



The New York Times | <http://nyti.ms/1ZWCEdH>

SUNDAY BOOK REVIEW

'Dissent and the Supreme Court,' by Melvin I. Urofsky

By DAHLIA LITHWICK OCT. 21, 2015

In the closing days of the United States Supreme Court's 2014-15 term, Justice Anthony Kennedy wrote an opinion in a case about racial bias in a jury pool that raised an almost wholly unrelated issue: the mistreatment of American prisoners in solitary confinement. In a rejoinder that also had nothing to do with the merits of the case at hand, Justice Clarence Thomas sneered that however small the accused's current solitary prison quarters might be, they are "a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora and Jose Luis Rositas, now rest." In his dissent in a case upholding the structure of federal tax subsidies under the Affordable Care Act, Justice Antonin Scalia dismissed the majority opinion as "pure applesauce" and sniffed that the law should be better named "Scotuscare."

Justice Stephen Breyer used a dissent in a case testing the efficacy of the lethal injection protocol to announce that he has come to believe the death penalty may always violate the Eighth Amendment. In a concurring opinion in the same case, Scalia scoffed: "Justice Breyer does not just reject the death penalty, he rejects the Enlightenment." Perhaps most famously, in last term's blockbuster marriage equality cases, the majority opinion written by Justice Kennedy was scorched and pillaged by four separate dissenting opinions, one from each member of the court's conservative wing. The critiques included Scalia's characterization of the majority opinion as containing the "mystical aphorisms of the fortune cookie" and the

conclusion (again by Scalia) that if he had ever joined an opinion whose opening lines were written as Kennedy's were, "I would hide my head in a bag."

Welcome to the era of the judicial dissent as body slam. Most of these opinions had precisely the desired effect: They were rounded up and repeated and retweeted and doubtless embroidered on throw pillows. In much of the ensuing commentary, court watchers worried that the justices' soaring rates of written dissents, nasty and personal attacks and scathing remarks read aloud from the bench bespeak a new toxicity in Supreme Court discourse. As Erwin Chemerinsky, dean of the law school at the University of California, Irvine, put it in an editorial in *The Los Angeles Times*, the justices seem to be working to "encourage a new generation of peevish, callous scoffers."

The legal historian Melvin I. Urofsky's ambitious new look at the role of dissents throughout our constitutional history offers some useful tools for making sense of the Roberts court's recent predilection for personal, non sequitur and ad hominem dissents. According to his central thesis, a dissent can become important, can indeed shape the future, when it becomes part of the larger "constitutional dialogue." Urofsky's concern here is for the "canonical or prophetic" dissents that go on to shape the future deliberations of the justices, their successors and the American public.

Urofsky's extraordinarily careful analysis and sense of historical depth make "Dissent and the Supreme Court" an important book, one that explores some of the most significant dissents in the history of that institution. Working his way through the arguments against published dissents in the court's early history — Chief Justice John Marshall wanted his colleagues to speak in "one voice" — Urofsky approvingly cites Chief Justice Charles Evans Hughes's defense of the dissenting opinion as "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." Urofsky's project is to show how the dissents in cases like *Dred Scott v. Sandford* (1857) and *Plessy v. Ferguson* (1896) became as much a part of constitutional history as the majority opinions.

Urofsky is riveting when detailing the arguments and rhetorical workings of the nation's great dissenters, from John Marshall Harlan to Louis Brandeis to William O. Douglas. He concludes with the reminder that in some of the most significant cases, the dissenter "spoke for a future that not only had not arrived but in some cases could not even be guessed at." Indeed his book can serve as a guide, a way of determining what constitutes a really fine and compelling dissent, which Urofsky distinguishes from — for instance — Justice Felix Frankfurter's frequent tone of: "I am right and why don't you people listen to me."

And yet it remains true that a unifying definition of constitutional dialogue — and even of a truly significant dissent — continues to be elusive. The greatest dissents are great, in this telling, precisely because they shaped history. And, as Urofsky cautions several times, in this instance quoting Mark Tushnet's "I Dissent," "the fate of a dissent lies in the hands of history." Without the benefit of a glance in the rearview mirror, it's almost impossible to know which brilliantly written opinions would be lost and which would become building blocks in the larger legal foundation of the country — and whether they did so in part due to outside factors.

As Urofsky notes, a dissent becomes influential because sometimes future justices will perceive its truth decades later. Sometimes colleagues' views will change. Sometimes public opinion will be energized. But it's terrifically hard to tell whether a particular dissent accomplished those ends or whether future circumstances, the shifting stances of colleagues and public pressures were the true agents of change. At the end of his book, Urofsky selects three contemporary dissents that may well stand the test of time. These three opinions will always be good, or even great — yet history may still ignore them.

Sometimes, Urofsky points out, a dissent may even come to stand for precisely the opposite of its original argument. Consider, for example, his lengthy probe into John Marshall Harlan's admonition in his *Plessy v. Ferguson* dissent that "our Constitution is colorblind," which evolved from a rejection of slavery to a rallying cry against racial remediation programs in the modern era. Here he presents a good example of the way our constitutional dialogue can become more complicated, going beyond the words and meanings of the dissents themselves.

“What is not clear,” Urofsky argues, “is whether the dissent in the modern court is as powerful an agent of dialogue as it was in the days of Holmes and Brandeis, especially in terms of conversing with the larger society.” But Justices Scalia, Ginsburg and Roberts, in particular, are trying to reach out to join the larger constitutional debate, using all the mechanisms at hand — be it a Notorious R.B.G. tote bag or an eminently tweetable put-down. The frightening thing to contemplate is that these modes of dialogue may be as powerful a tool of dissent in the modern era as the Brandeis brief was in the past.

Early in this sweeping history, Urofsky explains that the rise of the dissent as a mode of persuasion in the Roger B. Taney era was a function of judicial ego as well as ideology. The justices of the time were concerned with their reputations and worried about being identified with majority rulings they disliked. Later on, quoting Justice William Brennan, who was in turn borrowing from George Orwell, Urofsky describes the act of dissenting as a way “of saying I, of imposing oneself upon other people, of saying listen to me, see it my way, change your mind.”

The current Supreme Court includes a number of individuals who are fully capable of expressing a forceful I, and each has the ability to communicate powerfully — as well as almost instantaneously — with millions of citizens. Whether this is a continuing part of a constitutional dialogue or merely constitutional performance art remains to be seen. History will surely let us know.

DISSENT AND THE SUPREME COURT

Its Role in the Court’s History and the Nation’s Constitutional Dialogue

By Melvin I. Urofsky

Illustrated. 528 pp. Pantheon Books. \$35.

Dahlia Lithwick is the Supreme Court correspondent for Slate.

A version of this review appears in print on October 25, 2015, on page BR24 of the Sunday Book Review with the headline: Split Decisions.