

INTRODUCTION

Why Dissent?

Our constitutional tradition celebrates the great dissenters—John Marshall Harlan, Oliver Wendell Holmes, William O. Douglas. On one level, the reason is clear: out of step with the prevailing constitutional views of their times, they were vindicated by history. The nation came to see the wisdom of *their* constitutional views, and the errors of the majorities that temporarily prevailed.

That is a comforting story—except for the fact that there are *always* dissenters, and we never know which is going to be vindicated and which repudiated by history. Once we realize, as we must, that some dissenters were wrong at the moment they dissented and wrong thereafter, the story about dissent, and about how history decides who is the winner and who the loser, becomes much more complicated.

I think it useful to begin by laying out some reasons for being skeptical about the very idea of a dissenting opinion. Imagine that you are justice on the Supreme Court. You have read the briefs and heard the arguments made in a case, and you have discussed the case with the other justices, who of course have examined exactly the same materials. You think that, properly read and interpreted, the Constitution requires that the plaintiff win her case. Five, six, even eight of your colleagues disagree. They read the legal materials to require that the plain-

tiff lose. You have done your best to show them that they are wrong, but they remain adamant. The opinion of the Court is issued, holding for the defendant.

We are accustomed to thinking that you should—or at least can—dissent, explaining your reasons for disagreeing with your colleagues. Yet, a skeptic might think, isn't publishing a dissent a self-indulgent, largely pointless, and possibly damaging act? After all, you and your colleagues have all examined the same materials. Why should you think that your take on the law is better than the considered views of your colleagues? Of course, if you thought that they were less capable than you, or had failed to do as conscientious a job as you, you might well reject their conclusions—but then aren't you being a bit arrogant?

And, in the end, what do you accomplish by publishing a dissent? Your views have lost out. The plaintiff is going to walk away without a remedy no matter what you do. The law will be as the majority declares it to be, and courts in the future will look to the majority opinion, not to yours, for guidance on the Constitution's meaning. You might hope that something you say in your dissent—"It's a good thing that the majority limits its decision to the facts of this case," for example—might lead lower court judges to interpret the majority opinion as you hope they will. But the majority opinion is there for everyone to read, and a judge who wants to read it in a limiting way can do so without your guidance (and a judge who wants to read it expansively isn't going to listen to you).

You may feel that publishing a dissent shows that you put up a good fight but lost in the end, but all that means is that you get to feel a little bit better about yourself, and may signal to people whose approval you seek that you are with them. And, after all, you get to feel better even as the plaintiff ends up worse off. It would not be hard to describe this as an unattractive way of salving your own conscience while neglecting the

person who really lost the case. Sometimes, of course, you might think that affirmatively signing on to the majority's decision would amount to cooperation with evil. That might justify a notation, "Justice X dissents," but not a full-fledged dissenting opinion. (Maybe law clerks today won't let a justice get away with something so simple, and it's easy enough to tell a law clerk to draft a dissent.)

Even more, publishing a dissent might be damaging to the law itself. The continental legal tradition is so concerned about this prospect that some European nations have made it a crime for a judge to publish a dissent or even to make it known, through conversations or private letters, that she disagreed with one of her court's decisions. The reason is that the mere existence of a published dissent will give some people—those who agree with the losing side, for example—one reason to hold on to their belief about what the law really is. And, holding *that* belief, they might act on it. Suppose the decision says that it is unconstitutional to hold a U.S. citizen as an "enemy combatant" based on secret evidence unless the government makes a strong showing that disclosing the evidence would harm the war effort. You dissent, saying that the government's assertion that disclosing the evidence would harm the war effort should be enough. Your dissent might encourage government officials to continue to hold someone based on flimsy evidence of damage from disclosing secret evidence. They might hope that your dissent will signal to lower court judges that they do not have to be too stringent in applying the majority's "strong evidence" rule, or they might hope that when the case comes to your court, you yourself will apply that rule in a pro-government way.

The concern that published dissents weaken the rule of law has even more bite where the courts need support from both government officials and ordinary people to ensure that the

courts' decisions are actually implemented. The classic example is school segregation (discussed in Chapter 11). Chief Justice Earl Warren and his colleagues whose legal analysis led them to conclude that segregation was unconstitutional worried that a dissent would provide the decision's opponents—and they knew that there would be many opponents—with ammunition to charge the Court with acting contrary to law. That worry is deepened when, as often happens, the dissent itself makes that charge, sometimes implicitly through its own legal analysis, and sometimes explicitly through statements that the majority's decision can be explained not by legal analysis but only by the majority's personal preferences.

Still, you might think that weakening the rule of law in this way would be a good thing. After all, you think that the majority's decision is wrong, perhaps even deeply wrong, as a matter of law. Making it less likely that the decision will “stick” is desirable from your point of view. Maybe so, but it is probably worth noting that, when the stakes are not all that high, the harm a dissent does to the idea that judges are simply interpreting the law and not implementing their policy preferences might often outweigh the self-satisfaction you get from explaining why you are right and your colleagues are wrong. (It is a real puzzle to understand why judges publish long and detailed dissents from decisions interpreting obscure provisions of the federal tax or pension laws, for example.)

Even when the stakes are high, you might not get more than self-satisfaction out of dissenting. Consider a case in which your analysis of the First Amendment's protection of freedom of speech leads you to conclude that it is unconstitutional to send someone to jail for criticizing the government's policy in vigorous terms, and your colleagues' analysis leads them to conclude that convictions for that offense are perfectly constitutional (for an example, see Chapter 7). Suppose a bunch of

people agree with you and act on that belief by making exactly the kinds of speech that led to imprisonment in the case you decided. What's going to happen to them? In the short run—as long as you continue to be outvoted by your colleagues—they are going to prison.

Maybe, though, the people who agree with your dissent will not make *exactly* the same speeches that got others into trouble. Their criticisms of the government, as lawyers would put it, are distinguishable from the ones your colleagues held to be punishable. Your dissent might encourage prosecutors and lower court judges to think twice about “extending” the Court’s decision to this new situation.

All this buys into a complicated and probably mistaken “theory” about how one case serves as a precedent for another. To continue with the example: Last year your colleagues upheld a conviction for criticizing the government, and you dissented. This year another case involving a similar but slightly different speech comes back to the Court. What are the possibilities?

- Your colleagues think that the same principle that justified the conviction last year justifies a conviction this year. Your dissent has no effect on the outcome.
- Your colleagues think that last year’s principle does *not* extend to cover this year’s speech, and they let the speaker off. Again, your dissent has no effect.

And what about you?

- You still think that last year’s decision was wrong, and you stick by your guns. Whether this year’s speech is distinguishable doesn’t matter to you.

- You still think that last year's decision was wrong, but you think that, even applying the majority's erroneous principle, the speech is constitutionally protected, and you vote to let the speaker off. It is probably worth observing that your colleagues may think to themselves that your willingness to distinguish this case from last year's is a bit convenient, especially if *they* think that their principle, properly applied, means that this year's defendant should go to jail, too.

So far, the fact that you dissented in the first case does not have any effects on the second. There are a couple of other possibilities, though.

- Your dissent last year might have eaten away at your colleagues' commitments, and some of them will change their minds, join you, and vote to overrule the decision they made last year. This is possible, and does happen. But it should be no surprise that it does not happen often. After all, the reasons you gave last year did not persuade them then, and—unless something new has happened (an important qualification)—it is hard to see why those very same reasons should suddenly persuade them now.
- You might say to yourself that you have a duty to apply the entire body of law, including last year's precedent, and that, when you do so, this year's speech is covered by the Court's (erroneous) principle. So, you vote to send the speaker to jail. This too happens, but again rarely, for the obvious reason: you think that, if your colleagues had gotten the law right last year, this defendant would go free, but because they made a mistake last year, she has to go to jail. This is not going to be a comfortable decision for you to make, and as long as there is some possible way of distinguishing this

year's case from last year's, you are going to be strongly tempted to say that the cases are different even under your colleagues' principle.

The conclusion of all this is that your dissent is not going to have much effect on outcomes in the short run. It is not going to keep your colleagues from extending their mistaken decision, although they might refrain from repeating their logic in this new case for their own reasons.

A large part of the reason, though, is that you are dealing with the same colleagues who made a mistake when they decided the first case. Change the players, and the outcomes might change. And, after all, if you wrote your dissent "for history," your assumption is that someday the players will change—that is, that there will be new justices on the Supreme Court who might share your constitutional vision.

At this point, saying that your dissent matters becomes quite tricky. Simplifying only a bit: new justices who share your constitutional vision get appointed when there is a new president who does the same. And how does that happen? Mostly, for reasons unconnected to your dissent, or indeed to the Supreme Court as a whole. An economic depression, a popular or unpopular war, demographic changes, migration from one part of the nation to another—all these are usually far more important in determining who the president is than what the Supreme Court does.

Usually, but not always. Occasionally, a presidential candidate may find it strategically useful to run against the Court, as Richard Nixon did in campaigning as a "law and order" candidate whose Supreme Court appointments would reverse the liberal criminal procedure precedents of the Warren Court. Such a candidate might build dissents from within the Court into the standard stump speech. Even in these campaigns,

though, the candidate's victory or defeat rarely turns on the issue of the Supreme Court: in the 1990s and after, Democrats routinely tried and failed to scare pro-choice voters into voting against Republican candidates who, if elected, would appoint justices who would in turn overrule *Roe v. Wade*.

Yet, sometimes what I have referred to as *constitutional visions* do matter in elections. Candidates run on platforms that implicate constitutional values: equality, domestic and international security, social justice. These platforms occasionally refer to Supreme Court decisions. In 1860 the Republican Party's platform denounced "the new dogma, that the Constitution, of its own force, carries Slavery into any or all of the Territories of the United States," as "a dangerous political heresy," alluding to the Supreme Court's decision in the Dred Scott case (Chapter 3), and modern political platforms have regularly taken positions on *Roe v. Wade*. More important, though, the platforms are infused with more general ideas about the way the political party's candidates think the Constitution should be implemented.

Those ideas come mostly from the party's political supporters, and in particular from the social movements that influence the general shape of American political parties. The civil rights movement of the 1960s produced a constitutional vision of racial and social equality that worked its way into the Democratic Party's platforms; the Christian Right developed a competing constitutional vision that was embodied in Republican platforms at the end of the twentieth century and after. Supreme Court decisions made some modest contributions to these social-movement visions. Urging Montgomery's African Americans to support the ongoing boycott of their city's segregated bus system in 1955, Martin Luther King Jr. said, "We are not wrong. If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States

is wrong. If we are wrong, God Almighty is wrong.” The social conservatism of the Christian Right reacted against *Roe v. Wade* and the Court’s decisions on school prayer (see Chapter 13). Scholars outside the legal academy who study these movements believe, though, that the Supreme Court’s contributions to the construction and appeal of these general constitutional visions are smaller than lawyers think they are (or hope them to be). King’s speech only began with a reference to the Supreme Court; it culminated with a reference to God Almighty.

Constitutional visions do matter to the Supreme Court—because presidents whose campaigns include appeals to such visions sometimes nominate Supreme Court justices who share their visions. Again, some historical perspective can deflate the importance of constitutional visions in the nomination process. The politics of judicial nominations mirrors politics generally. When ordinary politics involves interest-group bargaining, so does the politics of judicial nominations. That was true for most of the period from the 1870s to the 1950s. William O. Douglas was nominated to the Supreme Court in 1939 because he was from the West (and was a reliable New Dealer on economic questions), not because he was a strong civil libertarian. Some judicial appointments are straightforward political payoffs. The most important of these in recent history was the nomination of Earl Warren as chief justice in 1954 (see Chapter 11). And, importantly, when constitutional visions matter in politics generally, they will matter in judicial nominations. That was true with respect to constitutional visions about economic regulation during the New Deal, and it is true today: when presidents and senators inquire into what they call a person’s “judicial philosophy” (if they like the person) or “judicial ideology” (if they do not), they are really asking about the person’s constitutional vision.

So, dissents can matter, but in quite an indirect way: a dis-

sent *might* be picked up by a social movement because the dissent expresses something the movement already has in its constitutional vision; the social movement's constitutional vision *might* affect a political party and its candidates; successful candidates *might* nominate judges and justices because of *their* constitutional visions; and these new justices *might* conclude that the dissent—by now, perhaps years in the past—provides a better account of our Constitution than the majority opinion does. All of the qualifications are important here.

That the path from dissent to effects is so indirect also helps illuminate a question we might naturally ask about dissents: how would our world be different had the dissenters prevailed? In one sense, the answer is ordinarily going to be simple: “not much.” There almost certainly would have been a Civil War no matter what the Supreme Court said in the Dred Scott case (Chapter 3); African Americans in the South would almost certainly have faced substantial discrimination no matter what the Supreme Court said in the *Civil Rights Cases* (Chapter 4) or *Plessy v. Ferguson* (Chapter 5). And the reason the world would not be much different is simple, too. The way our world looks is determined far more by economics, social change, demographics, and the like than it is by Supreme Court decisions. It takes a long time to traverse the indirect path I described, and during that time lots of other things change. When the dissent is “vindicated,” should we explain that result by saying that the decision was right from the start, or by noting all the other things that happened between the time the dissent was written and the time it became the law?

That dissents matter, but almost always indirectly and over a long period, shapes what we can say about recent dissents, and explains why this book includes only a single dissent from the twenty-first century. The more recent the dissent, the harder it is to know what social, economic, and political devel-

opments will occur that will lead the dissent to fall by the way-side or to become important.

Perhaps, then, dissents that are “merely” interesting are ones that no important social movements pick up. The great dissenters are those whose dissents resonate with the constitutional visions of the social movements that in the long run have affected our political system.

The dissents compiled here span most of the Supreme Court’s history. The collection offers a quick overview of almost all the important issues the Court has dealt with, although of course there are gaps. I introduce each dissent with a short description of the background against which the case was decided—not only its facts, but sometimes its political and social setting. I have edited the dissents, sometimes severely, to make them as accessible as possible to readers who are not lawyers, but I believe that I have preserved enough of the *legal* analysis in each opinion to make it clear that these are dissents from Supreme Court opinions, not editorial essays about the policy or politics of the Court’s decision. Each dissent is followed by a discussion of the dissent’s effects and significance. I have used these followup discussions to introduce several themes important in today’s conversations about constitutional law generally. Among those themes are these:

- *The rhetoric of dissent.* Styles of opinion writing have changed. Older opinions are more ornate than more recent ones. Justice John Marshall Harlan’s opinions go on at enormous length, much of which appears, even after editing, to be wheel-spinning that does not advance any discernible argument (for an example, see Chapter 4). Justice Robert Jackson wrote more sparsely, and was a master at turning phrases that captured deep insights, but he too sometimes

had difficulty in sustaining an argument from beginning to end (for an example, see Chapter 11). On the Court today, Justice Antonin Scalia has perfected the “opinion as attack ad” rhetoric, offering quotable criticisms that writers of op ed pieces can incorporate into their work without saying anything new (for an example, see Chapter 16). Of the opinions in this book, Justice Louis Brandeis’s dissent in *Whitney v. California* (Chapter 7) is certainly the most elegant freestanding piece of prose—somewhat surprisingly, coming from the pen of someone who might be described as the justice with the soul of an accountant.

- *Great dissenters.* A few judges appear more than once in what follows. Taking account of the fact that my selections embody personal judgments made in an effort to provide selections from the entire history of the Supreme Court dealing with most of the major issues the Court has addressed, we might consider why these judges play a seemingly special role—and why other judges, notably William O. Douglas, who once were regarded as great dissenters, do not appear in the collection. For Justice Douglas, the answer is easy: his dissents *were* vindicated by history, but his writing style was somewhat slapdash and, probably more important, he actually took seriously the legal views against which he was writing. The effect was to make Justice Douglas’s dissents curiously time-bound. We might contrast him with Justice John Marshall Harlan, whose writing style seems quite ornate to us today, but whose dissents were animated by a powerful moral vision that retains its appeal. One final note: it is too soon to tell whether Justice Antonin Scalia, who appears twice in this collection, will someday be seen as a great dissenter. We don’t know whether his constitutional

vision will be vindicated, and—although here I know that I have idiosyncratic views—his writing style, widely admired today, may have less staying power than most people believe it will.

- *Legal doctrine as precedent.* We must interpret dissents to know what they mean, just as we must interpret majority opinions. And, just as with majority opinions, the meaning of a dissent depends at least as much on what *we* choose to make of it as it does on what its author meant. Precedents—and here we are considering dissents as precedents—can be extended in many directions, and their words are typically inadequate to project only one meaning for the future. The most dramatic example in this collection is Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson* (Chapter 5). Written at the end of the nineteenth century, the dissent was used in the twenty-first to explain why affirmative action programs were unconstitutional *and* why they were perfectly constitutional. Importantly, neither side was “misusing” the dissent. Both pro- and anti-affirmative action themes can fairly be found in the dissent, and Justice Harlan did not have to choose between them. Both themes pointed to striking down the segregation statute he was dealing with, and he had no reason to worry about problems of affirmative action that were nearly one hundred years in the future.
- *Political change and the vindication of dissents.* Several of the dissents included here have been—or might yet be—vindicated by history. Federal antidiscrimination laws held unconstitutional in the *Civil Rights Cases* (Chapter 4) are now uncontroversial, though their formal constitutional founda-

tions are different from the ones found inadequate in those cases. Racial segregation, held constitutional in *Plessy*, is now unconstitutional. Legislative regulation of the wages paid to ordinary workers was held unconstitutional in *Lochner v. New York* (Chapter 6), and is today so obviously constitutional that the only debates we have are over what the federally mandated minimum wage should be, not whether the Constitution allows Congress to prescribe a minimum wage.

Before taking a completely sunny view of these prescient dissents, we should remember that a dissent's vindication, if it comes, is the product of a complex social and political process. Some of the dissents were not vindicated, but the Court's holdings prevailed only after strong resistance was overcome. Seeing how dissents gradually became the law may be one of the best ways of seeing the connections between constitutional law resulting from the interplay of law, economics, politics, and society generally. In such cases we *know* that it was not law alone—or at least not law as laid down by the Supreme Court—that produced the outcomes we see, because these are cases where the law was one thing earlier and exactly the opposite later.

- *Popular constitutionalism.* A final theme introduces one of the more interesting developments in recent constitutional scholarship—the idea of popular constitutionalism. (A disclaimer: at least it is one of the more interesting themes to me, because I have been associated with the revival of interest in popular constitutionalism.)

Popular constitutionalism insists that responsibility for ensuring that our system of government adheres to the basic precepts of our Constitution lies at least as much with

the American people as a whole as it does with Supreme Court justices and other judges—and that the judges’ views about what the Constitution means have no particularly strong claim on the people, except to the extent that the judges give reasons supporting their interpretations that the people come to agree with.

Popular constitutionalism has been a persistent part of the U.S. constitutional experience. Critics of judicial review, early and late, have questioned why the judges’ views about the Constitution should always win out when the judges disagree with the constitutional views embodied in legislation adopted by the people and their representatives. I have included an early opinion critical of judicial review as the “dissent” to the Supreme Court’s unanimous decision in *Marbury v. Madison* (Chapter 1) as an illustration. Politicians have regularly asserted their right to disagree with the courts about the Constitution’s meaning. As the dissent to the Court’s unanimous decision in *McCulloch v. Maryland* (Chapter 2), I have included President Andrew Jackson’s message to Congress explaining why he vetoed a statute because he believed it to be unconstitutional even though the Supreme Court had made it clear that, in its view, the statute did not violate the Constitution. (An incidental benefit of including these “dissents” is that they show, concretely, that important discussions of constitutional law occur outside the Supreme Court—in state courts and in presidential messages.)

There is a vigorous debate in the legal academy today over the merits of popular constitutionalism, and I sketch some of the reasons for skepticism about popular constitutionalism in some of the followup discussions of particular dissents. And yet, if the overall argument I have made here

is right—that what the Constitution comes to mean results from the way social movements, politics, economics, and more lead us to think about what the Constitution's words mean—perhaps all constitutional law is popular constitutionalism. In which case, reading dissents is as important as reading majority opinions in helping us understand constitutional law.