
The value of a dissent can be described in many ways. Melvin Urofsky, a professor emeritus of history at Virginia Commonwealth University and former chair of its history department, believes that Chief Justice Charles Evans Hughes said it best when he explained: “A dissent in a court of last resort 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.”¹ As everyone knows, there are shining and memorable dissents, and there are dissents lost forever to the dustpan of history. This point is not lost on Urofsky, as he readily concedes that not all dissents are equal in Dissent and the Supreme Court. Urofsky mostly focuses on canonical dissents that have become part of the “constitutional dialogue.” As defined by Urofsky, the phrase “constitutional dialogue” includes more than the debates among Supreme Court justices, it also includes discussions between members of Congress, the executive branch, administrative agencies, state and federal courts, the legal academy and the public.

For the most part, Urofsky takes a chronological approach to exploring the history of the Supreme Court and its most influential dissents. Urofsky’s use of a wide lens allows him to touch upon many aspects of Supreme Court history. He also knows when to stop the narrative clock and add biographical sketches of many of the justices. He begins by taking the reader back to the early days of the Supreme Court where the practice was to issue seriatim opinions, wherein justices delivered separate opinions. When

¹ Melvin I. Urofsky, Dissent and the Supreme Court: Its Role in the Court’s History and the Nation’s Constitutional Dialogue 12 (2015) (quoting Charles Evans Hughes, The Supreme Court of the United States 68 (1928)).
Connecticut’s Oliver Ellsworth was the Chief Justice of the Supreme Court he attempted to reduce the number of seri-atim opinions. However, it was not until John Marshall became Chief Justice that the custom of speaking in one voice become an enduring practice. This practice was not without its critics; President Thomas Jefferson was irked by the practice. Of course, Jefferson, as Urofsky explains, was also generally annoyed by the appointment of Marshall and other judges by his predecessor, President John Adams. Urofsky recounts Jefferson’s ill-conceived and failed plan to remove some Federal judges by impeaching them. In justification of his plan to remove the Federalist justices, Jefferson quipped that “few died and none retired.”

Urofsky rightfully refers to Justice John Marshal Harlan as the first great dissenter. Harlan is best known for his dissent in *Plessy v. Ferguson*, where he memorably stated that, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Urofsky notes that Harlan, notwithstanding his soaring dissent, was a man of his time in his patrician and racist view of African-Americans. Urofsky adds that despite *Plessy’s* holding of “separate but equal” being overruled by *Brown v. Board of Education* and the legislative success of the civil rights movement, questions of race continue to return to the Court. Urofsky also comments on what he considers the irony of Chief Justice John Roberts’ opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, where Roberts refers to a “color-blind Constitution” in striking down the voluntary use of race to achieve the benefits of diversity and to end racial isolation.

Any book about great dissents must give due recognition to Justice Oliver Wendell Holmes, Jr.’s dissent in *Abrams v. United States*. The majority opinion in *Abrams* upheld the convictions of all five defendants for violating the 1918 Sedition Act, which banned almost any speech criticizing

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2 163 U.S. 537 (1896).
5 250 U.S. 616 (1919).
the government. Holmes notably stated:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.6

Urofsky observes that Holmes’ dissent has resonated among the justices over the years and refers to forty-one majority, concurring or dissenting opinions where this dissent was discussed. The interpretation of the First Amendment has continued to develop since Abrams. The First Amendment, as explained by the United States Supreme Court in Brandenburg v. Ohio,7 does not allow a state to prohibit advocacy of the use of force or of a violation of the law, “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

Justice Louis Brandeis’ dissent in Olmstead v. United States8 is discussed at length by Urofsky. The majority opinion upheld the warrantless taps on phones that lead to the arrest of Olmstead and seventy other people. Brandeis’ dissent was one of his most eloquent. Brandeis and his former law partner, Samuel D. Warren, had many years before in an 1890 law review article advocated that a common-law right to privacy existed. This article foreshadowed a passage from his dissent wherein he stated that the makers of the Constitution conferred “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation

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6 Id. at 630.
8 277 U.S. 438 (1928).
of the Fourth Amendment.”

Olmstead was overruled, in part, by Katz v. U.S., which found the wiretapping of a phone booth inconsistent with the protections embraced by the Fourth Amendment. It was in Katz that Justice Potter Stewart declared that the “Fourth Amendment protects people, not places.” The right to privacy, as discussed by Justice Brandeis, figures prominently in the reasoning underlying the decision in Katz.

Urofsky also addresses the treatment of protective legislation by the Supreme Court. He describes it as a battle between conservative advocates of substantive due process and freedom of contract, on one hand, and reform proponents of the police power, on the other hand. Urofsky starts his discussion with Lochner v. New York, which involved a challenge to a New York law that restricted baker’s hours to ten hours a day and sixty hours per week. The majority agreed with Lochner, holding that the hours provision interfered with the right of contract as part of the liberty protected by the due process clause of the Fourteenth Amendment. Justice Holmes authored one of his iconic dissents. Urofsky states that Holmes believed that judges should not be in the business of determining the wisdom of legislation and that the state should be given the widest latitude in using its police powers. Holmes stated that:

The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics...a Constitution is not intended to embody a particular economic theory... I think that the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as

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9 Id. at 478.
11 198 U.S. 45 (1905).
Urofsky explains that Holmes was not opposed to judicial review and would not give a legislature carte blanche discretion. However, unless Holmes found a statute arbitrary, he would not strike it down as long as a “reasonable” person could find it sensible. Urofsky notes that Justice William O. Douglas in *Williamson v. Lee Optical Co.* adopted Holmes’ rational basis test as the standard the Supreme Court would use going forward in evaluating economic regulations. Urofsky returns to substantive due process later in the book when he discusses Justice John Marshall Harlan’s dissent in *Poe v. Ullman.* The case involved a Connecticut law enacted in 1879 prohibiting a physician from dispensing advice about birth control even when the life of the mother was in danger. The majority avoided the constitutional issue of whether the law violated the due process clause of the Fourteenth Amendment by finding the case nonjusticiable because Connecticut never prosecuted anyone under the law. Urofsky explains that the plaintiffs were essentially asking the court to resurrect substantive due process. After remarking that Justice Harlan’s opinions were usually conservative and restrained, Urofsky emphasizes that Justice Harlan’s dissent set forth a constitutional basis for privacy in the Fourteenth Amendment. In Urofsky’s opinion, Justice Harlan’s dissent in *Poe* provided a more logical analysis in recognizing a right to privacy in the Constitution than Justice Douglas’ opinion in *Griswold v. Connecticut* where the right to privacy was found in the “penumbras” of the Bill of Rights. According to Urofsky, in *Roe v. Wade,* Justice Harry Blackman boldly identified a new substantive due process right as the basis for noneconomic individual rights.

A more recent dissent discussed by Urofsky is Justice Ruth Bader Ginsburg’s dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*

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12 *Id.* at 75-76.
15 381 U.S. 479 (1965).
The majority held that the Equal Pay Act required an employee who believed she was being discriminated against to file a complaint within 180 days of the violation. Urofsky explains that such a restrictive interpretation effectively barred nearly all claims because few women would have known within six months that their pay was less than their male coworker. Justice Ginsburg, and the three other justices who joined her, attacked the majority’s decision and also called on Congress to modify the law and to make it clear that the 180 day period ran from the time that the employee learned of the discrepancy. Congress did act, and President Barack Obama signed what is known as the “Lilly Ledbetter Fair Pay Law” as one of first acts as President.

There are many more significant and interesting dissents analyzed in Dissent and the Supreme Court, which cannot be discussed in this book review. Urofsky concludes toward the end of his book that there is no evidence that Harlan’s dissent in Plessy, Holmes’ dissent in Abrams, or Brandeis’ dissent in Olmstead made significant impressions on those who read them at the time. However, each of these dissents, as well as others, has over time entered the canons of great dissents.

Dissent and the Supreme Court is a well-researched and discerning book that will appeal to members of the legal community and to those interested in American legal history. The book covers more than 200 years of dissents by the Supreme Court. The comprehensive nature of the book may wear on some readers, but for someone interested in the subject its lengthy treatment will not be a deterrent. Although the book may be of less interest to other members of the public, it is a book for anyone who wishes to understand better the constitutional system of the United States, or as Urofsky puts it “the nation’s constitutional dialogue.”

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