

THE VALUE OF DISSENT

THE HON. PATRICK J. BUMATAY*

INTRODUCTION

It is a privilege to deliver this inaugural Spencer Abraham Address, which is named in honor of Secretary Abraham. Secretary Abraham served at the highest levels of American government, both as a United States Senator from Michigan and later as the Secretary of Energy under President George W. Bush.¹ But to Harvard Federalist Society members, we know him best as the “Founding Father” of the *Harvard Journal of Law & Public Policy*.² I proudly served as the Articles Editor for the JLPP.³ Since its founding in 1978, the JLPP has been a clearinghouse for innovative and consequential scholarship. So thank you, Secretary Abraham, for your service to the country and to the Federalist Society.

For my address, I will discuss the value of dissent—a topic that has proven timely considering recent events at other prominent law

* Judge, United States Court of Appeals for the Ninth Circuit. These remarks were delivered during the Harvard Federalist Society Alumni Banquet on April 1, 2023, at the Sheraton Commander Hotel in Cambridge, Massachusetts. With thanks to Steven Burnett.

1. *Secretary of Energy Spencer Abraham*, GEORGE W. BUSH WHITE HOUSE ARCHIVES, <https://georgewbush-whitehouse.archives.gov/government/abraham-bio.html> [<https://perma.cc/UH6E-CEFF>] (last visited Sept. 21, 2023).

2. *About Harvard JLPP*, HARV. J.L. & PUB. POL’Y, <https://journals.law.harvard.edu/jlpp/about/> [<https://perma.cc/MM4F-EFYA>] (last visited Sept. 21, 2023).

3. PATRICK BUMATAY, S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 4 (2019).

schools around the country. In particular, I want to discuss the role that judicial dissent plays in our constitutional system—how that role has developed since the Founding, the various functions it serves, and what it reflects about our society.

In my relatively short time on the bench, I've authored more than 50 dissents.⁴ At times, I have asked myself—is my writing separately so often a good thing? Does it help shape the law? Or am I contributing to the division we see all too often today? To answer these questions, I looked at the history of dissenting opinions.

First, I will start with the English tradition. Second, I will trace its emergence in American law. Third, I will look at dissenting opinions in the modern Supreme Court. Along the way, I highlight some noteworthy Supreme Court dissents throughout history. After marshaling through this history, I will then address common arguments for and against vigorous dissents. In the end, I have come down on the side that respectful dissent opens important dialogue, inspires others, and strengthens our constitutional system.

I. HISTORY

A. *Seriatim* Opinions in the British Tradition

To understand our modern practice of dissenting opinions, we need to start with the English legal tradition. An important precursor to our Supreme Court was an English court called “The Court of King’s Bench”—a common law court dating back to the 12th century.⁵ The Court of King’s Bench—always staffed with multiple judges—delivered its decisions orally and *seriatim*, Latin for “in

4. An updated list of dissents is on file with the author.

5. MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* 38 (2015).

series.”⁶ In other words, the judges would take turns delivering their individual opinions orally in each case. These *seriatim* opinions created great complexity in the law, requiring a counting of “for” and “against” votes to determine the outcome of a case.⁷ And you had to look to the vote count on the winning side to determine which line of reasoning prevailed and became precedent. Unanimity in judicial decisions then was not yet a common feature in our early legal tradition.

Further complicating matters, English courts didn’t publish official case reports until the 18th century.⁸ Before then, lawyers sought, “to the best of their ability,” to record in writing the oral pronouncements of judges at trial and relay this as precedent for other lawyers.⁹ According to one source, the scribes were actually law students, and their legal education consisted of recording the *seriatim* opinions.¹⁰ If you think Westlaw searches are difficult, just imagine conducting research using other students’ handwritten notes!

Even after the appearance of official reporters, deciphering precedent remained an arduous task. The result was a general lack of clarity in the law.¹¹ It was not until 1756, while many of our Founding Fathers were studying law, that the new Lord Chief Justice of the King’s Court, Lord Mansfield, brought some order to the

6. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292.

7. *Id.* at 298–99.

8. *Id.* at 293; UROFSKY, *supra* note 5, at 39.

9. Henderson, *supra* note 6, at 292.

10. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent* 8 n.35 (John M. Olin Program in Law and Economics, Working Paper No. 363, 2007), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1217&context=law_and_economics [<https://perma.cc/X5G9-W3YA>].

11. UROFSKY, *supra* note 5, at 39.

chaos.¹² Lord Mansfield sought to create a more consistent and reliable body of merchant law for the growing commercial classes, which had amassed considerable wealth during the expansion of the British Empire.¹³ Mansfield's most important contribution was the replacement of *seriatim* opinions with one unified "opinion of the court." This reform allowed the justices to deliberate privately and reach a consensus, both on the overall outcome of a case and on the proper reasoning to get there. The decision was then delivered as the *unanimous* and *anonymous* "opinion of the court."¹⁴ This model was profoundly successful and would later be emulated by other courts around the world—including here across the Atlantic.¹⁵

B. The Early Supreme Court: The John Jay and Oliver Ellsworth Courts

This was the world of law that America's Founding generation grew up in. Both *seriatim* decisions and unanimous "opinions of the court" had powerful supporters in early American society.¹⁶ When Congress established the federal judiciary in 1789, no provision was made as to whether decisions were to be issued *seriatim* or as unanimous opinions of the court.¹⁷ A seemingly esoteric matter now, the debate between *seriatim* and unanimous decisions would become a significant political issue in the first decades of the United States.¹⁸ At its core, the debate reflected divergent attitudes toward the scope and power of the newly formed federal government.

12. Henderson, *supra* note 6, at 294; UROFSKY, *supra* note 5, at 39–40.

13. Henderson, *supra* note 6, at 294–96, 299–300; UROFSKY, *supra* note 5, at 39–40.

14. Henderson, *supra* note 6, at 300; UROFSKY, *supra* note 5, at 39–40.

15. Henderson, *supra* note 6, at 303–04.

16. *See id.* at 304–08; UROFSKY, *supra* note 5, at 40–41.

17. *See* Judiciary Act of 1789, 1 Stat. 73.

18. *See generally* Henderson, *supra* note 6, at 303–25.

On one side was Jefferson, who advocated for *seriatim* decisions because they increased transparency and accountability.¹⁹ *Seriatim* opinions showed that each judge had considered and understood the arguments, and the vote count provided a weight for each precedent. According to Jefferson, each judge should “[t]hrow himself in every case on God and his country,” arguing “both will excuse him for error and value him for honesty.”²⁰ Jefferson’s underlying motivation for preferring *seriatim* opinions was his fear of a powerful federal judiciary.²¹ Jefferson viewed the courts as anti-democratic and recognized them as a threat to the decentralized, democratic Republic.²² The confusing world of *seriatim* precedents, and the resulting lack of clarity, helped restrain the federal courts during these early years.

Under Chief Justice John Jay, the Supreme Court’s general practice was to issue decisions *seriatim*, and to announce a short summary of issues the Justices agreed on.²³ Under this regime, dissents received little attention, as the summaries emphasized points of agreement among the Justices, rather than their disagreements.²⁴

Things began to change after 1796, when Oliver Ellsworth was appointed Chief Justice.²⁵ Ellsworth was an advocate for a stronger centralized government and a more powerful federal judiciary.²⁶ To augment federal power, Ellsworth favored the unanimous “opinions of the Court” developed by Lord Mansfield.²⁷ By issuing

19. *See id.* at 294 n.38.

20. UROFSKY, *supra* note 5, at 53.

21. *See* Henderson, *supra* note 6, at 305.

22. *Id.* at 305–07.

23. *Id.* at 308–09.

24. UROFSKY, *supra* note 5, at 66.

25. Henderson, *supra* note 6, at 309.

26. *Id.* at 309–10.

27. *Id.* at 310.

decisions “for the Court” without dissent—now often called *per curiam* opinions—the power of the Court, and of the national government, would be increased.²⁸

Under Chief Justice Ellsworth, more than 70% of the Court’s decisions were issued *per curiam*.²⁹ But many of these *per curiam* decisions occurred in simpler cases not involving issues of constitutional or statutory interpretation.³⁰ Among prominent decisions involving constitutional questions, half were delivered *seriatim* and half were issued *per curiam*.³¹

C. The John Marshall Court (1801-1835)

This takes us to the Marshall Court. John Marshall served as Chief Justice for 34 years, starting in 1801.³² Like his predecessor Oliver Ellsworth, Chief Justice Marshall also championed a strong federal government and a concomitant powerful federal judiciary.³³ He favored a unified voice for the Supreme Court, which he believed would give it greater authority and legitimacy.³⁴ As a member of the waning Federalist Party, Marshall was politically outnumbered on the Court, but he still proved effective at achieving much of his project to strengthen the Court.³⁵

The Marshall Court issued over a thousand decisions, of which close to 93% were unanimous—a record unimaginable by today’s

28. *Id.*

29. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 140 (1999).

30. *Id.* at 141–43.

31. *Id.* at 141.

32. Henderson, *supra* note 6, at 316.

33. *Id.* at 312–16, 320.

34. See Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2238–40 (1996).

35. Henderson, *supra* note 6, at 311–13.

standards.³⁶ Under Marshall, most unanimous decisions were no longer delivered as anonymous *per curiam* opinions. Instead, they were signed and delivered by one Justice—almost always Marshall himself—as the “opinion of the Court.”³⁷

Chief Justice Marshall was said to reach such frequent consensus through his personal charisma and sheer legal intellect.³⁸ According to legend, Chief Justice Marshall was so respected and esteemed by his colleagues that he even enlisted Justice Joseph Story—a renowned legal scholar himself—to do his Bluebooking! Marshall was once quoted as saying, “There, Story; that is the law of this case; now go and find the authorities.”³⁹

It’s also worth noting that this was a different era—the Supreme Court Justices all lived together in a Washington boardinghouse for two months out of every year, eating, drinking, and deciding each case with little outside contact.⁴⁰ Perhaps the Justices were willing to forgo writing separately in many cases to preserve comity on the Court. Imagine what an amazing reality television show it would be if Justices did that today! I would definitely watch it.

Also, the Supreme Court’s docket looked very different in Chief Justice Marshall’s day. The modern practice of granting petitions for certiorari didn’t fully take shape until 1925.⁴¹ In the Marshall era, the Court had mandatory jurisdiction over several common law

36. UROFSKY, *supra* note 5, at 55 (placing the Marshall Court’s “nonunanimous rate” at “just over 7 percent”).

37. See Karl M. ZoBell, *Division of Opinion in the Supreme Court A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 193–94 (1959).

38. See Henderson, *supra* note 6, at 313–14.

39. Theophilus Parsons, *Distinguished Lawyers*, 2 ALB. L.J. 126, 126–127 (1870).

40. See Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN L. REV. 1, 1 (2010).

41. See generally Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008).

matters including property, family law, and contracts.⁴² Those cases were often unanimous, which skews the Court's dissent rate from that time.⁴³

Still, the Marshall Court was responsible for the emergence and development of the third model of judicial writing—a hybrid style with an authored majority opinion for the Court with other Justices having the option of writing separately, either in concurrence or dissent.⁴⁴ This is the model we see most often today. This “hybrid” approach was something of a compromise between Chief Justice Marshall and Justice William Johnson, a friend and political ally of Jefferson.⁴⁵ Justice Johnson was accustomed to delivering *seriatim* opinions from his time on South Carolina's highest court.⁴⁶ Drawing on that experience, Johnson became the first frequent dissenter in American history, authoring about half of the dissents written by the Marshall Court.⁴⁷

Justice Johnson held a different perspective on why Chief Justice Marshall was so successful at building consensus on the Court. In a private letter to Jefferson in 1822, he called one of his fellow Justices “incompetent,” said another could “not be got to think or write,” and stated that still another was “slow.”⁴⁸ Johnson also told Jefferson that two of his other colleagues were “commonly estimated as one Judge.”⁴⁹ In Johnson's mind, the early unanimity of the Court was as much a product of his colleagues' shortcomings as it was Chief Justice Marshall's leadership.

42. See Henderson, *supra* note 6, at 324 n.184.

43. *Id.* at 324.

44. Ginsburg, *supra* note 40, at 2–3.

45. ZoBell, *supra* note 37, at 197.

46. Donald G. Morgan, *Mr. Justice William Johnson and the Constitution*, 57 HARV. L. REV. 328, 333 (1944).

47. ZoBell, *supra* note 37, at 197.

48. UROFSKY, *supra* note 5, at 52.

49. *Id.*

Despite Justice Johnson's private sentiments, the tone of early dissenting opinions was quite respectful—almost forlorn. For instance, in 1805, Justice Bushrod Washington wrote the first dissent of the Marshall Court, explaining that:

“[I]n any instance where I am so unfortunate as to differ with this court, . . . I owe it in some measure to myself and to those who may be injured by the expense and delay [of dissenting] to sh[o]w at least that the opinion was not hastily or inconsiderately given.”⁵⁰

Similarly, when Justice Johnson dissented in an 1807 case, he began by declaring, “I have the misfortune to dissent from the majority of my brethren.”⁵¹

This tone helped preserve civility among the Justices even as they disagreed. But by the end of Chief Justice Marshall's tenure, cracks were beginning to appear in the idealized picture of a unanimous, authoritative court as the Justices presided over increasingly volatile and politicized controversies related to slavery.⁵²

D. The Roger Taney Court (1836-1864)

Upon John Marshall's retirement in 1835, Roger Brooke Taney took over as Chief Justice.⁵³ Chief Justice Taney was different from his predecessor in many respects. For one, Taney did not try to preserve the unified voice that Marshall worked so hard to achieve. During the three decades of the Taney Court, the frequency of

50. *Id.* at 47.

51. *Id.*

52. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *cf.* *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813) (non-unanimous Court in freedom case).

53. *See Henderson, supra* note 6, at 316.

fractured decisions would double to around 15%—unprecedented in American history at that time.⁵⁴

Indeed, the Court was not immune to the increasing polarization of the country. Compared to the apprehensive tone employed by dissenters on the Marshall Court, sharper language in separate opinions became more common in the decades before the Civil War. For example, in one case, Justice Daniel wrote that he was dissenting “chiefly to free [him]self . . . from the trammels of an assent . . . to . . . the untenable, and . . . the irrelevant positions” of the majority opinion.⁵⁵

It was in the context of this declining civility and institutional cohesion, both on the Supreme Court and in the country at large, that the Taney Court would decide *Dred Scott v. Sandford*.⁵⁶ In that case, the Court held that black Americans, even those who were born free, could never be citizens of the United States. *Dred Scott* is notable for being a shameful mark on our country’s highest Court. But it also marked a turning point in the history of Supreme Court dissents. On top of Taney’s opinion, the Court produced six concurrences and two dissents.⁵⁷ In some ways, the case was so contentious within the Court that it inadvertently resurrected *seriatim* opinions.⁵⁸

The most powerful of the dissents was authored by Justice Benjamin Robbins Curtis.⁵⁹ Justice Curtis—a Harvard Law graduate—had never been an anti-slavery advocate or abolitionist. In fact, he had supported the Fugitive Slave Law of 1850.⁶⁰ Still, to his credit,

54. UROFSKY, *supra* note 5, at 55.

55. *Id.* at 65.

56. 60 U.S. 393 (1857).

57. *See id.*

58. UROFSKY, *supra* note 5, at 66–67.

59. *Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting).

60. UROFSKY, *supra* note 5, at 72.

Justice Curtis carefully refuted the majority's arguments, drawing upon historical, constitutional, and legal arguments.⁶¹

With his dissent in *Dred Scott*, Justice Curtis set a new standard for constitutional opinion-writing. Notably, he made the unprecedented decision to send copies of his dissent to the Boston press, to be published on the same day the decision was set to be delivered.⁶² Justice Curtis's dissent then was perhaps the first instance of a judicial dissent being used as a vehicle to foster constitutional dialogue with the public.

Chief Justice Taney would never forgive Justice Curtis for his *Dred Scott* dissent, and hostility within the Court would compel Justice Curtis to resign in disgust six months later.⁶³ He remains perhaps the only Supreme Court justice known to resign over principle.

E. The Great Dissenter: Justice John Marshall Harlan (1877-1911)

We cannot discuss the history of judicial dissents without recounting the renowned "Great Dissenter," Justice John Marshall Harlan. Named after Chief Justice Marshall, Justice Harlan is most remembered as the lone dissenting voice in *Plessy v. Ferguson*.⁶⁴ That case upheld the odious principle that "separate but equal" was consistent with our Constitution.⁶⁵ This left black Americans to generations of segregation throughout this country.

In his seminal dissent in *Plessy*, Harlan wrote:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are

61. See generally *Dred Scott*, 60 U.S. 393 (1857) (Curtis, J., dissenting).

62. UROFSKY, *supra* note 5, at 75.

63. *Id.* at 78.

64. 163 U.S. 537 (1896).

65. *Id.* at 552. (Harlan, J., dissenting).

equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land, are involved.⁶⁶

He accurately predicted that *Plessy* would one day be condemned as one of the most “pernicious” decisions of the Supreme Court.⁶⁷

For those who had fought so hard for progress and individual freedom, Harlan’s dissent was a small but significant consolation. Frederick Douglass wrote to Justice Harlan that his *Plessy* dissent was the greatest legal treatise in decades and that it “should be scattered like the leaves of autumn over the whole country, and be seen, read, and pondered upon by every citizen of the country.”⁶⁸

To me, Justice Harlan’s dissent in *Plessy* embodies our nation’s highest ideals, and I consider him my model of judicial courage. It could not have been easy for Justice Harlan—a Kentuckian and even a former slaveholder himself—to be the Court’s lone dissenter on racial issues. But dissent he did—forcefully and eloquently. His dissent is now for the ages.

F. The Modern Court (Justices Scalia and Ginsburg)

Now, for the sake of time, I would like to fast forward to the modern era of the Supreme Court. The modern era can be characterized by the continued proliferation of dissents. From 1801 to 1940 (Chief Justices Marshall through Hughes) there were dissents in only 7% of the Court’s cases.⁶⁹ But from 1941 to 1997 (Chief Justices Stone

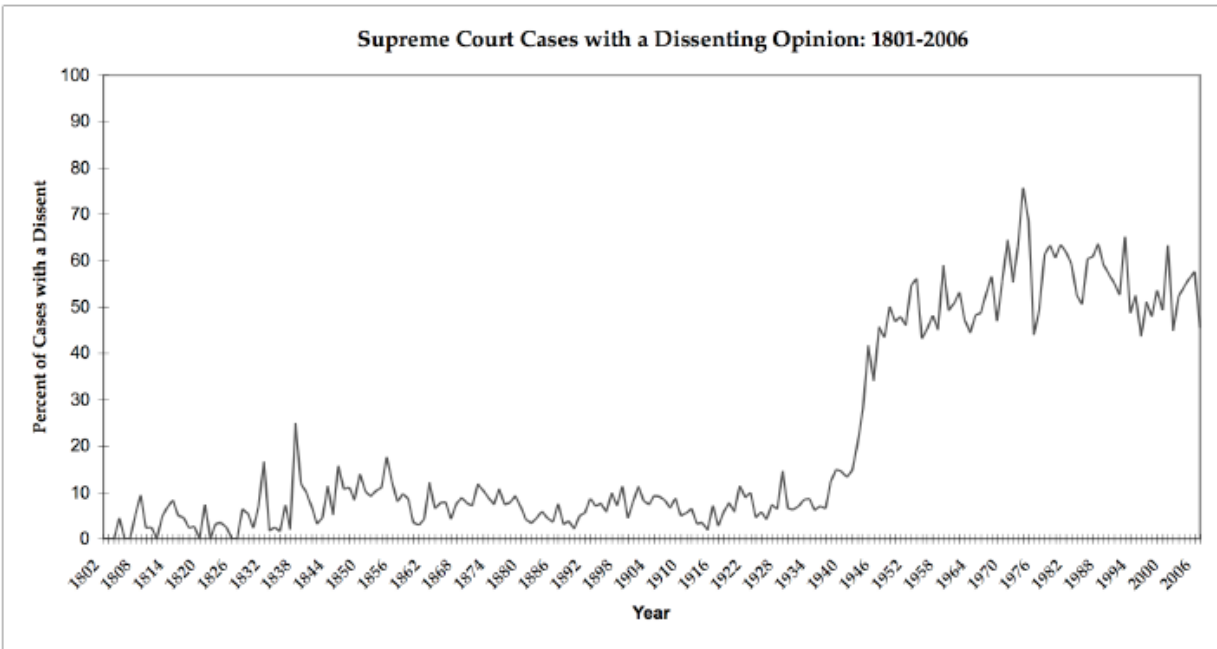
66. *Id.* at 559.

67. *Id.*

68. PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA’S JUDICIAL HERO 31 (2022).

69. Henderson, *supra* note 6, at 333 n.206.

through Rehnquist) 52% of the Court's cases produced dissenting opinions.⁷⁰



Henderson, *supra* note 6, at 322 fig.2.

Indeed, we see so many separate writings on the Supreme Court these days that one might argue that we have witnessed a *de facto* return to *seriatim* decisions.⁷¹

As for individual dissenters, few would deny the impact that Justices Scalia and Ginsburg had on modern jurisprudence. While their majority opinions deserve study and respect, their powerful

70. *Id.*

71. *See id.* at 333–34.

and incisive dissents should be studied for how they moved both public opinion and the law.

I'd just like to highlight one dissent from each of them. I'll start with Justice Scalia. Perhaps his most prophetic was his lone dissent in *Morrison v. Olson*.⁷² In that case, he called for the Independent Counsel Act to be struck down as unconstitutional. Who can forget Justice Scalia's timeless line about the affront to the separation of powers in that case? While the concentration of power in one branch often comes "in sheep's clothing," he said, "this wolf comes as a wolf."⁷³

A few years ago, Justice Kagan called this "one of the greatest dissents ever written and every year it gets better."⁷⁴ Sure enough, Justice Scalia's view eventually won the day and Congress let the Independent Counsel Act expire in 1999.⁷⁵

Justice Ginsburg was also able to spur Congressional action with her spirited dissent in *Ledbetter v. Goodyear*.⁷⁶ In that equal-pay case, Justice Ginsburg admonished the Court for "failing to comprehend or [being] indifferent to the insidious ways in which women can be victims of pay discrimination."⁷⁷ Justice Ginsburg later said she wrote that dissent with Congress in mind as the audience.⁷⁸ And

72. 487 U.S. 654 (1988).

73. *Id.* at 699 (Scalia, J., dissenting).

74. *Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, STAN. LAW. (May 30, 2015), <https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench/> [<https://perma.cc/ANS7-BGUK>].

75. *See* 28 U.S.C. § 599.

76. 550 U.S. 618 (2007).

77. Oral Dissent of Justice Ginsburg at 4:00, *Ledbetter v. Goodyear Tire Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074), <https://www.oyez.org/cases/2006/05-1074> [<https://perma.cc/8UER-L3FA>].

78. Ginsburg, *supra* note 40, at 7.

again, Congress listened, later passing the “Lilly Ledbetter Fair Pay Act.”⁷⁹

As these examples show, today’s dissents can become tomorrow’s binding law by influencing public discourse on issues that come before the Court.

II. ANALYSIS

So what does this history tell us about the value of dissenting opinions? Should voicing dissent be embraced and encouraged? Or should it be discouraged as an affront to the legitimacy of the Court?

As I said at the outset, I come down on the side of vigorous dissent.

A. *Arguments Against Dissents*

Opponents of judicial dissents generally argue that separate opinions weaken the Court’s authority by undermining the unity of its interpretation of the law.⁸⁰ One could argue that there are some areas of the law where, as Justice Brandeis famously said, “it is more important that the applicable rule of law be settled than it be settled right.”⁸¹ A Supreme Court that decides cases unanimously would legitimize the nation’s laws and improve lower courts’ ability to interpret them consistently and coherently.

Some might also view dissenting judges as prioritizing the publication of their own opinions over working cooperatively with colleagues to craft unified precedent. Judges who dissent too often

79. *Id.*

80. Matthew P. Bergman, *Dissent in the Judicial Process, Discord in Service of Harmony*, 68 DENV. L. REV. 79, 86-87 (1991).

81. Henderson, *supra* note 6, at 284; Ginsburg, *supra* note 40, at 7.

may undermine the weight of their words and damage the collegial atmosphere of their court. Frequent dissents might also damage a court's institutional legitimacy—especially when the majority and dissent split along partisan lines.

B. Arguments in Favor of Dissents

1. Legitimacy

On the other hand, proponents of dissenting opinions argue that they democratize the judiciary, making it more transparent to the public and thus strengthening its legitimacy and credibility.⁸² In a healthy, engaged democracy, judicial decisions should result from rigorous and thoughtful legal analysis—not secret deliberations and facades of unanimity.⁸³ As Justice Frankfurter once said, “[u]nanimity is an appealing distraction,” but “a single Court statement on important constitutional issues is bound to smother differences that in the interest of candor and of the best interest of the Court ought to be expressed.”⁸⁴ Furthermore, no one could deny the critical role that many famous dissents have played in enhancing the legitimacy of the Court. As Justice Scalia said, “[d]issents augment, rather than diminish the prestige of the Court When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake,” and I imagine Justice Scalia had *Dred Scott* and *Plessy* in mind, “it is comforting—and conducive of respect for the Court—to look back and realize, that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern.”⁸⁵

82. Bergman, *supra* note 80, at 87–88.

83. See generally Stack, *supra* note 34, at 2247–59.

84. UROFSKY, *supra* note 5, at 341.

85. Antonin Scalia, *Dissents*, 13 OAH MAG. HIST. 18, 18–19 (1998).

2. Intra-court Dialogue

Dissents also promote dialogue between the members of a court. Being tested by contrary views allows judges to strengthen their own writings, thus improving the law. As Justice Ginsburg put it, “there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.”⁸⁶ Reflecting on her 1996 opinion in *United States v. Virginia*, Justice Ginsburg remarked that “[t]he final draft was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia’s attention-grabbing dissent.”⁸⁷ I think most judges would attest to this benefit of separate opinions. Even when my colleagues have failed to persuade me to change my vote, I have often sharpened my majority opinions thanks to comments and suggestions from dissenters.

3. Dialogue with the Public and Other Branches

Dissents aren’t only useful as a mechanism for dialogue within a court, but they also have communicative value to the public. Some judges write lengthy dissents with an aim toward educating the country. Dissents can also guide lawmakers to act, as we’ve seen in the examples from Justices Scalia and Ginsburg.

4. Dialogue with the Future

Perhaps the most compelling justification for judicial dissents is the role they play in shaping constitutional dialogue across time. Many landmark dissents have been vindicated long after their authors’ lifetimes. We talked about Justice Harlan’s dissent in *Plessy* and Justice Curtis’s dissent in *Dred Scott*, but examples abound.

86. Ginsburg, *supra* note 40, at 3.

87. *Id.*

Even if a dissenter does not live to see his or her views adopted as the law, the prospect of persuading future generations remains.

III. PARTING THOUGHTS

There's much more to say about the value of dissent, but in the interest of time, I'll leave you with a few parting thoughts.

First, dissenting helps facilitate and foster dialogue, whether within the courts, between branches of government, or with the public. There may be a time and a place for silence and unanimity, but surely that's rarely the case when it comes to defending our Constitution.

Second, we cannot discount the costs of separate writings. Clarity, consistency, and the legitimacy of the courts may suffer. So we must choose our battles wisely. Of course, that means understanding the difference between trolling and dissenting. And it should go without saying—heckling is not productive dissent.

Third, there's a task for you all—it's your job to turn today's dissents into tomorrow's majority opinions. Originalism and textualism wouldn't have risen to prominence without the forceful dissents of Justices Scalia and Thomas and the work of younger generations of lawyers committed to demonstrating why these approaches lead to a more faithful interpretation of the Constitution and our laws.

Fourth, don't give up on civil discourse, and friendship with others you may disagree with. No matter how intense the difference of opinion, I see no reason why it should affect collegiality or common respect for others. And while I have vigorously dissented from my colleagues on the Ninth Circuit, that doesn't diminish my respect and admiration for them as jurists. As polarized as society may seem, note that this past term, 47% of cases decided by the Supreme

Court were 9–0.⁸⁸ And that’s with the Supreme Court taking on the hardest cases in the nation.

I’ve mentioned Justices Scalia and Ginsburg as examples several times during this discussion. With your indulgence, I want to close with one last anecdote. It is well known that they vehemently disagreed about the law in many cases. But it is also well known that they regarded each other as the best of friends. Let their enduring friendship serve as a reminder that we should never let legal disagreements define our relationships. In remembering Justice Scalia, Justice Ginsburg alluded to a duet from the 2015 opera *Scalia/Ginsburg*, entitled “We are different. We are one.” “Yes,” she wrote, we are “different in our interpretation of written texts, but one in our reverence for the Constitution and [the Court].”⁸⁹ In the law, as in life, you will find that mutual respect and recognition of shared values will only refine your voice and make you a stronger lawyer and person.

88. Adam Liptak, *Along With Conservative Triumphs, Signs of New Caution at Supreme Court*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html> [<https://perma.cc/KZV3-S6NW>].

89. Press Release, Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Statements of the Supreme Court Regarding the Death of Antonin Scalia (Feb. 14, 2016), https://www.supremecourt.gov/publicinfo/press/pr_02-14-16.pdf [<https://perma.cc/VF5S-CJMN>].