradoxical rewarding of his behavior:

The divorce court found that the net value of the Sanderfoots' marital property, consisting primarily of the couple's home, was $58,000 and that the property should be split 50-50. No one questions that this is the proper division. To effect the split, the court awarded to the husband the couple's home, which had been bought during the marriage and was jointly owned, and ordered him to pay $29,000 in cash to the wife. To enforce this order, the court gave her a lien on the house. The husband did not pay his wife a cent (nor did he comply with any other order of the divorce court, including an order to provide child support), but instead declared bankruptcy, claimed a homestead exemption for the house, and filed a motion . . . to avoid the wife's lien—a tactic designed to nullify (or perhaps to complete the nullification of) the divorce decree and give the husband all rather than half the marital property. \textit{Today we place the crown of success on this vicious scheme.} The Bankruptcy Code as liberalized in 1978 is widely criticized as making bankruptcy an ordinary tool of business planning, but after today it also will be criticized as a tool by which bounders defraud their spouses.


\textsuperscript{405} "Pathopoeia" is "a general term for arousing passion or emotion."

\textsuperscript{406} \textit{Sanderfoot}, 899 F.2d at 606 (Posner, J., dissenting).

\textsuperscript{407} "Philophronesis" is an "attempt to mitigate anger by gentle speech and humble submission."
This result, a perversion of bankruptcy law, is a product neither of judicial hardheartedness nor of legislative ineptitude, but of judicial misunderstanding of the lien-avoidance provision of the Bankruptcy Code. 408

Judge Posner’s dissenting opinion is a masterful combination of what one author has termed “the five types of legal argument”: 409 arguments “based upon text, intent, precedent, tradition, or policy analysis.” 410 First, Posner’s dissent in Sanderfoot addressed the pertinent text of the bankruptcy statute allowing a debtor in bankruptcy to avoid a judicial lien that impairs an exemption. According to his analysis, the pertinent provision of the Bankruptcy Code says that the bankrupt may avoid a judicial lien to the extent that it impairs an exemption 411 and “it says that the bankrupt may avoid ‘the fixing of’ such a lien ‘on an interest of the debtor in property.’ The debtor must have the interest at the time the court places the lien on it. That condition is not satisfied here.” 412 Second, Sanderfoot focused on the intent of Congress in passing the lien avoidance scheme. Citing pertinent legislative history, Posner contended that “[t]he purpose—as appears unmistakably from legislative history the purport and significance of which are unquestioned—is to thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the exemptions.” 413 Distilling the facts of the case to simple, basic words, Posner’s dissent goes on to apply the intent of Congress to the case at bar:

As explained in [the legislative history], the lien-avoidance provision allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions. This is not what happened here. No creditor beat the debtor into court. The lien was created by a court, it is true, but not to enable a creditor to defeat his debtor’s household exemption; it was done to protect a spouse’s preexisting property rights. 414

Third, Posner’s dissenting opinion in Sanderfoot perspicaciously summarized and dissected existing national precedent on the question presented

408. Sanderfoot, 899 F.2d at 606 (Posner, J., dissenting) (emphasis added).
410. Id. at 13.
411. Sanderfoot, 899 F.2d at 606 (Posner, J., dissenting).
412. Id. (Posner, J., dissenting).
413. Id. (Posner, J., dissenting) (citation omitted).
414. Id. (Posner, J., dissenting) (quotation marks omitted).
by the case, concluding that the Seventh Circuit "should go with the Eighth and Tenth Circuits. We should reverse."\footnote{Id. at 608 (Posner, J., dissenting).} Fourth, his dissenting opinion examined arguments in the case implicating tradition, specifically the role of equity in resolving the dispute. Posner opined:

I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance statute in order to achieve a result that does not promote, but instead denies, simple justice—layman’s justice. I do not expect an argument about this characterization of our result, because at oral argument the husband’s lawyer admitted that his client’s action had subverted the purpose of the divorce decree. The lawyer added, however, that this did not matter because (in his words) "bankruptcy is inequitable." I had thought bankruptcy a branch rather than a rejection of equity. In so saying I do not endorse a free-wheeling judicial discretion to disregard either the Bankruptcy Code or the state-law entitlements that the Code is largely concerned with enforcing.\footnote{Id. at 607 (Posner, J., dissenting).}

Fifth, Posner engaged in policy analysis in his Sanderfoot dissent by noting the likely social and economic consequences of the majority’s approach that will allow the Bankruptcy Code to become “a tool by which bounders defraud their spouses.”\footnote{Id. at 606 (Posner, J., dissenting).} Moreover, he used policy analysis in the following epimone:\footnote{An “epimone” constitutes a “refrain; frequent repetition of a phrase or question.” \textsc{Rhetorical Terms}, supra note 161, at 190.}

I acknowledged at the outset of this opinion, and I repeat, that superficially unjust results are sometimes made just by institutional and systemic concerns, such as the desirability of simple rules. If this were not so, there would never be a tension between legal justice and substantive justice. But there is no such tension here. Mrs. Sanderfoot is not asking us to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She is asking us not to disregard Congress’s words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt’s property and a judicial lien intended to secure a spouse’s preexisting interest in marital property. We could do justice here without deforming the Bankruptcy Code.\footnote{Sanderfoot, 899 F.2d at 607 (Posner, J., dissenting).}
Judge Posner’s next dissenting opinion issued during 1990 was in *Wyletal v. United States*—a simple negligence case brought against the government by an eighty-five year old woman for personal injuries she suffered in a sidewalk collision with a U.S. Postal Service employee.420 The aesthetic of Posner’s dissent in *Wyletal* is a combination of his identification with the injured plaintiff, on the one hand, and identification with the harried federal district court judge, who did a sloppy job in finding the facts, on the other hand. Both identifications constitute a kind of *ethopoeia*.421 Indeed, Posner’s approach is an example of what Professor Schlag calls an aesthetic of “perspectivism”422. At the outset of the opinion Posner identified, in an ironic way, with the district judge:

It is natural to want to give short shrift to a small case. The district judge succumbed to the temptation, embodying the findings of fact that [the federal rules of civil procedure] required him to make in an unedited oral opinion that neither demonstrates that he performed his proper function as the trier of fact nor provides an adequate predicate for our performance of the appellate function.

There were two versions of what happened here. The plaintiff’s, Mrs. Wyletal’s, was that she was walking on the sidewalk nine feet from the row of storefronts from which the defendant’s postman, Mr. Plost, emerged and that he walked into her, presumably at right angles although her impression was of being struck in the back. Plost’s version of the accident was that Mrs. Wyletal was hugging the storefronts and walked into him as he stepped out from a recessed doorway, his view of her blocked by the angle that the recess made with the inner part of the sidewalk. If her version is correct, Plost was negligent and she was not, and she is entitled to 100 percent of her damages. If his version was correct, she was negligent and Plost not, and she is entitled to nothing.

The district judge was unable to make up his mind whom to believe. “I’ll tell you, I haven’t been able to reconcile, given the conflicting testimony, how this accident happened other than the fact that both people were equally negligent.” But if he couldn’t figure out how the accident had happened, he couldn’t determine their relative negligence. What is more, there were only two versions of the accident, and in neither were the parties equally negligent. The judge

---

421. *See supra* note 212 and accompanying text.
seems just to have thrown up his hands in despair of being able to find
the facts in this case.\textsuperscript{423}

At the end of the opinion Posner identified, in an empathetic way, with the
plaintiff, Mrs. Wyletal:

The case was squarely within the jurisdiction of the district court,
and would be even if ambitious proposals to overhaul federal
jurisdiction were adopted. . . . [T]his is not a petty case, fit only for
small-claims court. Although the district judge assessed the plaintiff’s
damages at only $50,000, she had a colorable claim to a much greater
amount.

And speaking of damages, the $10,000 that the judge awarded for
pain and suffering was shockingly small. An 85 year old woman
broke her hip and as a result must use a walker to walk, and a bar in
the bathroom to lift herself from the toilet seat, and she has suffered
pain and the aggravation of a bladder condition. As the saying goes,
old age is not for sissies; and an 85 year old can expect pain and
suffering even if she does not break her hip. But Mrs. Wyletal is now
almost 90, so that the judge’s award comes out to only about $2,000
a year. I am sure she would have paid more than that to have been
spared an accident that broke her hip.

She deserves a better shot from the federal courts. I would
reverse the judgment and remand to the district court for further
findings.\textsuperscript{424}

\textsuperscript{423} \textit{Wyletal}, 907 F.2d at 51-52 (Posner, J., dissenting). Posner also identified with
the district court judge, in an ironic manner, by saying, “It might not be a bad rule to
discount an award of damages by the probability that the plaintiff was really entitled to
the award,” \textit{id.} at 52 (Posner, J., dissenting), and, “Another possibility would be to bring
back the old admiralty rule and make each party to a collision bear exactly one half the
total damages caused by it.” \textit{Id.} (Posner, J., dissenting). He concluded: “But none of
these is an authorized approach to deciding which of two versions of an accident is
correct. The approach to that question is given by the rules on burden of proof.” \textit{Id.}
(Posner, J., dissenting). Posner went on, in biting fashion, to state:

The likeliest inference is that the judge didn’t think the case worth the care
and attention that would be required to decide, with reasonable though of
course not complete confidence, what happened. This is an understandable
response, since the stakes are modest by the standards of modern federal
litigation . . . . But it is not a justifiable response.

\textit{Id.} (Posner, J., dissenting).

\textsuperscript{424} \textit{Id.} at 52-53 (Posner, J., dissenting).
In *United States v. Michaud*, his next dissenting opinion of the year, Judge Posner disagreed with his Seventh Circuit colleagues' en banc opinion, which reversed a panel decision that he had authored. Posner had sided with the Internal Revenue Service, reversing a district court order which quashed several summonses issued to the Michauds, which had directed them to submit to fingerprinting and to provide handwriting exemplars as part of a civil tax enforcement investigation. Posner commenced his dissenting opinion from the en banc reversal of his panel opinion with the following observation: "The remand throws a monkey wrench into the machinery for the investigation of tax violations and in the course of doing so commits a serious error in the interpretation of the tax-summons statute." Posner followed his metaphorical statement with a commonplace legal hyperbole: "A fishing expedition into the government's motives, such as the court invites the district judge to conduct, is inconsistent with the summary nature of proceedings to enforce tax summonses." By extending the fishing metaphor in the next sentence of his dissent ("Worse, the court allows the district judge to troll for fish in an area that Congress has placed beyond judicial authority.") Posner fashioned a *parable* of sorts on the morality of judicial interference with the will of Congress.

In *United States v. Marshall*, which was consolidated on appeal with *United States v. Chapman*, Judge Posner dissented from the en banc majority opinion that held that the federal drug statute setting mandatory minimum terms of imprisonment for selling a "mixture or substance" containing LSD included the weight of the carrier medium—blotter paper, sugar cubes or gelatin cubes—resulting in stiff prison terms for LSD dealers. In the course of his extended dissenting opinion, Posner employed logic, *simile* and precedent in his bravura attempt to interpret the federal drug statute. He started his dissent

426. *Id.* at 757 (Posner, J., dissenting) (panel decision attached to appendix of en banc opinion).
427. *Id.* (Posner, J., dissenting).
428. *Id.* at 755 (Posner, J., dissenting).
429. *Id.* at 755-56 (Posner, J., dissenting) (citations omitted).
430. *Id.* at 756 (Posner, J., dissenting).
431. A "parable" is a metaphorical rhetorical technique designed to "teach[] a moral by means of an extended metaphor." *[RHETORICAL TERMS, supra*] note 161, at 189. A "metaphor," in turn, involves "changing a word from its literal meaning to one not properly applicable but analogous to it; assertion of identity rather than, as with simile, likeness." *Id.* "Hyperbole"—another metaphorical rhetorical device—involves "exaggerated or extravagant terms used for emphasis and not to be taken literally." *Id.*
433. A "simile" is an "explicit comparison" often employing the word "like." *[RHETORICAL TERMS, supra*] note 161, at 189.
with the following pragmatic analysis of the different ways contraband drugs are sold and used, and how drug sale and use should be punished:

Based as it is on weight, the [traditional drug punishment] system . . . works well for drugs that are sold by weight; and ordinarily the weight quoted to the buyer is the weight of the dilute form, although of course price will vary with purity. The dilute form is the product, and it is as natural to punish its purveyors according to the weight of the product as it is to punish moonshiners by the weight or volume of the moonshine they sell rather than by the weight of the alcohol contained in it. So, for example, under Florida law it is a felony to possess one or more gallons of moonshine, and a misdemeanor to possess less than one gallon, regardless of the alcoholic content.

LSD, however, is sold to the consumer by the dose; it is not cut, diluted, or mixed with something else. Moreover, it is incredibly light. An average dose of LSD weighs .05 milligrams, which is less than two millionths of an ounce. To ingest something that small requires swallowing something much larger. Pure LSD in granular form is first diluted by being dissolved, usually in alcohol, and then a quantity of the solution containing one dose of LSD is sprayed or eyedropped on a sugar cube, or on a cube of gelatin, or, as in the cases before us, on an inch-square section of "blotter" paper. (LSD blotter paper, which is sold typically in sheets of ten inches square containing a hundred sections each with one dose of LSD on it, is considerably thinner than the paper used to blot ink but much heavier than the LSD itself.) After the solution is applied to the carrier medium, the alcohol or other solvent evaporates, leaving an invisible (and undiluted) spot of pure LSD on the cube or blotter paper. The consumer drops the cube or the piece of paper into a glass of water, or orange juice, or some other beverage, causing the LSD to dissolve in the beverage, which is then drunk. This is not dilution. It is still one dose that is being imbibed. Two quarts of a 50-proof alcoholic beverage are more than one quart of a 100-proof beverage, though the total alcoholic content is the same. But a quart of orange juice containing one dose of LSD is not more, in any relevant sense, than a pint of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke.
it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer.\footnote{Marshall, 908 F.2d at 1331-32 (Posner, J., dissenting) (emphasis added) (citation omitted).}

Posner continued his rhetorical attack on the en banc majority, deploying \textit{iconic prose},\footnote{An "icon" involves "painting resemblance by imagery." \textsc{Rhetorical Terms}, \textit{supra} note 161, at 189.} contending, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."\footnote{\textit{Marshall}, 908 F.2d at 1333 (Posner, J., dissenting).} He also stated,

A person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form, but the former is subject to a ten-year mandatory minimum no-parole sentence while the latter is not even subject to the five-year minimum.\footnote{\textit{Id.} (Posner, J., dissenting).}

Refining his initial metaphorical musings into a jurisprudential inquiry—and drawing on four of his favorite intellectual subjects: legal pragmatism, law and economics, Justice Holmes and Justice Cardozo,\footnote{See, e.g., \textit{Posner, supra} note 77; \textsc{Richard A. Posner}, \textsc{Economic Analysis of Law} (6th ed. 2003); \textsc{Richard A. Posner}, \textsc{Frontiers of Legal Theory} (2001).} Posner explored what Professor Schlag has called an energy aesthetic of the law,\footnote{See Schlag, \textit{supra} note 113, at 1070-80 (citation omitted).}—the tug and pull and tension between legal considerations—in his fascinating professional digression and candid change of mind:

Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer’s or legal pragmatist’s view that the practice of interpretation and the general terms of the Constitution (such as “equal protection of the laws”) authorize judges to enrich positive law with moral values and practical concerns of civilized society. Judges who in other respects have seemed quite similar, such as Holmes and Cardozo, have taken opposite sides of this issue. Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price
of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system oscillates between the approaches. The positivist view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatment; and let us explore the interpretive possibilities here. One is to interpret “mixture or substance containing a detectable amount of [LSD]” to exclude the carrier medium—the blotter paper, sugar or gelatin cubes, and orange juice or other beverage. That is the course we rejected [in an earlier decision], as have the other circuits. I wrote [our prior decision], but I am no longer confident that its literal interpretation of the statute, under which the blotter paper, cubes, etc. are “substances” that “contain” LSD, is inevitable. The blotter paper, etc. are better viewed, I now think, as carriers, like the package in which a kilo of cocaine comes wrapped or the bottle in which a fifth of liquor is sold.440

In contrast to his lengthy dissent in *Marshall*,441 Judge Posner’s 1990 dissent in *Visser v. Packer Engineering Associates, Inc.*442—an age discrimination case—was pithy. Focusing on the Schlagian grid aesthetic443 of the federal Age Discrimination in Employment Act444—the basic black letter law of the statute—Posner used the hapless plaintiff’s own arguments concerning the circumstances of his employment termination to support Posner’s own argument that the plaintiff was not fired because of his age.445 As Posner reasoned in the first paragraph of his dissent in *Visser*:

I regret not being able to agree with the majority’s disposition of this appeal. For reasons more fully stated by [the district court judge] in his opinion granting summary judgment for the defendant, there is

441. *See supra* notes 441-49 and accompanying text.
442. 909 F.2d 959, 963 (7th Cir. 1990) (Posner, J., dissenting).
445. This rhetorical technique is known as a “peristrophe,” a technique Posner used in other dissents. *See, e.g.*, *supra* note 274 and accompanying text.
no possible doubt that the plaintiff would have been fired no matter what his age or his pension entitlements. *By plaintiff's own account*, Kenneth Packer, the defendant's chief executive officer, is vengeful, vicious, and unethical; the plaintiff crossed Packer; this sealed the plaintiff's fate. Because the plaintiff was approaching the time at which his pension rights would vest, Packer's vengeance was particularly sweet: not only was he getting rid of an employee who defied him, but he was screwing the employee out of a pension. (The affidavits of the plaintiff's pals state merely that Packer was a nasty guy aware of Visser's pension status.)

As Posner explained in the second, and final, paragraph of his opinion, while Visser's boss was cruel and unjust, this did not give Visser a cause of action for age discrimination.

5. 1991

During 1991, the completion of his first decade on the federal appellate bench, Judge Posner issued five dissenting opinions—four pure dissents and one mixed concurring/dissenting opinion.


In Posner's view, the panel decision was inconsistent with existing Seventh Circuit precedent and the precedent of other circuits and deserved to be re-examined. Deploying *diallage*, he concluded: "The role of the replacement


447. *Id.* (Posner, J., dissenting).

[Plaintiff] was fired not because of age, but, by his own account of what happened, because he was disloyal to his boss. He may have been treated shabbily, cruelly, unjustly; but the Age Discrimination in Employment Act is not a tenure statute for the older employee. It is not a shield against corporate arbitrariness. It does not smite the vengeful.

*Id.* (Posner, J., dissenting).

448. *See* United States v. Chapple, 942 F.2d 439, 442 (7th Cir. 1991) (Posner, J., dissenting); United States v. Best, 939 F.2d 425, 432 (7th Cir. 1991) (en banc) (Posner, J., dissenting); Dimeo v. Griffin, 924 F.2d 664, 676 (7th Cir. 1991) (Posner, J., dissenting), vacated by 931 F.2d 1215 (7th Cir. 1991); Aqua-Chem, Inc. v. NLRB, 922 F.2d 403, 404 (7th Cir. 1991) (denial of reh’g en banc) (Posner, J., dissenting).


451. "Diallage" entails "bringing several arguments to establish a single point."
worker is fundamental in contemporary labor relations. The panel’s decision muddies that role, unsettles the law, buries the rights of management and labor alike in uncertainty and confusion. We should rehear the case en banc."

Jumping from a labor law dispute to a horse racing case, in Dimeo v. Griffin—a case involving the constitutionality of a random urine drug-testing policy adopted by the Illinois Racing Board—Judge Posner utilized peristrophe in the initial sentence of his dissenting opinion: "The majority opinion makes so strong a case against its own result that I have little more to do here than to express my perplexity at that result [which found the urine testing policy to be unconstitutional]." Then, blending comprobatio into the mix, Posner focused on the unique nature of Judge Harlington Wood, Jr.’s majority opinion:

As is obvious from the opinion, Judge Wood is not only a distinguished judge but also an experienced horseman. He realizes, therefore, and is scrupulous to point out, that the nonequestrian district judge underrated the dangers of horse racing (including harness racing). A jockey who is high on drugs can easily kill himself, or a valuable and delicate animal, or another jockey; a drug-impaired starter or assistant starter is also a menace, as Judge Wood explains, and if less likely than a jockey to kill a person or an animal is still quite likely to ruin the race. These are real, not hypothetical, dangers. Drugs are a real, not a hypothetical, problem in horse racing; horse racing is an intrinsically dangerous sport; and random drug testing is at once an important deterrent to the use of illegal drugs and a relatively minor invasion of personal privacy—the regulation at issue here limits the number of random drug tests per person per year to five. 

Rhetorical Terms, supra note 161, at 192.


453. Dimeo, 924 F.2d at 676 (Posner, J., dissenting); see supra notes 274 & 445 and accompanying text.

454. Dimeo, 924 F.2d at 676 (Posner, J., dissenting).

455. "Comprobatio" is "complimenting one’s judges or hearers." Rhetorical Terms, supra note 161, at 187.

456. Dimeo, 924 F.2d at 676 (Posner, J., dissenting). Judge Wood’s majority opinion in Dimeo was a scholarly exegesis of the history and nature of horse racing and the specifics of the Illinois urine-testing program. See id. at 664-76 (majority opinion consisting of twenty-seven footnotes and multiple references to literature on horse racing).
Posner’s *Dimeo* dissent continued with a skillful and succinct analysis of existing precedent,457 followed by a *dinumeratio* at the end of his opinion.458 Posner used the technique of *progressio*459 to elaborate—in the law and economics style that he so dearly loves—on the application of the Learned Hand balancing test460 in the context of constitutional interpretation:

[W]e have a persuasive argument—which Judge Wood not only accepts but emphasizes—that horse racing under the influence of drugs poses a danger to life and limb.

*Not—granted—the same level of danger as would be created by placing the Strategic Air Command in the hands of drug addicts.* But magnitude of danger is not the only consideration. Probability of accident is also important. The product of magnitude and probability is, indeed, expected accident cost. That cost is high in horse racing because it is a dangerous sport and because the inherent dangers interact with the loss of judgment and control caused by drug use to make the drug-infested horse race a scene of enormous danger. The danger is, it is true, mainly to participants in the race. But jockeys have a right to be protected against the dangers posed by fellow jockeys (and starters and assistant starters) who use drugs; *you do not become an outlaw by becoming a jockey.* The court disparages the state’s interest in protecting its revenues from parimutuel betting by keeping horse racing free of drugs. But that interest should not be considered separately. *It should be considered together with the state’s interest—paternalistic as it might seem to a follower of Herbert Spencer*—in the safety of the participants in the horse race, not to mention the owners’ interest in the lives of their precious animals. When *all* the interests in random drug testing of jockeys and other race participants are summed—the safety interest paramount, but reinforced by financial and property interests—the case for the minor invasion of privacy involved in requiring the occasional giving of a urine specimen (*something everyone who has an annual physical examination gives willingly and without a sense of embarrassment*) is decisive. The invasion of privacy is reasonable in the circumstances, and that is the Fourth Amendment test.461

457. *Id.* at 676 (Posner, J., dissenting).
458. A “*dinumeratio*” is “(1) amplifying a general fact or idea by giving all of its details; (2) a summary or recapitulation.” RHETORICAL TERMS, *supra* note 161, at 183.
459. “*Progressio*” is “building a point around a series of comparisons.” *Id.* at 185.
460. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (“if the probability be called P; the injury L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL”).
Judge Posner’s next dissenting opinion written during 1991 was in *United States v. Best.*462 The majority opinion framed the issue in *Best* as “whether the defendants were deprived of a fair trial due to the presence of binders containing certain government exhibits in the jury room during deliberations.”463 In a prior panel decision, the Seventh Circuit “held that the presence of the binders during jury deliberations was jury tampering that constituted reversible error”;464 upon rehearing en banc the court held “that the presence of the binders in the jury room was not error,” thereby affirming the defendant’s conviction for fraud, misapplication of bank funds and bank fraud.465 Posner’s dissent in *Best* presents the details of how the complex, seven-week criminal trial was conducted. It informs readers of the role of the binders—not admitted into evidence—in unfairly convicting the defendants. Posner used his extraordinary narrative skill and created apt analogies to convey his argument, and presented the following riveting account of the prejudicial impact of allowing the jury to have considered the prosecution-supplied “loose-leaf binder [to each juror] containing the key government exhibits, arranged by transaction, to assist the jury in following the evidence”.466

Both the district court and this court make much of the fact that all exhibits in the government’s binders had been admitted into evidence. That cannot be the end of our inquiry. If the prosecutor had entered the jury room during the jurors’ deliberations and told the jurors that if they examined the original exhibits in the following sequence it would help them to understand the defendants’ guilt, no judge would think that the fact that all the exhibits were in evidence would save the conviction. Instead of visiting the jury room in person the prosecutor sent into it a roadmap to a guilty verdict, in the form of suggestively sequenced selections from nine boxes of government exhibits, for the jurors to use in their deliberations. The ordering of familiar materials is a form of creativity recognized in law: you can copyright a compilation of materials that are in the public domain. And you can convict a man by a tendentious compilation of exhibits already in evidence.467

Later in his *Best* dissent, Posner employed literary allusion (“The binders—Ariadne’s thread through the maze constituted by the ten boxes of

462. 939 F.2d 425, 432 (7th Cir. 1991) (en banc) (Posner, J., dissenting).
463. Id. at 425-26.
464. Id. at 426.
465. Id.
466. Id. at 432 (Posner, J., dissenting).
467. Id. at 433 (Posner, J., dissenting).
original exhibits—were not in evidence.”)" and caustic sarcasm ("The [trial] judge's perfunctory and loaded inquiry (e.g., 'Did you use the jury book to the exclusion of all the other exhibits and evidence you heard in the case?') suggests more than anything else a determination not to have to sit through another seven-week trial.") to vigorously bring home his point.

In United States v. Chapple—another criminal appeal—Judge Posner took the prosecution's side in dissenting from the panel majority’s view that a criminal convict's possession of a handgun in the waistband of his trousers was not an offense "that presents a serious potential risk of physical injury to another," within the meaning of the federal sentencing guidelines that mandated a stiffer penalty of incarceration in a later federal prosecution. Using evocative hypothetical *exemplums* to prove his point, Posner, as usual, drew on his imagination and ability to recognize everyday human behavior to engage the reader’s support:

I have trouble imagining a more provocative act than a felon’s carrying a loaded gun in public view while traveling on public transportation [in a taxicab] in a crowded city. He is flaunting his defiance of the law. A quarrel with the taxi driver, a jostle by the crowd, a gesture of fear or anger by an onlooker alarmed or indignant at such a display—any of these incidents might have occurred and led to the gun’s being fired and killing or wounding someone.

Finally, in his last dissent of 1991, roughly rounding out his first decade on the federal appellate bench, Judge Posner in United States v. Bafia disagreed in part with his panel colleagues regarding the application of the federal statutory "kingpin" sentencing enhancement provision. In a somewhat hypertechnical approach, Posner quibbled with the majority’s remand instructions on the application of the drug kingpin sentencing enhancement statute because of an insufficient number of "slots" in the defendant Cappas’ criminal organization. In an impressive use of *conduplicatio*, Posner mentioned the word "kingpin"

---

468. *Id.* at 435 (Posner, J., dissenting).
469. *Id.* (Posner, J., dissenting).
471. An "exemplum" consists of "an example cited, either true or feigned; illustrative anecdote." RHETORICAL TERMS, *supra* note 161, at 188.
474. *Id.* (Posner, J., concurring in part and dissenting in part).
475. "Conduplicatio" involves "repetition of a word or words in succeeding clauses." RHETORICAL TERMS, *supra* note 161, at 190.
a total of eleven times in the course of an opinion that took up less than a full page of the *Federal Reports*. In a kind of legal *fable*, Posner provides the following creative allegory to bolster his view that a new trial was required with appropriate jury instructions on the issue of the drug kingpin charge as to Cappas:

A two-man band is not a large organization no matter how many times the second player is replaced. A six-man band is a large organization within the sense of the statute even if not all six players are playing at once. I assume that if through electronic wizardry two players can play all six instruments at once it's still not a six-piece band within the meaning of the statute...  

IV. SOME THEORETICAL INSIGHTS

A. Judge Posner's Evolving Style: Pragmatic Dissent

During his first few years as a federal appellate judge, Judge Posner seemed chiefly motivated to write dissenting opinions to satisfy a cathartic need to express his dissatisfaction with sloppy, inefficient or shopworn legal reasoning. In 1981 and 1982 Judge Posner's style was generally patient, respectful, and collaborative. However, one can observe a sea change during 1983, when Posner published a total of eight dissenting opinions. In 1983, Posner's dissent style became more confident, less collaborative, and more caustic. In reading through his 1983 dissenting opinions we can discern Posner-the-academic, Posner-the-tendentious-economist, Posner-the-taskmaster, and Posner-the-Cassandra. But as exemplified in his superb dissenting opinion in *DePass v. United States*, we can also perceive Posner-the-humanitarian coupled with Posner-the-epistemologist in his dissenting stylistics during 1983. During 1984 and 1985, Judge Posner's quantitative output of dissenting opinions continued to rapidly grow.

---

476. A "fable" is "a short, allegorical story." *Id.* at 188.
478. *See supra* notes 141-55 and accompanying text.
479. *See supra* notes 156-94 and accompanying text.
480. *See supra* notes 177-79 and accompanying text.
481. *See supra* notes 190-92 and accompanying text.
482. *See supra* note 159 and accompanying text.
483. *See supra* notes 160-62 and accompanying text.
484. *See supra* notes 167-76 and accompanying text.
485. *See supra* notes 196-287 and accompanying text.
Opinions that best characterize his style during this timeframe were in United States v. Markgraf (a dissent that champions the rights of a farm couple by poetically imagining both how this couple might feel about having their home foreclosed by the government as well as how Congress might have wanted the dispute to be decided), Geras v. Lafayette Display Fixtures, Inc. (an opinion where Posner deftly utilizes irony to sympathize with the majority, yet insist upon the recognition of strict constitutional principles), Haffner v. United States (a dissent that makes us laugh at the folly of the majority's statutory interpretation) and Britton v. South Bend Community School Corp. (an opinion where Posner eloquently and passionately addresses the unfairness of reverse discrimination against whites). During 1986—his fifth year on the federal appellate bench—Judge Posner began a pattern of less frequent dissent; his most attractive dissenting opinion written in 1986 was in United States v. Green (masterfully deploying many stylistic devices to uncover the injustice of a conviction for mail fraud). Yet, during 1981-1986, Judge Posner also issued some ugly dissenting opinions—exemplified by his stylistics in Alliance to End Repression v. City of Chicago and Chaulk v. Volkswagen of America, Inc.—which were characterized by overly-aggressive personal attacks.

Judge Posner's dissenting opinion style during 1987-1991—the second part of his first decade as a federal appellate judge—was generally most attractive when he used empathy as a stylistic technique—as in Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs and Wyletal v. United States—and generally least attractive when he directly or indirectly made personal attacks—as in Reilly v. Blue Cross and Blue Shield United of Wisconsin and Visser v. Packer Engineering Associates, Inc. Importantly, however, in three superb dissenting opinions written during this time period, Judge Posner demonstrated aesthetic sublimity: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc., In re Sanderfoot and United States v. Marshall.

486. See supra notes 208-15 and accompanying text.
487. See supra notes 216-27 and accompanying text.
488. See supra notes 248-51 and accompanying text.
489. See supra notes 260-75 and accompanying text.
490. See supra notes 291-304 and accompanying text.
491. See supra notes 233-39 and accompanying text.
492. See supra notes 324-26 and accompanying text.
493. See supra notes 357-63 and accompanying text.
494. See supra notes 420-22 and accompanying text.
495. See supra notes 368-70 and accompanying text.
496. See supra notes 441-46 and accompanying text.
497. See supra notes 378-96 and accompanying text.
498. See supra notes 404-19 and accompanying text.
499. See supra notes 432-40 and accompanying text.
In these three dissenting opinions—the most aesthetically pleasing dissents of his first decade on the bench—Judge Posner amply demonstrated the aesthetic virtues of technical virtuosity (in being able to masterfully combine numerous stylistic techniques in a dissenting performance that was greater than the sum of the individual parts of the dissenting opinion) and connoisseurship (in expertly judging the appeal and persuasiveness of his stylistic techniques). In sum, it is apparent that at the end of his first decade as a federal appellate judge, Posner had learned to breathe life and power into his dissenting opinions by deploying a number of attractive stylistic techniques, while, from time to time, forgetting what he had learned and dissenting in grating, displeasing, ugly ways. Moreover, in his best dissents Posner displayed remarkable writerly calculation of the winning effect his prose would have—entertaining his readers and confidently drawing them pictures of human behaviors and motives.

B. The Aesthetics of Judicial Dissenting Style

As Posner has implied in his academic writings,\(^5\) good judicial opinion style seemingly possesses certain generic qualities that transcend the genre of the opinion—whether it is, for example, a majority opinion, a concurring opinion, a dissenting opinion, a mixed concurring/dissenting opinion, a panel opinion, or an opinion derived from an en banc court. Thus, according to this approach, any stylistically good judicial opinion might be expected to exhibit some or all of the following stylistic characteristics: common sense; a felicitous discussion of relevant precedents and customs; a nuanced interpretation of pertinent texts; a practical analysis of critical public policies; an elegant expression of appropriate institutional considerations; a knowledgeable exposition and application of critical evidentiary and empirical data; and a moving, but subdued, articulation of powerful emotional factors.

However, because a separate judicial opinion always departs from a majority opinion in a self-conscious way (led off by language that indicates, by way of illustration, that Judge X is “dissenting” or “concurring in part”), the reader of a separate judicial opinion will tend to be more intensely and routinely aware that the opinion writer is attempting to draw attention not only to the content of her opinion but, often more importantly, to the performance of her opinion. Moreover, a reader of a dissenting opinion is arguably even more acutely aware of the performance aspect of the dissenter than in the case of a pure concurring opinion since, by definition, the concurring judge agrees with the majority holding but simply wants to clarify a different matrix of rule-based reasoning that supports the majority holding. “Generally, style applies to those sorts of artefacts and performances which communicate partly by inviting our conscious recognition that they are to be regarded as artefacts or

\(^5\) See supra notes 71-76 and accompanying text.
performances." So, many authors of majority appellate opinions probably intend to make their opinion style as transparent as possible and to concentrate on the rule-based substance of the judicial pronouncement because a majority opinion is written for the court and might not typically be expected to be a self-conscious performance or artifact. This is so because "to refer to the style (or stylishness) of what we normally suppose should not be a self-consciously produced artefact, is normally pejorative." Thus,

[i]t is, for example, not normally a compliment to refer to the style in which someone makes love, or to the style with which a student explains the lateness of an essay; to the style of a mechanic's cleaning rags, or an academic's rough notepaper. Style in the wrong place can be meretricious.

Furthermore, a majority appellate judicial decision can be thought of as a natural object—something that exists by virtue of our system of hierarchical judicial review and the institutional expectation that an appellate court will usually give reasons for its decision. Thus, to ascribe stylistic qualities to a majority opinion might be problematic in the same philosophical way that "neither a volcano nor a potato can have a style." A dissenting appellate judicial decision, in contradistinction, is not typical—in a sense, it usually is surprising—and, therefore, is not a natural object of the appellate judicial process. Style, then, is arguably more important and relevant in the case of a dissenting opinion (indeed, any separate opinion including a pure concurring opinion) than in the case of a majority opinion.

A robust aesthetic theory of dissenting opinion style would require us to focus on certain subtle moral conceptions of the dissenting "performance" because "[e]valuative disputes about style tend inevitably to look towards concepts of integrity and honesty (in design, performance or in unperformed behaviour), and to their polar opposites." This is so because our evaluations "have to do with our sense of how we may, or may fail to, see through the ways in which something is made or performed to deeper matters of the agent's thought and intention." Attention to rhetoric, writ large then (in the grand Aristotelean sense of ethos, pathos, and logos in addition to particularized

501. A COMPANION TO AESTHETICS 404 (David E. Cooper ed., 1992) [hereinafter AESTHETICS].
502. Id.
503. Id.
504. Id.
505. Id. (emphasis added).
506. Id.
rhetorical techniques), should be critical in our aesthetic reaction to particular dissenting opinions. Yet, since different appellate judges will tend to deploy certain favorite congeries of rhetorical techniques in their dissenting performances—as illustrated by my examination of Judge Posner's dissenting opinions during his first decade as a federal appellate judge—it is tempting to frame dissenting judicial style as the equivalent of signature, "as if one might 'peel off' the external manner of production from an inner kernel that could be given a different casing." As explained, by way of illustration, in a recent book on aesthetic theory:

In this sense it can be an intelligible exercise to rewrite a poem or a musical piece in the style of another or of another period. Thus we might construe the concept of style as "signature". Individual artists, authors, composers, types of people and identifiable periods and movements have their characteristic styles. The recognition of such stylistic signatures, therefore, may be the central skill of a certain kind of connoisseurship, a highly saleable skill for antique dealers, a taught skill in many English literature courses, an examined skill in "dating" documents; and a rich source not only for the forger's art, but, more importantly, for a high variety of fictional devices . . .

Thus, for example, we might describe some of Judge Posner's judicial opinions as "sexy"—as I did in an article on his general opinion style during his

According to Aristotle's classic work, On Rhetoric:

Means of persuasion are either nonartistic—laws, witnesses, contracts, or oaths, used but not invented by the speaker—or artistic, the invention of the speaker. Artistic means of persuasion take three forms, which have come to be known as ethos, the presentation of the character of the speaker as a person to be trusted; pathos, the emotions of the audience as stirred by the speaker; and logos, logical argument based on evidence and probability.

Id.

508. As illustrated in my examination of Judge Posner's style in early dissenting opinions, see supra notes 141-499 and accompanying text, there are a variety of classical rhetorical terms to describe a text's attempts to persuade the reader. Thus specific rhetorical terms exist to describe the following: addition, subtraction and substitution of letters, syllables, word phrases and clauses; amplification; balance, antithesis and paradox; brevity; physical description; emotional appeals; example, allusion and citation to authority; metaphorical substitutions and puns; repetition of letters, syllables, sounds, words, clauses, phrases and ideas; techniques of argument; and ungrammatical, illogical, or unusual uses of language. See RHETORICAL TERMS, supra note 161, at 181.

509. See supra notes 138-499 and accompanying text.

510. AESTHETICS, supra note 501, at 404.

511. Id.
rookie season on the federal appellate bench.\textsuperscript{512} A theorist of judicial dissenting style might label the “Posner dissenting signature” during his first decade as a judge—depending on whether the critic was a connoisseur of military strategy, wine tasting, film, furniture or cold water swimming—in some, or all, of the following terms: “precision bombing runs,” “citric with a memorable aftertaste,” “a clockwork green (as in economics),” “severely utilitarian,” and “delightfully bracing.”

It is probably misguided, however, to make a sharp differentiation between a “stylistic skin and an inner kernel”\textsuperscript{513} in evaluating dissenting judicial opinion style because such a theoretical approach tends to overemphasize reader whim. Of equal, if not greater importance to the quality of a dissenting opinion is author-intentionality or what might be alternatively called thematic authority—use of a style of dissent that controls and channels a reader’s response in the direction demanded by the dissenting judge. A fair reading of Judge Posner’s first decade of dissenting opinions leads to a mixed assessment: at his best, he directs the flow or argument according to his intentions; at his worst, however, he elicits a knee-jerk reaction against his rich law and economics parlance, sometimes grating \textit{ad hominen} rhetoric, and occasional shrill protestations. The deep meaning of this mixed assessment seems to relate to Judge Posner’s all-too-human temptation during his early years on the bench to have periodically lapsed into a meretricious dissenting style—a “mere production and reproduction of style-as-signature”\textsuperscript{514} that easily apes his past dissents in a kind of “facile self-imitation.”\textsuperscript{515}

Posner’s most effective dissenting opinions during his first decade as a judge were those that deployed style as a handmaiden of morality—dissenting opinions that paid serious attention to, and managed to orchestrate, the integrity and honesty of the argumentation, rather than engaging in “self-conscious posturing.”\textsuperscript{516} Over time Posner became more pragmatic—in the fights he picked with the majority, in the stylistics of his dissents, and in his role as a judge interacting with his colleagues. Indeed, after I finished the first draft of this Article, I picked up Posner’s latest book, published in early 2003, and read a passage that succinctly explains his own underlying judicial character and legal philosophy—and ultimately his own dissenting opinion style—that started to emerge during his first decade on the bench. According to Posner:

An everyday pragmatist in law, an everyday-pragmatist judge for example, wants to know what is at stake in a practical sense in

\textsuperscript{512} See Blomquist, \textit{supra} note 1.
\textsuperscript{513} \textit{AESTHETICS}, \textit{supra} note 501, at 404.
\textsuperscript{514} \textit{Id.} at 405.
\textsuperscript{515} \textit{Id}.
\textsuperscript{516} \textit{Id}.
deciding a case one way or another. This does not mean, as detractors of legal pragmatism such as Ronald Dworkin assert, that such a judge is concerned solely with immediate consequences and the short term. The pragmatic judge does not deny the standard rule-of-law virtues of generality, predictability, and impartiality, which generally favor a stand-pat approach to novel legal disputes. He just refuses to reify or sacralize those virtues. He dares to balance them against the adaptationist virtues of deciding the case at hand in a way that produces the best consequences for the parties and those similarly circumsanced. He is impatient with abstractions . . . with slogans . . . and with highfalutin rhetoric of absolutes—unless he is persuaded that such flag-waving has practical social value. For the everyday pragmatist . . . moral, political, and legal theories have value only as rhetoric, not as philosophy.517

V. CONCLUSION

Judge Richard A. Posner’s dissenting opinions written during his first ten years as a federal appellate judge are, in general, interesting, memorable and even entertaining to read. This is so in large part (and despite occasional lapses) because of what might be summed up as a pragmatic style of dissent—one that skillfully and effectively deploys various rhetorical techniques in the service of clearly stated substantive points of law and compelling principles of justice and morality to achieve practical ends of the parties in the lawsuits and those similarly situated. Judge Posner’s dissenting style is not typical. Other appellate judges, more typically, demonstrate an ideological style of dissent and are more interested in scoring abstract debating points than evaluating practical consequences.

A study of Judge Posner’s pragmatic dissenting style, moreover, provides food for thought in helping us to theorize on an overriding conception of the aesthetics of dissenting opinion style—a project that needs and deserves further work.518

517. RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 12 (2003).

518. Another potential issue in the ongoing project of theorizing on the aesthetics of dissenting opinion style might include a comparison of modern American dissenting opinion style with the way others in positions of cultural power have engaged in the “complex process of self-fashioning.” See STEPHEN GREENBLATT, RENAISSANCE SELF-FASHIONING: FROM MORE TO SHAKESPEARE 6 (1980). Moreover, it might be intriguing to compare what aesthetic theorists in other genres have argued are universal, indispensible qualities of great art with possible universal and indispensible qualities of great dissenting opinions. Cf. ITALO CALVINO, SIX MEMOS FOR THE NEXT MILLENNIUM (1988) (arguing for six critical aesthetic qualities of all great imaginative literature: lightness, quickness, exactitude, visibility, multiplicity and consistency).