

## Oral Dissenting on the Supreme Court

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# ORAL DISSENTING ON THE SUPREME COURT

Christopher W. Schmidt\* and Carolyn Shapiro\*\*

## ABSTRACT

In this Article we offer the first comprehensive evaluation of oral dissenting on the Supreme Court. We examine the practice in both historical and contemporary perspective, take stock of the emerging academic literature on the subject, and suggest a new framework for analysis of oral dissenting. Specifically, we put forth several claims. Contrary to the common assumption of scholarship and media coverage, oral dissents are nothing new. Oral dissenting has a long tradition, and its history provides valuable lessons for understanding the potential and limits of oral dissents today. Furthermore, not all oral dissents are alike. Dissenting Justices may have different reasons for deciding to announce their opinions, and the reception and potential influence of an oral dissent varies according to the situation. Recent scholarly efforts to identify a set of factors for predicting the likelihood of an oral dissent thus may miss the forest for the trees. The more interesting question, we suggest, is not necessarily why a Justice might decide to announce a dissent, but why certain oral dissents seem to reverberate while others (perhaps most) are ignored and forgotten. We therefore seek to recenter the discussion of oral dissents, moving to an empirical and analytical discussion of the role that oral dissents actually play in the dynamic relationship between the Court and the American people.

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## INTRODUCTION

On January 21, 2010, the Supreme Court handed down its much-anticipated decision in *Citizens United v. Federal Election Commission*.<sup>1</sup> A five-member majority voted to strike down prohibitions on corporate spending in elections. To demonstrate his deep disagreement with the majority, Justice Stevens chose to supplement his long, forcefully written dissent with a twenty-minute summary from the bench. His performance immediately became part of the story told in the media coverage of the decision. Stevens, according to one account, spoke “in a slow, halting voice, periodically getting tangled up in thickets of words like ‘corporation’ and ‘corruption.’”<sup>2</sup> In contrast to Justice Kennedy’s “brisk” summary of the majority’s opinion, Justice Stevens

<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> Dahlia Lithwick, *The Pinocchio Project: Watching as the Supreme Court Turns a Corporation Into a Real Live Boy*, SLATE, Jan. 21, 2010, <http://www.slate.com/id/2242208/>; see also Robert Barnes, *High Court Shows It Might Be Willing to Act Boldly*, WASH. POST, Jan. 22, 2010, at A4 (“Thought by many to be ready to leave the bench after this term, Stevens stumbled uncharacteristically in more than 20 minutes of denouncing the majority opinion.”); Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1 (describing Stevens talking “[i]n sometimes halting fashion”); Adam Liptak, *Stevens Era, Nearing End, Takes On An Edge*, N.Y. TIMES, Jan. 26, 2010, at A12 [hereinafter Liptak, *Stevens Era*] (“He seemed weary, and more than once he stumbled over and mispronounced ordinary words in the lawyer’s lexicon—corruption, corporation, allegation. Sometimes he would take a second or third run at the word, sometimes not.”).

“labored through a 20-minute rebuttal,” which, in a portrait offered by the *New York Times*, invoked “a sort of twilight . . . over the courtroom. It seemed the Stevens era was ending.”<sup>3</sup>

*Citizens United* is only one of the latest examples of notable oral dissents. In the 2007, for example, Justice Ginsburg has used oral dissents when urging Congress to override the majority opinion<sup>4</sup> and when suggesting that the Court’s decision to uphold an abortion restriction virtually identical to one it struck down only a few years earlier might be due to changes in the Court’s make-up.<sup>5</sup> Even more recently, Justice Ginsburg appeared to use her oral dissent in *Ricci v. DeStefano*,<sup>6</sup> the New Haven firefighters case, to address a national debate over whether “empathy” is, as President Obama urged, a desirable trait for a Supreme Court Justice.<sup>7</sup>

Perhaps the most famous of recent oral dissents, however, is Justice Breyer’s 2007 bench statement in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>8</sup> the case in which the Supreme Court struck down Seattle and Louisville’s

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<sup>3</sup> Liptak, *Stevens Era*, *supra* note 2.

<sup>4</sup> *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007). For a transcript and recording of the opinion announcement, see [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_1074](http://www.oyez.org/cases/2000-2009/2006/2006_05_1074).

<sup>5</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007). For a transcript and recording of the opinion announcement, see [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_380](http://www.oyez.org/cases/2000-2009/2006/2006_05_380). For a general discussion of Justice Ginsburg’s oral dissents, see Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1 [hereinafter Greenhouse, *Ginsburg*].

<sup>6</sup> 129 S. Ct. 2658 (2009).

<sup>7</sup> President Obama identified empathy as an important trait when selecting his first nominee to the Supreme Court. Press Briefing by Press Secretary Robert Gibbs (May 1, 2009) (Statement by President Barack Obama) (“I view the quality of empathy, or understanding and identifying with people’s hopes and struggles, as an essential ingredient for arriving as [sic] just decisions and outcomes.”). Obama’s critics argued that judicial empathy was a euphemism for liberal judicial activism. See, e.g., Wendy E. Long, *Opening of a Sorry Chapter*, WASH. TIMES, May 4, 2009 at A21 (deriding “empathy” as a “lawless standard of partiality”); *This Week* (ABC television broadcast May 3, 2009) (statement of Senator Hatch), available at [http://www.realclearpolitics.com/articles/2009/05/03/senators\\_leahy\\_and\\_hatch\\_on\\_this\\_week\\_96318.html](http://www.realclearpolitics.com/articles/2009/05/03/senators_leahy_and_hatch_on_this_week_96318.html) (“[H]e’s also said that a judge has to be a person of empathy. What does that mean? Usually that’s a code word for an activist judge.”).

In *Ricci*, the Court found discriminatory New Haven’s decision to throw out the results of a firefighter promotions test out of concern for its possible liability to African-American firefighters under disparate impact law. Justice Ginsburg’s oral dissent, read from a prepared text that she distributed to the press, included a statement that the white firefighters who had scored high on the test “understandably attract the court’s empathy.” Robert Barnes, *Parsing the Words of the Justices*, WASH. POST, July 2, 2009, at A17. The use of the word “empathy” was a deviation from the written opinion, which used the word “sympathy” instead. *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting). As one reporter put it, Justice Ginsburg’s oral dissent “seemed to be accusing her conservative colleagues in the majority of using the same standard that others have criticized President Obama for seeking in appointing judges: empathy.” Barnes, *supra*.

<sup>8</sup> 551 U.S. 701 (2007).

voluntary efforts to desegregate their schools. In fact, one of the most widely quoted lines from the dissent, if not from the entire case, appears nowhere in the more than seventy-seven pages of his written dissent. Speaking from the bench, and condemning the majority opinion for abandoning the principles and promise of *Brown v. Board of Education*,<sup>9</sup> Justice Breyer stated: “It is not often in the law that so few have so quickly changed so much.”<sup>10</sup> This statement, described by one observer as a “direct slap” at Breyer’s new colleagues, Chief Justice Roberts and Justice Alito,<sup>11</sup> became a key element of public discussions about the case.<sup>12</sup>

These and other recent high-profile oral dissents have received prominent media coverage in recent years,<sup>13</sup> and they have been the focus of a number of scholarly articles. Yet there has not yet been a comprehensive evaluation of the practice of dissenting from the bench. This Article fills that void. It evaluates the significance of Supreme Court oral dissents as both historical and contemporary practice, takes stock of the emerging but limited academic literature on the subject, and offers a new framework for analysis of oral dissenting going forward.

As a result of this research, we make several claims. First, contrary to the assumption of much contemporary commentary and media coverage, oral dissents are nothing new. The practice of Justices using the bench on decision day as a platform to draw attention to their views, to dramatize disagreements and tensions within the Court, and to attempt to engage the public has a rich historical pedigree. Although it is too soon to tell whether the recent high profile instances are a harbinger of a growing embrace of oral dissents by the current Justices, such a development would be more a return to past practice than a novel departure for the Court.

Second, we emphasize that not all bench dissents are alike. Although recent empirical scholarship has tended to approach oral dissents as a unitary category,<sup>14</sup> the differences between oral dissents may be as interesting as what they have in common. Any given oral dissent might serve one or more distinct purposes. It might be designed as a general public plea to constitutional principles. It might be intended as a more directed plea—a call to Congress, for example, to override a majority holding. Or it might simply reflect interpersonal tensions within the Court.

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<sup>9</sup> 347 U.S. 483 (1954).

<sup>10</sup> Transcript of Opinion Announcement, *Parents Involved*, 551 U.S. 701 (No. 05-908) (Breyer, J., dissenting) (hereinafter Oral Opinion of Justice Breyer), available at [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_908/opinion](http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion).

<sup>11</sup> JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 336 (2007).

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See, e.g., Greenhouse, *Ginsburg*, *supra* note 5; Adam Liptak, *When Words on Paper Don't Convey Enough Ire*, N.Y. TIMES, Mar. 9, 2010, at A12.

<sup>14</sup> See, e.g., Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices*, 102 L. LIBR. J. 7 (2010); Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560 (2009).

Third, as important as the oral dissent itself is the way in which the press and commentators discuss it in their reporting and criticism of the Court's work. While recent scholarly attention on oral dissents has focused on the Justices—on why they chose to dissent<sup>15</sup> and on how they might use oral dissents to engage with the public on the major legal issues of the day<sup>16</sup>—our research demonstrates that extrajudicial actors largely control, even create, the significance of oral dissents.<sup>17</sup> Many oral dissents are not even mentioned in the mainstream press or are mentioned only in passing with no meaningful discussion of their content.

Oral dissents thus become prominent parts of public discussion or debate only when the press or other extrajudicial actors find in the dissent a storyline that helps dramatize an otherwise attractive narrative. The traction of an oral dissent in public discourse is largely a product of factors well beyond the control of the dissenting Justice. We explore the implications of this reality, and we suggest that the Justices' contemporary use of oral dissents demonstrates some ambivalence about their relationship with the press and, ultimately, with the public.

This Article proceeds in three parts. Part I examines the recent attention Supreme Court oral dissents have received among legal scholars. This scholarship has tended in one of two directions: either a narrow focus on the factors that make oral dissents more likely or a broad, prescriptive discussion of oral dissents as catalysts for social reform movements. The more useful level of analysis, we argue, lies between these two approaches: a middle ground examination of the mechanisms by which oral dissents are interpreted and promulgated, with particular attention to the role of the press.

We develop our case for this approach to oral dissenting in the next two parts. Part II describes the historical development and use of oral dissents. Oral dissents, are hardly new. In this Part, we also begin to demonstrate the wide range of types of oral dissents and the surprisingly unpredictable nature of the press coverage of these events. In Part III, we turn to the modern era of oral dissenting. Here, we extend the themes identified in Part II to argue that oral dissents continue to be both diverse in apparent motivation and underreported in the press. We conclude the Article by noting that oral dissents can indeed play a role in public dialogue about important issues and we discuss steps the Justices might take if they wish to maximize their influence over such discussion.

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<sup>15</sup> See *infra* Part I.A.

<sup>16</sup> See *infra* Part I.B.

<sup>17</sup> One recent example of the media helping to create the significance of oral dissents is found in Linda Greenhouse's claim that the 2006 Term would be "remembered as the time when Justice Ruth Bader Ginsburg found her voice, and used it." Greenhouse, *Ginsburg*, *supra* note 5. Yet Ginsburg had already orally dissented six other times before that Term—more times than most of her colleagues during the same period of time. Greenhouse's focus on these particular recent oral dissents, however, helped to create a narrative about both Justice Ginsburg and the 2006 Term.

I. RECENT SCHOLARSHIP ON ORAL DISSENTING:  
MISSING THE FOREST FOR THE TREES

The high-profile oral dissents in 2007—and the widespread attention they received<sup>18</sup>—sparked a number of scholarly articles. These works generally fall into one of two categories. First, there are articles that use statistical techniques to attempt to identify the circumstances under which Justices are most likely to dissent from the bench.<sup>19</sup> Second, there are articles that describe and assess the actual and potential social and political impact of these dissents.<sup>20</sup> Most notable among these are Lani Guinier's 2008 *Harvard Law Review Foreword*,<sup>21</sup> her subsequent extension and discussion of the *Foreword* in a *Boston University Law Review* article,<sup>22</sup> and a number of pieces responding to her work.<sup>23</sup>

This Part explores this recent wave of scholarship on oral dissents. We evaluate the central claims they put forth and identify areas of weaknesses, including conflicting conclusions, underexamined assumptions, and issues that remain to be addressed.

A. *The Empirical Approach*

Two articles by teams of political scientists attempt to identify those factors that increase the likelihood that a Justice will issue an oral dissent: *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench*, by Timothy R. Johnson,

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<sup>18</sup> See, e.g., Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1; Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1 [hereinafter Greenhouse, *Integration Plans*]; Greenhouse, *Ginsburg*, *supra* note 5. In addition to the mainstream press, these oral dissents received attention from legal commentators. See, e.g., Jeff Bleich et al., *Dissenting from the Bench*, S.F. ATT'Y MAG., Spring 2008, at 30, 31–32; John Q. Barrett, *Commending Opinion Announcements by Supreme Court Justices 4 (2007)* (unpublished manuscript), available at <http://www.stjohns.edu/media/3/55c14b0772794f148fec48e3c14851a7.pdf>.

<sup>19</sup> Johnson et al., *supra* note 14; William D. Blake & Hans J. Hacker, *"The Brooding Spirit of the Law": Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J. 1 (2010), available at <http://ssrn.com/abstract=1328496>; see also Duffy & Lambert, *supra* note 14, at 23–37 (attempting to identify every case from 1969 to the present for which the authors could confirm there was an oral dissent).

<sup>20</sup> Johnson et al. make brief motions toward exploring the possible effects of oral dissents, *supra* note 14, at 1580–81, but this is not the focus of their article.

<sup>21</sup> Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) [hereinafter Guinier, *Foreword*].

<sup>22</sup> Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009) [hereinafter Guinier, *Courting the People*].

<sup>23</sup> Professor Guinier's *Boston University Law Review* article was the centerpiece of a panel discussion on "Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence" held at Boston University Law School in November 2008. The *Boston University Law Review* published reaction pieces to Guinier's article by Gerald Rosenberg, Robert Post, Linda McClain, and Fredrick Harris in 89 B.U. L. REV. 563–608 (2009).

Ryan C. Black, and Eve M. Ringsmuth (*HMR*), and *The Brooding Spirit of the Law: Supreme Court Justices Reading Dissents from the Bench*, by William Blake and Hans Hacker. These works both use logistic regression to compare cases in which there were known oral dissents with other cases that included dissenting opinions. Both teams of scholars use concededly incomplete data sets. Their works are among the very first to study the phenomenon of oral dissents and as a result they worked with the data available to them at the time.<sup>24</sup> Their findings and conclusions must therefore be considered preliminary. Perhaps unsurprisingly, the two studies agree that oral dissents are more likely in closely decided cases.<sup>25</sup> Indeed, Blake and Hacker found that the size of the majority coalition had the most explanatory power of any variable that they tested.<sup>26</sup> Each study also attempted to identify the political salience of particular cases and concluded that at least some measures of salience make oral dissents more likely. Blake and Hacker found, for example, that oral dissents were more likely in cases involving federalism and privacy (mostly abortion), although they found no such effect for cases involving civil rights or criminal law and procedure.<sup>27</sup> The *HMR*

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<sup>24</sup> *HMR* used every case for which an opinion announcement audio file was available on the Oyez website as of August 2007. They identified 40 orally announced opinions. Johnson et al., *supra* note 14, at 1573. In discussing the *HMR* findings, we will refer to all of these orally delivered opinions as dissents, although six of them were concurrences. *Id.* at 1573–74 n.75. Since these authors gathered their data, many more opinion announcement recordings have been uploaded onto Oyez.com. See Duffy & Lambert, *supra* note 14, at 13.

Blake and Hacker built a more comprehensive database of dissents. They supplemented the Oyez material with a survey of press accounts and they identified a total of ninety-three oral dissenting opinions in eighty-six separate cases, beginning with the Burger Court in 1970. Blake & Hacker, *supra* note 19, at 5; E-mail from William Blake to Carolyn Shapiro (March 27, 2009) (on file with author). They do not include concurring opinions in their count. Blake & Hacker, *supra* note 19, at 5. The significant difference in the size of the two studies' data sets certainly may explain some of their inconsistent findings. Despite Blake and Hacker's considerably larger data set, however, their findings, too, must be considered preliminary. As we will show, press reports of oral dissents are surprisingly inconsistent and oral dissents are often under-reported. Since they relied heavily on press reports in building their data set, their study is better understood as evaluating the likelihood of an oral dissent being issued *and* of it being reported.

<sup>25</sup> Blake & Hacker, *supra* note 19, at 18 (finding that the smaller the size of the majority coalition, the more likely a Justice was to read a dissent from the bench); Johnson et al., *supra* note 14, at 1578–79 (finding that cases decided by a minimum winning coalition—generally 5-4 decisions—were more likely than other cases to have oral dissents). There are instances, however, of a lone dissenter reading from the bench in an 8-1 case. Justice Scalia did so, for example, in *Morrison v. Olson*, 487 U.S. 654 (1988). See Stuart Taylor, Jr., *Scalia In Dissent*, N.Y. TIMES, June 30, 1988, at A1.

<sup>26</sup> Blake & Hacker, *supra* note 19, at 18.

<sup>27</sup> *Id.* at 19–20. To identify issue areas, Blake and Hacker relied on the widely-used Supreme Court Database, <http://scdb.wustl.edu>. Despite the database's ubiquity in the political science and empirical legal studies literature, its coding of issue areas is problematic and incomplete. See generally Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009).

authors found that the more questions a Justice asked at oral argument, the more likely that Justice was to announce a dissent orally.<sup>28</sup>

The studies also present some surprisingly inconsistent findings. Most notably, the studies disagree as to whether a greater ideological distance between majority opinion writer and dissenter makes an oral dissent more or less likely. Blake and Hacker found that oral dissents are more likely the *closer* the two Justices are ideologically,<sup>29</sup> while *HMR* reached the opposite conclusion.<sup>30</sup> Blake and Hacker also found that oral dissents were more likely where a case “formally alters precedent,”<sup>31</sup> or when the Court decides constitutional issues.<sup>32</sup> The *HMR* authors, in contrast, found that formal alteration of precedent or a declaration that a law was unconstitutional had no statistically significant effect on the likelihood of a Justice dissenting orally.<sup>33</sup>

The *HMR* authors make little attempt to explain their statistical results, perhaps due to their preliminary nature. In contrast, Blake and Hacker offer an intriguing hypothesis for why Justices choose to dissent from the bench. They argue that:

[The decision to dissent at all] is a component of the collaboration and bargaining characterized by opinion writing and voting fluidity. However, it remains predominantly a behavioral option to which justices resort when those processes are strained. . . . The subject of our study here raises the prospect of a more severe response on the part of the justices—dissenting from the bench

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<sup>28</sup> Johnson et al., *supra* note 14, at 1577–78.

<sup>29</sup> Blake & Hacker, *supra* note 19, at 20–21.

<sup>30</sup> Johnson et al., *supra* note 14, at 1576–77. Not only did the two studies use different datasets, but they also measured ideological distance differently. The *HMR* authors relied on Judicial Common Space scores popular among political scientists. *Id.* at 1574 (citing Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306–07 (2007)). Blake and Hacker, on the other hand, used the percentage of liberal votes cast by each Justice, as coded in the Supreme Court Database, *supra* note 27. They then calculated ideological distance as the absolute value of the difference in those scores between the majority author and the dissenter. Blake & Hacker, *supra* note 19, at 14. For a critique of the database’s liberal/conservative ideology coding, see Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79 (2010).

<sup>31</sup> Blake & Hacker, *supra* note 19, at 18.

<sup>32</sup> *Id.* at 18. Blake and Hacker hypothesize that this is because “correction cannot be had through legislative means.” *Id.* They overstate this claim, however. They describe cases of judicial review as deciding the constitutionality of a “legislative enactment.” Of course judicial review can also be of executive or judicial actions. Moreover, correction of a sort can be had through legislation when an enactment is *upheld* as constitutional. Under those circumstances, the legislature can still decide to repeal the law. Nor do Blake and Hacker provide any theoretical reason why lack of a legislative remedy should make oral dissenting more likely. To the contrary, if the dissenting Justices are appealing to the public, one might expect oral dissents to be most common where Congress is able to act.

<sup>33</sup> Johnson et al., *supra* note 14, at 1574.

may indicate that bargaining and accommodation have broken down irreparably.<sup>34</sup>

This hypothesis is consistent with a number of their findings. In particular, it is consistent with their and *HMR*'s finding that the smaller the majority coalition, the more likely there will be an oral dissent. “[B]argaining and accommodation among justices within the majority coalition occurs most frequently when that coalition is of minimum winning size,” they suggest.<sup>35</sup> The excluded dissenter in a close case may therefore feel more frustration—perhaps seeing moments when the bargaining and accommodation on the winning side might not have succeeded—than in an “8-1 case in which a dissenting Justice may be resigned to a lonely fate.”<sup>36</sup>

Blake and Hacker’s hypothesis also provides a possible explanation for their counterintuitive finding that greater ideological distance between majority author and dissenter *reduces* the likelihood of an oral dissent. They suggest that bargaining and accommodation are more likely to have been attempted but to have failed where the Justices are ideologically close than where they are further apart, leading to the ideologically close, but frustrated Justice orally dissenting.<sup>37</sup>

Intriguing as their findings and hypotheses may be, however, the empirical studies leave unaddressed some fundamental questions. Essentially, these studies and their statistical techniques attempt to determine what oral dissents have in common in comparison to dissents that were not orally delivered. But this approach may be of limited value for two important reasons. First, the factors that make oral dissent *more* likely do not make them likely in an absolute sense. Even in the presence of all of the statistically significant factors, oral dissents remain somewhat infrequent, and the empirical analysis therefore may not give us much insight into why particular Justices dissent in particular cases.<sup>38</sup> Such insight might be better gained through the more qualitative, thick descriptive approach that we pursue in later parts of this Article.

Second, the statistical approach is not conducive to an analysis of the ways in which oral dissents *differ* from each other. A recognition of the diverse qualities of oral dissents allows us to understand not only the reasons that particular Justices might be motivated to dissent from the bench in particular cases, but also changing norms over time, differing views of the appropriateness of oral dissents in general, personality

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<sup>34</sup> Blake & Hacker, *supra* note 19, at 2.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 21.

<sup>38</sup> This problem is a recurrent one in empirical legal scholarship, where the fact that a variable has a tiny impact on a particular outcome may be ignored while the fact that it is statistically significant is used to suggest that the variable is substantively important. See BRIAN TAMANHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 145 (2010) (citing STEPHEN T. ZILIAK & DEIDRE MCCLOSKEY, THE CULT OF STATISTICAL SIGNIFICANCE (2008)) (arguing that statistical studies of judging overemphasize “whether” a factor has an effect to the expense of considering “how much” of an effect it has).

quirks, and interpersonal dynamics. Our exploration of the history of oral dissents attempts to flesh out these and other differing features of oral dissents.

### *B. The Qualitative Approach*

In contrast to the empirical studies' focus on the conditions under which a Justice is more likely to deliver an oral dissent, recent work by Professor Lani Guinier explores the social and political meaning and potential of oral dissents. In her *Harvard Law Review Foreword* following the close of the Supreme Court's 2007 Term,<sup>39</sup> Guinier describes what she calls the "demosprudential" potential of oral dissents. "Demosprudence" is a term she and Professor Gerald Torres have coined to describe jurisprudence that bolsters democratic participation and accountability.<sup>40</sup> An oral dissent can be demosprudential, she argues, because it "offer[s] a novel and potentially interactive pedagogical space, one that, with the right technology and a democratizing agenda, could spark a lively conversation among, and with, a decidedly non-professional and non-elite audience."<sup>41</sup> That conversation would be "democracy-enhancing" because it can "inform and [be] informed by the wisdom of the people" and "engage a wider constituency in debates about the core conflicts at the heart of democracy."<sup>42</sup>

Guinier's primary example of the demosprudential potential of oral dissents is Justice Breyer's bench statement in *Parents Involved*.<sup>43</sup> Justice Breyer's oral dissent was notable for its length, its passionate delivery, and—especially—for its blunt (and unwritten) assessment of the case's significance: "It is not often in law that so few have so quickly changed so much."<sup>44</sup> Guinier describes Breyer's twenty-one minute

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<sup>39</sup> Guinier, *Foreword*, *supra* note 21.

<sup>40</sup> *Id.* at 15 n.46 (citing LANI GUINIER & GERALD TORRES, CHANGING THE WIND: THE DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS (forthcoming 2010)).

<sup>41</sup> *Id.* at 12.

<sup>42</sup> Guinier, *Foreword*, *supra* note 21, at 15–16. Although Guinier acknowledges that written dissents and concurrences (and even, on occasion, majority opinions like *Brown v. Board of Education*, 347 U.S. 483 (1954)) can serve these purposes, she argues that oral dissents are particularly suited to demosprudence. *Id.* at 52. Oral dissents, she explains, "offer an intriguing prism on the way that dissents provide alternative sources of democratic legitimacy and important pathways toward democratic accountability. Oral dissents tend to be short. They are conversational in style. They have no footnotes. . . . [T]hey are often impassioned." *Id.* at 23 (citations omitted). Bench announcements allow a Justice to abandon the formal conventions of judicial opinions, "tell a good 'public story'" and thereby to "speak to members of the public at large rather than to the dissenter's usually sequestered colleagues." *Id.* at 49–50.

<sup>43</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). *Parents Involved* is not the only example she cites, however. She notes Justice Ginsburg's oral dissents in both *Ledbetter* and *Carhart*, as well as both oral and written dissents—and one written concurrence—from the Court's October 2007 Term. Guinier, *Foreword*, *supra* note 21, at 42–43; *see also id.* at 4 (citing *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (Stevens, J., dissenting) (oral dissent); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Scalia, J., dissenting) (oral dissent); *Baze v. Rees*, 128 S. Ct. 1520 (2008) (Stevens, J., concurring); *Wash. State Grange v. Wash. Republican Party*, 128 S. Ct. 1184 (2008) (Scalia, J., dissenting)).

<sup>44</sup> Oral Opinion of Justice Breyer, *supra* note 10, at 32:53–33:01.

dramatic delivery in “a voice both incredulous and distressed,”<sup>45</sup> and his use of “memories, values, and practices that might . . . resonate[] with a less educated audience, including those who never graduated from high school but had seen evidence in their own lives of what he described.”<sup>46</sup> Moreover, Breyer’s arguments were also explicitly concerned with democratic institutions. “[D]emocratically elected school boards,” he argued, should have “‘significant practical leeway’ . . . to make educational policy that ‘tries to bring people together.’”<sup>47</sup> Although the audio was not made public until months later, and although Justice Breyer never released a transcript or written version of his bench announcement, his oral dissent “reverberated throughout the blogosphere, inviting other non-judicial dissenters to speak up in more traditional media.”<sup>48</sup>

For Guinier, the *Parents Involved* oral dissent met the key criteria of a demosprudential dissent. In attacking the majority for overruling plans that were “adopted democratically to overcome racial isolation . . . [and that] are ‘partly remedial, partly educational, partly civic,’”<sup>49</sup> Breyer’s statement “engage[d] with a core issue of democratic legitimacy, democratic accountability, democratic structure, or democratic viability.”<sup>50</sup> The oral dissent had a “dramatic tone” that was less a “conventional point-by-point refutation of the majority’s logical flaws” than a discussion “organized around values.”<sup>51</sup> And, perhaps most critically, she argues that the oral dissent spoke “to non-judicial actors, whether legislators, local thought leaders, or ordinary people, and encourage[d] them to step in or step up to revisit the majority’s conclusions.”<sup>52</sup>

Not only was Breyer’s announcement more accessible to this audience than a typical written opinion, but, Guinier claims, “some ordinary people were listening.”<sup>53</sup> The dissent “had legs in directly affected communities.”<sup>54</sup> One of the non-judicial actors Guinier highlights was Pat Todd, an education administrator in Louisville who “used the dissent to remind herself, her colleagues, and Louisville residents that they controlled some chess pieces too.”<sup>55</sup> Similarly, local officials and community leaders were “[a]ffirmed in part by Justice Breyer’s dissent” in their efforts to “explore the options” still available to them to ensure racially integrated schools.<sup>56</sup> “Emboldened

<sup>45</sup> Guinier, *Foreword*, *supra* note 21, at 8.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 8 (quoting Oral Opinion of Justice Breyer, *supra* note 10, at 25:16–25:27).

<sup>48</sup> *Id.* at 10 & n.23 (citing Jack Greenberg’s denunciation of the ruling as “the rebirth of massive resistance in more acceptable form”).

<sup>49</sup> *Id.* at 8 (quoting Oral Opinion of Justice Breyer, *supra* note 10, at 21:05–21:09).

<sup>50</sup> *Id.* at 49.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 12.

<sup>54</sup> *Id.*; *see also id.* at 37 (noting that Breyer’s oral dissent “seems to have had some practical impact” on local school boards).

<sup>55</sup> *Id.* at 12.

<sup>56</sup> *Id.* at 12–13. Guinier speculates that Breyer might have had personal reasons for delivering his oral dissent as he did. He may have sought to “link[] himself to the civil rights community, and especially civil rights attorneys. Perhaps he issued an impassioned oral

by the dissent,” Guinier explains, “Todd and her cohorts are ‘norm entrepreneurs’ who are pushing back on the majority’s formulation because it is inconsistent with the values of the community they represent.”<sup>57</sup>

Like the empirical scholars, Guinier raises important questions that are worthy of additional inquiry, yet her analysis of oral dissenting tends to waver between descriptive claims that demand additional empirical support and aspirational claims that too often strain plausibility. Her claim, for example, that Breyer’s oral dissent in *Parents Involved* had a discernible impact on the reactions of Todd and others is unsupported, as pointed out by Professor Gerald Rosenberg.<sup>58</sup> In Guinier’s telling, causation tends to be assumed rather than demonstrated. The nature of the causal links she alludes to are somewhat fuzzy: oral dissents “affirm[]”<sup>59</sup> or “embolden[]”,<sup>60</sup> they “reverberate[]” and they “invite[]”.<sup>61</sup>

In response to such critiques, Guinier retreats somewhat, asserting that “Rosenberg wrongly assumes that my claims are descriptive rather than aspirational.”<sup>62</sup> Guinier does in fact make some descriptive claims about the influence of oral dissents on social movements. But she apparently intends these claims to be understood as suggesting ways in which oral dissents *might* interact with social movements rather than as actually demonstrating that they have already done so. In other words, Guinier’s descriptions of the impact of the oral dissents in *Parents Involved* and other cases might be primarily a rhetorical device. Indeed, much of Guinier’s rhetoric is explicitly aspirational:<sup>63</sup> oral

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dissent—to which the civil rights lawyers bore witness—to show that ‘he gets it,’ that he is not just a technocrat with a steady but relatively quiet record on civil rights.” *Id.* at 36. He also might have been consciously reaching out to local school board officials, a possibility Guinier attributes to Breyer’s background as an administrative law scholar and his father’s career as a lawyer for a school board. *Id.* at 37–38.

<sup>57</sup> *Id.* at 13 (citation omitted).

<sup>58</sup> Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 570–71 (2009) (noting the lack of evidence that Todd knew about the oral dissent, as opposed to the written version).

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.* at 13.

<sup>61</sup> *Id.* at 10; see *supra* note 48 and accompanying text.

<sup>62</sup> Guinier, *Courting the People*, *supra* note 22, at 548. Robert Post defends Guinier against Gerald Rosenberg’s criticism that she fails to convincingly demonstrate that dissents have had any real impact on social movements by questioning the utility of causality to the issue. “[W]hat matters,” according to Post, “is the texture and substance of dialogue,” and judicial statements play a role in shaping the political dialogue over basic constitutional principles even if this effect cannot be demonstrated in an empirical causal analysis. Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 585 (2009). “Arguments about cause and effect can surely be relevant to assessing the plausibility of the descriptions we offer, but these descriptions must be understood in the first instance as qualitative rather than causal.” *Id.* at 586. Post does admit, however, that Guinier’s arguments as applied specifically to oral dissents are “perhaps vulnerable to some of the empirical points that Rosenberg advances.” *Id.* at 583.

<sup>63</sup> In her *Boston Law Review* article, Guinier explicitly draws upon hypotheticals to make her point about the potential of oral dissents. Guinier, *Foreword*, *supra* note 21.

dissents “have a distinctive *potential*,” they “*may* spark a deliberative process;” they “*can* become a crucial tool.”<sup>64</sup>

Guinier also identifies a central obstacle to opinion announcements having a real influence on society: dissemination. To allow oral dissents to reach their potential as significant contributions to a democratic discussion of constitutional principles, they need to be more directly conveyed to a broader audience. Currently, the dissemination of an oral dissent is largely dependent on an intermediary—the press sitting in the courtroom on decision day. Audio recordings of bench opinions are not released until months after the fact.<sup>65</sup> Guinier points out that technology allows the wide and immediate dissemination of oral dissents.<sup>66</sup> “For purposes of reaching a larger audience (for whom the Justices are otherwise invisible and indistinct from one another), the orality of delivering a dissent from the bench, which is then available on audiotape to the larger public, seems to be a potentially revolutionary communication ‘technology.’”<sup>67</sup> Such technology, Guinier argues, could help bring the demosprudential potential of oral dissents to fulfillment.

Moreover, Guinier does not claim that the mere existence of oral dissents, even with wider and more effective dissemination, would be sufficient to spark democratic engagement by a critical mass of people. Rather, “social activists, legal advocacy groups, media translators, legislators and ‘role-literate participants’”—people like Pat Todd—would need to hear and act upon the Justices’ messages.<sup>68</sup> And to some degree, the Justices do reach such individuals already. One example of this kind of dialogue between a dissenting Justice and social movement leaders is Justice Ginsburg’s dissent in *Ledbetter*, in which she urged congressional action to correct the majority’s interpretation of Title VII. Marcia Greenberger of the National Women’s Law Center heard and responded to what she described as Justice Ginsburg’s “clarion call,” and worked to get Congress to override the decision.<sup>69</sup>

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<sup>64</sup> *Id.* at 14 (emphasis added).

<sup>65</sup> See Oyez FAQ, <http://www.oyez.org/faq/> (last visited Oct. 3, 2010).

<sup>66</sup> Guinier, *Foreword*, *supra* note 21, at 54 (arguing that “[a]s a result of the Court’s resistance to twenty-first-century technology, most oral dissents do not yet realize their demosprudential potential”).

<sup>67</sup> *Id.* at 28.

<sup>68</sup> Guinier, *Courting the People*, *supra* note 22, at 543 (citing Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1339–48 (2006)). Guinier concedes, however, that no “single Justice in dissent could issue a poetic and inspired commentary that by itself could initiate action and be historically relevant in the same way as Martin Luther King’s speech at Holt Street Baptist Church in Montgomery in 1955 or on the Washington Mall in 1963.” *Id.* at 561.

<sup>69</sup> Guinier, *Courting the People*, *supra* note 22, at 543–44. Another example of this phenomenon is Ginsburg’s oral dissents in *Gonzales v. Carhart*. These cases clearly resonate with Ginsburg’s historic role as a legal advocate for women’s rights. And Justice Scalia, Guinier says, “effectively uses his originalist jurisprudence as ‘a language that a political

Professor Guinier's articles provide valuable insight into the practice and potential of oral dissents. Yet we diverge from her conclusions and analysis at several key points. First, Guinier, like most contemporary commentators, assumes that recent high-profile oral dissents represent "a new genre of judicial speech."<sup>70</sup> The long and rich history of oral dissenting that we describe in the following Part belies that assumption.

Second, we believe that an assessment of the democracy or dialogue-enhancing potential of oral dissents requires an analysis of the process by which oral dissents have long been communicated beyond the courtroom—if they are communicated at all. The history of this dissemination cautions against bold claims for the potential of oral dissenting to make consistent contributions to popular discourse or social movement mobilization. Notably, the history of oral dissents highlights the critical role of the media in creating (or ignoring) the public significance of an oral dissent. Indeed, we argue that dissents sometimes gain attention not because of their socially transformative content, but because they are consistent with a narrative that the media is eager to tell.

Guinier is surely right that releasing same-day audio of opinion hand downs on the internet would greatly expand the audience for those announcements and would provide social movements and their leaders more opportunities to capitalize on them. Should cameras ever appear in the U.S. Supreme Court, that change would also likely expand the Court's ability to engage in more of a dialogue with the public and with other democratic institutions. The effects of such changes, however, are likely to be considerable more chaotic and unpredictable than Guinier suggests.<sup>71</sup>

## II. HISTORICAL PRACTICES: ORAL DISSENTS THROUGH THE WARREN COURT

A look at the history of the public announcement of Supreme Court opinions offers valuable perspective on the bench dissents of recent years. The historical record undermines certain assumptions contained in most recent media coverage and scholarly commentary on oral dissents. Most obviously, history refutes the suggestion that oral dissenting has always been a rare phenomenon.<sup>72</sup> To the contrary, oral statements in dissent, as well as in support of the majority holding, were common practice for most of the Court's history. If we indeed stand on the cusp of an era in which Justices articulate their dissenting positions from the bench more frequently and in terms more

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movement can both understand and rally around." *Id.* at 546 (quoting Guinier, *Foreword*, *supra* note 21, at 114).

<sup>70</sup> Guinier, *Foreword*, *supra* note 21, at 10.

<sup>71</sup> Cf. Dahlia Lithwick, *The Internet and the Judiciary: We Are All Experts Now*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA (Keith J. Bybee ed., 2007) 183–84 (arguing that while the Internet "provides the public with the tools to better understand the law, [it] offers every incentive to deliberately misunderstand it—to distort and demean and politicize it in ways that may have irreparable consequences").

<sup>72</sup> See, e.g., Blake & Hacker, *supra* note 19, at 2; Bleich et al., *supra* note 18, at 31.

conversational and direct than in their written opinions, then this is hardly something new. Rather, it is best understood as a return to a relatively established past practice.

The historical record also establishes that many oral dissents fail to garner the attention of the press or the public. This conclusion is in some tension with assumptions made by contemporary commentators who suggest that an oral dissent is an inherently newsworthy event.<sup>73</sup> Finally, we conclude that to the extent that oral dissents do become well-known, it is often because of factors unrelated to the underlying legal arguments. Identifying the reasons that a particular oral dissent becomes noteworthy is confounded by not only the variety in motivation, style and frequency of such dissents, but also by the necessary but unpredictable role of extrajudicial actors—most notably the press—in interpreting and disseminating what happened in the courtroom. As a result, the significance of an oral dissent depends largely on circumstances beyond the Justices' control. And of course, not all oral dissents are the same, even on the same Court, during the same Term, or issued by the same Justice. Different oral dissents appear to have different motivations and purposes.

#### *A. A Brief History of Oral Announcements and Separate Opinions*

To understand the place of oral dissents in the work of the Supreme Court, it is necessary to situate them within the larger history of the Court's opinion announcements and dissenting practices. Dissents must be understood in historical context. Since the Supreme Court issued its first decision in 1792, Court decisions have almost always been orally announced.<sup>74</sup> In fact, during its earliest years, the *only* opinions the Court issued were oral ones, which the court reporter would transcribe and eventually publish.<sup>75</sup> Even after the Court began to submit written opinions to the Court Reporter in 1834,<sup>76</sup> the Justices continued to announce their opinions, sometimes through verbatim readings of the written opinion, sometimes through a prepared summary, and sometimes through an extemporaneous description. Although there have been occasional efforts within the Court to eliminate this practice of reading or announcing opinions,<sup>77</sup>

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<sup>73</sup> See, e.g., Blake & Hacker, *supra* note 19, at 14; Johnson et al., *supra* note 14, at 1564.

<sup>74</sup> BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 63 (1996).

<sup>75</sup> Roy M. Mersky, *Publishing, Law*, in *OXFORD COMPANION TO AMERICAN LAW* 680 (Kermit L. Hall ed., 2002).

<sup>76</sup> *Id.* According to Justice Story, the job of the Court Reporter was “to abridge arguments, to state facts, [and] to give the opinions of the Court substantially as they [were] delivered.” G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 *VA. L. REV.* 1, 33 (1984) (quoting Letter from Joseph Story to Richard Peters (May 7, 1836)). Professor White also notes that the process of actually publishing a decision during this period often took months, and occasionally years. *Id.*

<sup>77</sup> See, e.g., WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939–1975*, at 39–40 (1980) (explaining Douglas's claim to have proposed, at some point early in his tenure on the Court, that the Justices give up the practice of reading or summarizing opinions from the bench); Barrett, *supra* note 18, at 2–3 (describing Vinson's initial discomfort with announcing opinions); see also *infra* note 211 (describing Blackmun and Burger's efforts to end the practice).

the tradition remains. Each Justice has the option to read his or her opinion, summarize it, or, for a majority opinion, simply announce the result and note that an opinion has been filed.<sup>78</sup>

Although oral opinion announcements have long been the norm, during the nineteenth and early twentieth centuries, concurrences and dissents were much rarer than they are today, leading to fewer oral dissents.<sup>79</sup> Chief Justice John Marshall steered the Court away from its early practice of seriatim opinions and toward a new norm under which Justices held back possible dissents and joined majority opinions that were then presented to the public as the unified voice of the Court.<sup>80</sup> Even into the early twentieth century, some Justices remained uncomfortable about dissenting opinions. “I don’t approve of dissents generally,” explained Chief Justice William Howard Taft, “for I think that in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way.”<sup>81</sup>

Beginning in the latter part of the nineteenth century and continuing over the course of the twentieth century, this view gradually gave way to a greater appreciation of the value of dissenting. A dissent might serve, in the famous words of Chief Justice Charles Evans Hughes, 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

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<sup>78</sup> See DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 311–12 (8th ed. 2009). The current norm is that the majority opinion author reads a summary of the opinion and then announces what separate opinions, if any, have been filed. Usually, the authors of those separate opinions do not speak.

<sup>79</sup> David M. O’Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES* 92 (Cornell W. Clayton & Howard Gillman eds., 1999).

<sup>80</sup> 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 16 (1919). Marshall’s biographer described his insistence on having the Court present a unified front as “one of those acts of audacity that later marked the assumption of power which rendered his career historic.” *Id.*; see also White, *supra* note 76, at 34–47. The institutional benefits of unanimity did not escape the Justices even long after separate opinions became commonplace. Chief Justice Warren famously worked hard for a unanimous opinion in *Brown v. Board of Education* precisely because he believed unanimity would give the unquestionably controversial outcome more authority. See, e.g., Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in Brown*, 49 N.Y. L. SCH. L. REV. 741, 748–49 (2004–2005).

<sup>81</sup> Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1311 (2001) (quoting Chief Justice Taft). Chief Justice Stone expressed similar reservations. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 303 (1956) (“Somehow, dissenting opinions always seem to me a dismal business. When I do it I feel somewhat as the smart youth ought to feel when he proclaims his opinion, which has not proved convincing to older and wiser men. This feeling has kept me silent sometimes when I had the inclination to speak, but I soon found that when I remained silent, despite strongly held convictions the other way, I was not altogether happy with myself.” (quoting Letter from Justice Stone to Judge Proskauer (March 21, 1930))).

the dissenting judge believes the court to have been betrayed.”<sup>82</sup> Beginning in the 1940s, the percentage of non-unanimous decisions increased dramatically and dissents became far less exceptional.<sup>83</sup> Recent and current Justices are unafraid to issue written dissents, providing them with plenty of opportunities to deliver oral dissents.<sup>84</sup>

### *B. The Occasional Drama of Decision Days*

Opinion announcements can be rather tedious affairs, even for significant cases. During Justice Tom Clark’s long announcement of the majority opinion in *Abington School District v. Schempp* (1963),<sup>85</sup> a landmark case that held unconstitutional required reading of the Bible in schools, a restless Justice William O. Douglas passed a note to Justice Hugo Black. “Is he going to read all of it?” Douglas asked. “He told me he was only going to say a few words—he is on p. 20 now—58 more to go. Perhaps we need an antifilibuster rule as badly as some say the Senate does.”<sup>86</sup>

But there are notable exceptions when decision day is anything but routine. The drama of a decision’s announcement can derive simply from the significance of the ruling, perhaps heightened by particular aspects of the oral presentation. One such dramatic announcement came on May 17, 1954, when Chief Justice Earl Warren read the Court’s decision in *Brown v. Board of Education*.<sup>87</sup> Warren recalled the scene in his memoirs: “As we Justices marched into the courtroom on that day, there was a tenseness that I have not seen equaled before or since.”<sup>88</sup> Justice Jackson, who had been away from the Court for the prior seven weeks recovering from a heart attack, made a point of being in Court on this day.<sup>89</sup> When Warren announced that he was about to read the long-awaited school desegregation decision, he saw “a general shifting of positions in the crowded room and a rapt attention to my words.”<sup>90</sup> Warren’s intention in writing the *Brown* opinion was, as he privately told the other Justices, that it “should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory,”<sup>91</sup> and it was this straightforward text (rather than a summary) that

<sup>82</sup> CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

<sup>83</sup> Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362–63 (2001); O’Brien, *supra* note 79, at 91–113. For an early effort to make sense of this new trend in Supreme Court practice, see C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* 46–53 (1948).

<sup>84</sup> See, e.g., William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Antonin Scalia, *The Dissenting Opinion*, J. SUP. CT. HIST. 33 (1994); Greenhouse, *Ginsburg*, *supra* note 5 and accompanying text.

<sup>85</sup> 374 U.S. 203 (1963).

<sup>86</sup> SCHWARTZ, *supra* note 74, at 18 (internal quotations omitted).

<sup>87</sup> 347 U.S. 483 (1954).

<sup>88</sup> EARL WARREN, *THE MEMOIRS OF EARL WARREN* 3 (1977).

<sup>89</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 701 (1976).

<sup>90</sup> WARREN, *supra* note 88, at 3.

<sup>91</sup> Memorandum from Chief Justice Earl Warren to the Members of the Court (May 7,

he read aloud. The decision began with a general discussion of the background to the case and the relevant issues, with Warren not tipping his hand on which way the decision would go. Several minutes into his reading he revealed the holding: “We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We unanimously believe that it does.”<sup>92</sup> The word “unanimously” was not in the written opinion.<sup>93</sup> Warren inserted it, by hand, into the draft that he read from the bench.<sup>94</sup> According to Warren, “When the word ‘unanimously’ was spoken, a wave of emotion swept the room; no words or intentional movement, yet a distinct emotional manifestation that defies description.”<sup>95</sup> While many observers had expected the Court to strike down school segregation laws, the fact that Warren was able to get all nine Justices to agree to this outcome came as a surprise to most.<sup>96</sup> Warren’s insertion of the word “unanimously” into his announcement highlighted the unified commitment of the nine Justices behind the *Brown* decision.

More recent majority opinions have arrived in similarly dramatic fashion. For example, as Justice Kennedy read his opinion for the Court in *Lawrence v. Texas*,<sup>97</sup> the 2003 case that struck down anti-sodomy laws, supporters of the decision in the courtroom—many of them gay and lesbian members of the Supreme Court bar—reacted visibly.<sup>98</sup> Kennedy’s oral statement and written opinion were notable not only for the holding, but also for their absolute repudiation of the precedent that *Lawrence* overruled, *Bowers v. Hardwick*,<sup>99</sup> and for the respectful terms in which Kennedy discussed the intimate relationships of gay citizens. “By the time [Kennedy] referred to the dignity and respect to which he said gays were entitled,” reported Linda Greenhouse of the *New York Times*, “several were weeping, silently but openly.”<sup>100</sup>

Not surprisingly, some of the most notable moments in the Supreme Court have included oral dissents. It would be hard to find a more anticipated and momentous day than the announcement of *Dred Scott v. Sandford*.<sup>101</sup> An increasingly divided nation

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1954) (Earl Warren Papers, Container 571, Manuscripts Division, Library of Congress, Washington, D.C.).

<sup>92</sup> WARREN, *supra* note 88, at 3.

<sup>93</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>94</sup> Draft Opinion, *Brown v. Bd. of Educ.* (Earl Warren Papers, Container 571, Manuscripts Division, Library of Congress, Washington, D.C.) (draft with inscription “Copy from which C.J. read on Bench—5/17/54”).

<sup>95</sup> WARREN, *supra* note 88, at 3; see also KLUGER, *supra* note 89, at 707.

<sup>96</sup> Warren noted that after the decision “people would phone the Clerk’s Office and demand to see the dissenting opinion.” WARREN, *supra* note 88, at 3.

<sup>97</sup> 539 U.S. 558 (2003).

<sup>98</sup> Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court’s ‘86 Ruling*, N.Y. TIMES, June 27, 2003, at A1.

<sup>99</sup> 478 U.S. 186 (1986).

<sup>100</sup> Greenhouse, *supra* note 98.

<sup>101</sup> 60 U.S. (19 How.) 393 (1857).

was turning to the Court to see how it would resolve the controversy over slavery in the territories; never before had the Court assumed such a prominent position in a national issue of such magnitude.<sup>102</sup> Each Justice participating in the decision wrote his own opinion and each read his opinion in Court. The process took two full days to complete.<sup>103</sup>

The anti-slavery *New York Tribune* described not just the content of the opinions, but also the drama of their announcement. On the opinion delivered by Chief Justice Taney, who was in failing health by this point in his life, the paper wrote:

No wonder that the Chief Justice should have sunk his voice to a whisper, conscious, as he must have been, that the decision which he promulgated had been arrived at on grounds totally different from those indicated in the opinion—that opinion being but a mere collation of false statements and shallow sophistries, got together to sustain a foregone conclusion,—knowing that he was engaged in a pitiful attempt to impose upon the public. However feeble his voice might have been, what he had to say was still feeble.<sup>104</sup>

The *Tribune* also described the uncomfortable reactions of the Justices in the majority when Justice Curtis read his dissenting opinion. Justices Wayne and Daniel “seemed as uneasy, while Judge Curtis was reading, as though they were listening to an Abolition harangue.”<sup>105</sup> Meanwhile, Justice Catron, whom the *Tribune* portrayed

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<sup>102</sup> See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 279–319 (rev. ed. 1926).

<sup>103</sup> The mere spectacle of watching the Court intervene in such dramatic fashion on the slavery dispute constituted a major event, but the fact that these bench announcements came before all the written opinions had been finalized also ended up being historically significant. Following the public announcement of the opinions, Chief Justice Taney spent two more weeks revising his opinion. This caused considerable tension within the Court, since he refused to let anyone, including the other Justices, see the revised draft before it was published. Justice Curtis, who had made his opinion available to the press immediately following its announcement, was particularly angry with the Chief Justice, since much of the revised material Taney added was in response to Curtis’s influential dissenting opinion. Taney, in turn, accused Curtis of purposely fomenting an “assault” on the Court through the circulation of his dissent in partisan publications. When the final version of Taney’s opinion eventually came out, Curtis believed that he had added over eighteen pages in direct response to his dissent. Curtis’s resignation in the following months was in part brought about by what he viewed as Taney’s disingenuous dealings with his colleagues. STUART STREICHLER, *JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM* 145–49 (2005).

<sup>104</sup> WARREN, *supra* note 88, at 305. In another attack on Taney, the *Tribune* was even more direct in portraying his physical appearance as reflective of his misguided judicial views. “[Taney] walks with inverted and hesitating steps. His forehead is contracted, his eye sunken and his visage has a sinister expression.” *Id.* at 319.

<sup>105</sup> *Id.* at 318.

as a misguided simpleton, “listened with a good deal of respectful surprise to Judge Curtis’s exposition of the fallacy of his deductions.”<sup>106</sup>

Other nineteenth-century opinion announcements likewise included noteworthy oral dissents—sometimes so dramatic as to be shocking. Justice John Marshall Harlan, who earned a reputation as “The Great Dissenter,” often delivered emotional readings of his dissenting opinions from the bench.<sup>107</sup> In 1895, for example, in *Pollock v. Farmers’ Loan & Trust Co.*,<sup>108</sup> the Court held that Congress lacked the constitutional authority to create a federal income tax. The decision was monumental; it would eventually be overturned by the Sixteenth Amendment.<sup>109</sup> But the scene at the Supreme Court when the opinions were announced—a process that lasted three hours<sup>110</sup>—was given an extra dramatic element because of Justice Harlan’s announcement of his dissent in the case. Harlan, according to the account in the *New York Sun*:

[P]ounded the desk, shook his finger under the noses of the Chief Justice and Mr. Justice Field, turned more than once almost angrily upon his colleagues of the majority, and expressed his dissent from their conclusions in a tone and language more appropriate to a stump speech at a Populist barbecue than to an opinion on a question of law before the Supreme Court of the United States.<sup>111</sup>

Another newspaper reported that Harlan’s dissent sent the audience “into a state of very undignified hilarity.”<sup>112</sup>

Dramatic oral dissents became even more common in the twentieth century. Justice James Clark McReynolds, for example, was not shy about oral dissents and during the 1930s he spoke in increasingly vitriolic terms as a majority formed to uphold New Deal programs.<sup>113</sup> One reporter described McReynolds’s style of announcing his

<sup>106</sup> *Id.*

<sup>107</sup> David G. Farrelly, *Justice Harlan’s Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175 (1951).

<sup>108</sup> 158 U.S. 601 (1895).

<sup>109</sup> Farrelly, *supra* note 107, at 176.

<sup>110</sup> *Id.*

<sup>111</sup> Farrelly, *supra* note 107, at 177 (quoting CARL SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 451 (1943)); *see also* LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 171 (1999).

<sup>112</sup> PRZYBYSZEWSKI, *supra* note 111, at 171 (quoting *EVENING STAR* (Washington), May 20, 1895). “Old lawyers who had practiced at that tribunal for more than a quarter of a century sat aghast as sentence followed sentence,” reported the *New York Tribune*. Farrelly, *supra* note 107, at 177 (quoting *NEW YORK TRIBUNE*, May 21, 1895).

<sup>113</sup> On McReynolds’s less-than-friendly attitude toward his fellow Justices, his clerks, and anyone else he came across, *see* JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR’S WASHINGTON* (Dennis J. Hutchinson & David J. Garrow eds., 2002).

opinions as basically following the text of his opinion (which he had memorized) but then “liberally interlard[ing] it with extemporaneous observations.”<sup>114</sup>

McReynolds’s most memorable decision-day performance took place on February 18, 1935, when the Court handed down the *Gold Clause Case*, which upheld a federal law abolishing the gold standard for currency.<sup>115</sup> By the time Chief Justice Hughes had finished his hour and a half reading of the majority opinion to a packed courtroom, audience interest had dissipated and people were beginning to leave.<sup>116</sup> It was at this moment that, in the words of the *New York Times* reporter, “Mr. Justice McReynolds, who had been leaning back with his eyes closed, sat forward and began to speak,” paying “virtually no attention to his text.”<sup>117</sup> “[T]he scene was electrified,” reported another journalist, as the Justice “announced his inability to accept the views of the court.”<sup>118</sup> “The audience was spellbound, listening for every word,” according to the *Times*.<sup>119</sup> “[A]s he went on in his Southern voice, government attorneys and others in the crowded benches leaned forward intently . . . Sarcasm and irony were behind sentence after sentence as he went along.”<sup>120</sup> Among the words of condemnation that flowed from McReynolds that day, his most remarked upon line was something to the effect that “the Constitution has gone!”<sup>121</sup> He effectively stole center stage, for a moment at least, from a Court that was soon to leave the aging Justice behind.

### C. *The Heyday of the Oral Dissent: The Stone, Vinson, and Warren Courts*

As the preceding subparts demonstrate, oral dissents are nothing new. Moreover, their significance and impact often appear to have as much to do with the emotional delivery or quirky personality on display as with the legal importance of the dissent itself. This aspect of the public reception of oral dissents continued long after Justices Harlan and McReynolds left the bench.

During the 1940s through the 1960s—through the Stone, Vinson, and Warren Courts—oral dissents were relatively common and were often quite dramatic. This frequency and drama may have been due to the fact that during this era particularly confident and loquacious men strode the halls of the Supreme Court. Moreover, a number of these Justices simply did not like each other.<sup>122</sup> The resulting combustible

<sup>114</sup> *Supreme Court Upholds Social Security Act*, CHI. TRIB., May 25, 1937, at 1.

<sup>115</sup> *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935).

<sup>116</sup> *Gold O.K. Cheers New Deal*, CHI. TRIB., Feb. 19, 1935, at 1.

<sup>117</sup> Arthur Krock, *Congress is Censured*, N.Y. TIMES, Feb. 19, 1935, at 1.

<sup>118</sup> *Gold O.K. Cheers New Deal*, *supra* note 116.

<sup>119</sup> *Constitution Gone, Says M’Reynolds*, N.Y. TIMES, Feb. 19, 1935, at 1.

<sup>120</sup> *Id.*

<sup>121</sup> *Gold O.K. Cheers New Deal*, *supra* note 116. Observers disputed exactly what he said. Michael Allan Wolf, *James Clark McReynolds*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 299 (Melvin I. Urofsky ed., 1994).

<sup>122</sup> *See, e.g.*, MASON, *supra* note 81, at 607–08.

mixture of conflicting judicial philosophy and contentious personalities sometimes exploded in open court on decision days. “As personalities were traded in the oral delivery of opinions,” wrote Chief Justice Stone’s biographer of the Court under Stone’s leadership (1941–46), “the smoldering fires of controversy, long at work in the conference, erupted into the open.”<sup>123</sup> The press and academics took note of the sharp rise in dissents as well as the increasingly antagonistic rhetoric that characterized the Justices’ opinions<sup>124</sup>—a trend that seemed all the more divisive because it was played out not just in formal written opinions, but also face to face and with an audience (many with pens in hand) in the courtroom during the delivery of the Court’s decisions. As the *New York Times* reported following a particularly contentious line of decisions in 1944, “Acid comments scattered through decisions and biting comments by one or another member of the black-robed ‘brethren’ are causing gasps in the national capital, where rows and disputes are never a novelty.”<sup>125</sup>

The modern heir to the oral dissenting tradition of Harlan and McReynolds was Justice Hugo Black, who served on the Court from 1937 to 1971. Like Harlan and McReynolds, Black favored extemporaneous summaries of his opinions, and like them, he drew attention to his performances with heartfelt emotion and with sweeping, sometimes apocalyptic language.<sup>126</sup> Justice Black’s direct and often passionate bench announcements were sometimes likened to a lawyer’s closing argument before a jury,<sup>127</sup> a fitting description since Black began his career as a courtroom lawyer.

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<sup>123</sup> *Id.* at 606.

<sup>124</sup> See, e.g., C. Herman Pritchett, *The Coming of the New Dissent: The Supreme Court, 1942–43*, 11 U. CHI. L. REV. 49 (1943); C. Herman Pritchett, *The Divided Supreme Court, 1944–1945*, 44 MICH. L. REV. 427 (1945); *Dissents Marked in Supreme Court*, N.Y. TIMES, Jan. 4, 1944, at 1. Much of the editorial commentary surrounding the increasing number and volume of dissenting opinions was critical of the trend. *An Unstable Court*, N.Y. TIMES, Feb. 4, 1944, at 14 (criticizing the “vacillation and disagreement” reflected in the “recent astonishing record of dissents on the Court”); *Court Feud*, WASH. POST, Jan. 8, 1944, at 8 (criticizing Black for simply going out of his way to mock and discredit a fellow Justice and noting that “every time feuds of this sort break out into backbiting in official opinions the prestige of the court necessarily sags.”); see, e.g., *Self-Inflicted Wounds*, WASH. POST, Feb. 12, 1944, at 6 (“[T]he country expects something better than a display of wrath or even personal irritation of its Supreme Court.”).

<sup>125</sup> Lewis Wood, *Supreme Court Split is Aired in Dissents*, N.Y. TIMES, Feb. 13, 1944, at E6.

<sup>126</sup> See, e.g., James E. Clayton, *High Court Rules Out Public School Prayers in Six-to-One Decision*, WASH. POST, June 26, 1962, at A1 (“Justice Black began to read his opinion with a great deal of emotion in his voice . . .”).

<sup>127</sup> As Arthur Goldberg told Black in 1965: “You’re still an Alabama jury lawyer who can’t resist playing to the galleries.” Roger K. Newman, *Hugo Black*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 51 (Roger K. Newman ed., 2009). Black’s written opinions also tended toward the clarity of expression and avoidance of legalistic jargon characteristic of the most effective bench statements. See, e.g., ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 276 (2d ed. 1997) (“Black is certainly popular with newspaper men because he recently wrote a dissent in English as plain and simple and clear as a good running story on the first page.” (quoting Heywood Broun)); see also Anthony Lewis, *Justice Black at 75: Still*

In the long list of oral dissents Black delivered, his most notable performance might have been in *Brown v. Louisiana*,<sup>128</sup> a 1966 decision in which the Court struck down breach-of-peace convictions for a civil rights protest in a library. Black's dissent was noteworthy because it marked an apparent shift for a Justice who had earned a reputation as a strong advocate of civil rights for African Americans.<sup>129</sup> But the oral presentation itself gained attention in part because of the dire and chastising tone he adopted in his remarks from the bench. Indeed, Black's dissent garnered as much attention as the Court's holding, which was largely in line with previous Warren Court decisions on civil rights protests. Both the *New York Times* and the *Washington Post* included a picture of Black, but no other Justice, in their articles.<sup>130</sup> The *Times* noted that Black, "[s]peaking extemporaneously much of the time . . . spent almost a half-hour denouncing what he termed a threat to 'public buildings such as libraries, schoolhouses, fire departments, courthouses, and executive mansions.'" <sup>131</sup> The *Washington Post* was more descriptive: "Trembling with rage and shaking his finger at the courtroom audience, Black blistered the majority with a 30-minute verbal assault that made his strongly phrased written dissent seem pale by comparison."<sup>132</sup> Black's dissent garnered considerable attention, both from supporters such as James J. Kilpatrick, who felt the "thunderclap opinion[ ]" reflected an effort to "bring[ ] sanity back to the Supreme Court,"<sup>133</sup> and critics, such as the editors of the *Chicago Defender*, who questioned both "the logic of his dissent and the passion with which he delivered it."<sup>134</sup>

In contrast to Justice Black, Justice Felix Frankfurter treated opinion announcements as an opportunity not so much for passion but for edification. He favored long extemporaneous lectures on the law. The former Harvard law professor was such an enthusiast of the tradition of delivering substantial announcements of opinions that he once chastised Justice Black from the bench when Black gave an uncharacteristically brief statement of the result of a case in which he wrote the majority opinion.<sup>135</sup>

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*the Dissenter*, N.Y. TIMES, Feb. 26, 1961, at SM 13 ("Frequently, in a Black dissent, there is an air of his standing alone against a hostile world—the despairing tone of one who has often fought against long odds.").

<sup>128</sup> 383 U.S. 131 (1966).

<sup>129</sup> See, e.g., NEWMAN, *supra* note 127, at 43–44.

<sup>130</sup> *Negro Protests Upheld by Court*, N.Y. TIMES, Feb. 24, 1966, at 23; John P. MacKenzie, *Louisiana Sit-In Conviction Reversed*, WASH. POST, Feb. 24, 1966, at A1.

<sup>131</sup> *Negro Protests Upheld by Court*, *supra* note 130.

<sup>132</sup> MacKenzie, *supra* note 130. In defense of Black, his loyal ex-clerk A.E. Dick Howard explained that this was the way Black always read his opinions. A.E. Dick Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030, 1045 (1967).

<sup>133</sup> James J. Kilpatrick, Op-Ed., *Justice Black's Library Case Dissent Clears Air*, L.A. TIMES, Mar. 3, 1966, at A5.

<sup>134</sup> Editorial, *The Black Dissent*, CHI. DAILY DEFENDER, Mar. 14, 1966, at 13.

<sup>135</sup> Anthony Lewis, *High Drama in the High Court*, N.Y. TIMES, Oct. 26, 1958, at SM 10. Lewis also noted that on another occasion Frankfurter's extended and extemporaneous remarks in describing a majority opinion caused Chief Justice Warren, prior to announcing his dissent, to note that Frankfurter's comments were different from the argument contained in his written

Justice Frankfurter's lengthy dissents from the bench were also noteworthy because they could be so irksome to his colleagues. His disquisitions repeatedly stirred the normally genial Warren to open anger in the courtroom. On the closing day of the 1957 term, for example, Warren announced a one sentence, unsigned opinion in a case in which the Court denied the appeals of two California death row inmates who sought to challenge the procedure by which their sanity was determined.<sup>136</sup> Frankfurter gave what the *New York Times* characterized as an "impassioned"<sup>137</sup> oral dissent attacking the procedural deficiencies in a situation where "life hangs in the balance."<sup>138</sup> Accepting some administrative "inconveniences" was "far better . . . than that the State of California should have on its conscience a single execution that would be barbaric because the victim was in fact, though he had no opportunity to show it, mentally unfit to meet his destiny."<sup>139</sup> Warren, a former California attorney general and governor, came to the defense of his home state. "Neither the judgment of this court nor that of California is quite as savage as this dissent would indicate," he responded.<sup>140</sup> He went on to defend California's actions for several minutes before concluding, "I merely make this statement because I don't believe that this case is as bad as it might appear."<sup>141</sup>

Another extemporaneous oral dissent by Justice Frankfurter so exasperated Chief Justice Warren that he decided on the spur of the moment to announce his own rebuttal—this in a relatively minor case in which he had not even written an opinion.<sup>142</sup> "[S]ince so much has been said here that was not in any written opinion," Warren said he wanted to offer some words.<sup>143</sup> After summarizing the majority's position at somewhat more length than Justice Potter Stewart had initially offered in announcing the opinion of the Court, Warren then turned back to Frankfurter and asked if he wanted

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opinion and that Warren's dissent would be in response to the written opinion. *Id.* This event foreshadowed the bench dramatics of 1961, when in two cases in which Warren had not written an opinion he felt compelled to weigh in after Frankfurter's oral dissent. *See infra* notes 142–154 and accompanying text.

<sup>136</sup> *Caritativo v. California*, 357 U.S. 549, 550 (1958).

<sup>137</sup> *Justices' Debate Stirs the Capital*, N.Y. TIMES, July 2, 1958, at 19.

<sup>138</sup> *Id.* (quoting *Caritativo*, 357 U.S. at 558).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (internal quotations omitted).

<sup>141</sup> *Id.* (internal quotations omitted); *see also* William J. Brennan, Jr., *Chief Justice Warren*, 88 HARV. L. REV. 1, 2 (1974) (summarizing the incident). Warren was not the first Chief Justice to take issue with Frankfurter's bench lectures. Earlier in Frankfurter's time on the Court, an extended summary of one of his majority opinions led Chief Justice Stone to say: "By God, Felix, if you had put all that stuff in the opinion, never in my life would I have agreed to it." DOUGLAS, *supra* note 77, at 40.

<sup>142</sup> *Milanovich v. United States*, 365 U.S. 551 (1961) (reversing a criminal conviction when the trial court failed to instruct the jury that it could not convict a defendant of both larceny and receiving stolen property).

<sup>143</sup> *Dissent by Frankfurter Provokes Warren to Rebuttal From Bench*, N.Y. TIMES, Mar. 21, 1961, at 1.

to respond. “The Chief Justice urges me to comment on what he said, but of course I won’t,” Frankfurter said, “I have another case.”<sup>144</sup> The *Washington Post*, which gave the exchange front-page coverage, wrote that this “rare display of irritation” by the Justices “showed again . . . that they are as human as the rest of us.”<sup>145</sup>

Less than a month later Warren and Frankfurter were at it again in what the *Chicago Tribune* reporter described as “one of the bitterest scenes observed on the Supreme court [sic] bench in recent years.”<sup>146</sup> This encounter, like their argument over the California mental fitness case, earned front page coverage in the *New York Times* and the *Washington Post*.<sup>147</sup> The Court had reversed, in a 5-4 decision, a murder conviction for prosecutorial misconduct.<sup>148</sup> Frankfurter delivered an extemporaneous oral dissent in which he accused the Court of “turning ‘a criminal appeal into a quest for error.’”<sup>149</sup> The Court’s holding, he asserted, was “indefensible.”<sup>150</sup> Warren then said that although he did not write an opinion in this case, he felt compelled to respond because what Frankfurter had just said “was not the dissenting opinion that was filed.”<sup>151</sup> Rather, Frankfurter’s oral dissent was “a lecture . . . a closing argument by the prosecutor to the jury properly made in the conference room, but not in the courtroom.”<sup>152</sup> Warren noted that “the purpose of reporting an opinion in the courtroom is to inform the public and not for the purpose of degrading this court.”<sup>153</sup> As the *Tribune* reported,

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<sup>144</sup> *Id.* The *Washington Post* reported Frankfurter’s response slightly differently, as “I’m tempted to comment on what the Chief Justice has said but I won’t.” James E. Clayton, *Burst of Irritation Shows Justices Are Just as Human as Anyone Else*, WASH. POST, Mar. 21, 1961, at A1.

<sup>145</sup> Clayton, *supra* note 144. The *Post* reporter brought attention to the fact that the exchange “will never make the casebooks because it was never written” and that “[s]uch statements from Justices are few and far between.” *Id.*

<sup>146</sup> *Warren Flays Frankfurter on High Court*, CHI. TRIB., Apr. 25, 1961, at 4.

<sup>147</sup> Anthony Lewis, *Warren Says Frankfurter Degrades Court in Dissent*, N.Y. TIMES, Apr. 25, 1961, at 1; James E. Clayton, *Justice Warren Chides Frankfurter for ‘Lecture’ on Decision in Murder*, WASH. POST, Apr. 25, 1961, at A1. Prior to the main event, Justices Harlan and Black gave an opening performance in a First Amendment case in which the Court upheld Illinois’ denial of admittance to the bar of George Anastaplo for refusing to answer questions about the Communist Party. *In re Anastaplo*, 366 U.S. 82 (1961). Black gave one of his typically passionate oral dissents, in which he noted that Anastaplo “made the mistake of saying he believed fully in the Declaration of Independence.” Clayton, *supra*. Anastaplo had cited the Declaration in support of his belief in the right to revolution. *Anastaplo*, 366 U.S. at 99–100. Harlan, who had already announced the majority decision in the case, felt compelled to offer a rebuttal to Black’s dissent. He noted that the denial of the law license was not because of Anastaplo’s commitment to the Declaration but because of his refusal to answer questions about the Communist Party. Clayton, *supra*.

<sup>148</sup> *Stewart v. United States*, 366 U.S. 1 (1961).

<sup>149</sup> Clayton, *supra* note 147.

<sup>150</sup> Lewis, *supra* note 147.

<sup>151</sup> *Warren Flays Frankfurter on High Court*, *supra* note 146.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

“When Warren finished his remarks to a court chamber almost electric with tension, Frankfurter snapped back a one-sentence rejoinder: ‘I’ll leave it to the record.’”<sup>154</sup>

If nothing else, these exchanges showed Warren’s frustration with Frankfurter’s style of delivering his oral opinions. Yet a *Washington Post* reporter saw the incident as indicative of underlying tensions among the Justices.<sup>155</sup> “Justice Frankfurter never reads what he has written but talks about it,” the reporter wrote.<sup>156</sup> “He occasionally goes beyond what he has written but he did not appear to stray much more yesterday than he has in the past.”<sup>157</sup> The reporter suggested that the divisions may have been more than stylistic, reflecting “ideological divisions which have been sharpened this year because of the divisive and controversial cases which the Court must decide.”<sup>158</sup>

Ideological divisions were certainly on display when Chief Justice Warren announced *Miranda v. Arizona*,<sup>159</sup> one of the most controversial opinions of his tenure. He read the entire sixty-one page majority opinion, a process that took over an hour.<sup>160</sup> He delivered the opinion with “emotion in his voice,”<sup>161</sup> and he interspersed his presentation with extemporaneous comments to the courtroom.<sup>162</sup> Justice Harlan read his dissent, “his face flushed and his voice occasionally faltering with emotion.”<sup>163</sup> In this case, the *New York Times* noted, the emotion of both Warren and Harlan “bespoke the deep division in the Court over the new doctrine.”<sup>164</sup>

Another notable oral dissenter was Justice Douglas, who could deliver a scathing denunciation of a majority opinion.<sup>165</sup> Douglas’s oral dissents often appeared to be motivated as much by emotion as by ideological disagreement or by the legal significance of the case. In 1959, for instance, Douglas lashed out at Justice Charles E.

<sup>154</sup> *Id.* The tension was apparently transient. Anthony Lewis noted seeing Warren and Frankfurter “conversing amiably” later in the session. Lewis, *supra* note 147.

<sup>155</sup> Clayton, *supra* note 147.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> 384 U.S. 436 (1966).

<sup>160</sup> John P. MacKenzie, *High Court Curbs Police Questioning*, WASH. POST, June 14, 1966, at A1.

<sup>161</sup> Fred P. Graham, *High Court Puts New Curb on Powers of the Police to Interrogate Suspects*, N.Y. TIMES, June 14, 1966, at 1.

<sup>162</sup> Warren departed from his text, for example, to praise the police “when their services are honorably performed.” *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See, e.g., Fred P. Graham, *High Court Backs Conviction of 32 in Rights Protest*, N.Y. TIMES, Nov. 15, 1966, at 1 (reporting Douglas’s oral dissent in *Adderley v. Florida*, 385 U.S. 39 (1966), and describing it as delivered “extemporaneously in a quiet, passionate voice”); *High Court Backs U.S. Expatriation*, N.Y. TIMES, Apr. 1, 1958, at 22 (noting Douglas’s oral dissent in *Perez v. Brownell*, 356 U.S. 44 (1958) (upholding congressional power to expatriate a U.S. citizen who voted in a foreign election), which included a critical and hyperbolic assessment of the majority opinion as “perhaps the most important constitutional pronouncement of this century”).

Whittaker.<sup>166</sup> The *New York Times*, in a story headlined “Douglas Berates a Fellow Justice,” described Douglas as “pale with anger” after listening to Whittaker’s concurrence in a railroad injury case in which he poked fun at Douglas’s dissenting argument.<sup>167</sup> “The case is rather an important one,” Douglas stated. “It cannot be dismissed by this attempted humor.”<sup>168</sup> He went on to indicate that he believed Whittaker had not even read the record of the case and that the seriousness of the issue was demeaned by the “rather smart-alecky things that have been said.”<sup>169</sup>

In another case, several years later, the object of Douglas’s anger was an opinion by his usual ally, Justice Black. In extemporaneous remarks that, according to the *New York Times*, “startled those in the courtroom,”<sup>170</sup> Douglas accused his colleague of writing an opinion that sounded “more like a Congressional committee report than a judicial opinion.”<sup>171</sup> “[O]ne gets lost in [the] words” of Black’s opinion, he complained.<sup>172</sup> Despite the routine nature of the case being discussed (a water rights dispute between Arizona and California), the event earned front page coverage in the *Times*, with the headline *Douglas Upbraids Black From Bench*.<sup>173</sup> The report included speculation that the incident reflected the growing distance between Douglas and Black and might presage a retirement announcement from the obviously frustrated Douglas.<sup>174</sup>

#### *D. Learning from History*

Interesting as these stories are in their own right for students of history and court watchers alike, they also enrich our understanding of the evolution of the opinion announcement process in general and of the oral dissent in particular.<sup>175</sup> Perhaps

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<sup>166</sup> *Douglas Berates a Fellow Justice*, N.Y. TIMES, Dec. 15, 1959, at 25.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Douglas Upbraids Black From Bench*, N.Y. TIMES, June 4, 1963, at 1.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Chief Justice Warren and Justices Black, Frankfurter, Harlan, and Douglas had no monopoly on generating emotional or awkward moments. For example, in a 1950 case involving the government’s refusal to allow the German wife of a World War II veteran to come into the United States because of national security concerns, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), Justice Jackson delivered an oral dissent denouncing the actions of the U.S. Attorney General. The Attorney General in question, Tom Clark, was a newly appointed Associate Justice and was sitting right next to Jackson. Jackson, in an oral dissent one report described as “caustic,” characterized the decision to exclude this woman as “abrupt and brutal” and the decision of the Attorney General to exclude her without hearing as a “menace to free institutions.” Lewis Wood, *U.S. Upheld on Bar to Alien Suspects*, N.Y. TIMES, Jan. 17, 1950, at 16; see also *Knauff*, 338 U.S. at 550, 550–51 (Jackson, J., dissenting).

most surprising to today's observers, these stories demonstrate that, at least during the Warren Court, decision days were sometimes occasions of actual unscripted colloquies between the Justices. What we know about these moments in the courtroom also demonstrates the wide variety of purposes and motivations that led Justices to speak from the bench—and that in turn generated press coverage. But perhaps one of the most striking aspects of the historical record is the evidence that even in this era of lively and passionate public displays of disagreement and ideological division on the Court, oral dissents were underreported. This subpart explores these lessons.

### 1. Underreporting

Contrary to the assumptions of scholars and commentators, oral dissents have not been consistently reported in the press.<sup>176</sup> Consider the coverage of Justice Black, one of the most frequent and forceful oral dissenters. It is likely that many and perhaps most of Black's oral dissents failed to even earn mention in most contemporary news accounts. For example, the fact that Black gave an angry oral dissent in *Bartkus v. Illinois*,<sup>177</sup> in which the Court held that prosecution by the state and federal governments for the same crime does not violate the Constitution's Double Jeopardy Clause, was not reported at all in many news accounts and was mentioned only briefly in the *New York Times* at the time of the opinion.<sup>178</sup> Similarly, Black's reading of his dissent in a 1950 case involving a domestic loyalty program,<sup>179</sup> which, according to one observer, he delivered "in a voice of scorn and steel,"<sup>180</sup> did not appear in the major news accounts of the Court's decision.<sup>181</sup> This lack of media attention was not for want

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<sup>176</sup> It is, of course, impossible to know which and how many oral dissents went unmentioned because we do not have reliable information about all of the cases in which there were oral dissents.

<sup>177</sup> 359 U.S. 121 (1959).

<sup>178</sup> Black's oral dissent was not mentioned in Richard L. Lyons, *State and U.S. Trials for Same Crime Declared Legal by Supreme Court*, WASH. POST, Mar. 31, 1959, at A1 or in Arthur Krock, *In the Nation: Twice 'in Jeopardy of Life or Limb' Under the Law*, N.Y. TIMES, Apr. 2, 1959, at 30. It was mentioned in Lewis, *supra* note 147 ("The importance and difficulty of the problems involved were also made dramatically clear in the courtroom today. The justices stated their opinions at length and with deep feeling."). In this article, Lewis mentioned only that there were emotional oral opinions; he said nothing about their content. Lewis returned to the *Bartkus* opinion, however, in a 1961 profile of Justice Black. Lewis, *supra* note 127. In that piece, he quoted a dialogue between Frankfurter and Black that, as far as we can tell, appeared nowhere in the immediate press coverage of *Bartkus*. "Justice Frankfurter," Lewis wrote, "in stating his opinion for the majority, made a passing reference to 'the so-called Bill of Rights.' When Justice Black read his dissent, his voice rang with passion as he said: 'This case concerns the Bill of Rights, not the so-called Bill of Rights.'" *Id.*

<sup>179</sup> *Dennis v. United States*, 339 U.S. 162 (1950).

<sup>180</sup> John P. Frank, *The United States Supreme Court: 1949–50*, 18 U. CHI. L. REV. 1, 44 (1950) (quoting a letter from an unnamed "courtroom observer").

<sup>181</sup> See Philip Dodd, *Supreme Court OK's Conviction of Red Leader*, CHI. TRIB., Mar. 28, 1950, at 5; *Red Secretary's Conviction Upheld*, L.A. TIMES, Mar. 28, 1950, at 1; Chalmers

of drama. Black's biographer writes that in delivering this particular dissent, Black "turned to Solicitor General Philip Perlman, not one of his favorites, looked at him coldly, lowered his voice and said scornfully, 'Nor should the government *want* such an unfair advantage,'" leading the solicitor general to "turn[ ] several shades of red."<sup>182</sup> The biographer also notes that Black made additional notations on his reading draft of his dissent in *Feiner v. New York*<sup>183</sup>—an indication that not only did he most likely read the dissent but he appeared to add some additional substantive commentary—yet this was another case in which the major news accounts did not find worthy of mention that Black read his dissent.<sup>184</sup>

It could be, of course, that the frequency with which Black dissented from the bench made his pronouncements less noteworthy in the eyes of the press. Or it could be that during this period of relatively frequent oral dissents, any single such demonstration (by any Justice) was not as notable as it might be in a period with fewer oral dissents. The more oral dissents that there are, the less likely it may be that any particular outburst might be considered news. It would not be surprising, then, if during the Stone, Vinson, and Warren years, a significant but unknown number of oral dissents went unmentioned in the press.

## 2. Diverse Motivations

A second lesson from history is that the Justices are motivated to speak from the bench for a variety of reasons. Unquestionably, some oral dissents, like Justice McReynolds's famous outburst in the *Gold Clause Case*,<sup>185</sup> evidence profound distress at the direction the Court is taking and a desire to expose the evils of that direction to the public.<sup>186</sup> McReynolds, in fact, went so far as to publish a version of his bench dissent in the *Wall Street Journal* in order to publicize his views.<sup>187</sup> Other oral dissents arise in insignificant cases and reflect interpersonal tensions or irascible personalities. Some of Justice Douglas's bench statements and the clashes between Warren and Frankfurter appear to fit this mold.

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M. Roberts, *Conviction of Dennis Sustained*, WASH. POST, Mar. 28, 1950, at 1; Lewis Wood, *Dennis Contempt Held Tried Fairly*, N.Y. TIMES, Mar. 28, 1950, at 4.

<sup>182</sup> NEWMAN, *supra* note 127, at 400.

<sup>183</sup> 340 U.S. 315 (1951); NEWMAN, *supra* note 127, at 401–02.

<sup>184</sup> See Philip Dodd, *Court Affirms Right to Speak; Bans Violence*, CHI. TRIB., Jan. 16, 1951, at 17; Murrey Marder, *Court Decides Against Political Speaker But Upholds Rights in Two Religious Cases*, WASH. POST, Jan. 16, 1951, at 1; Jay Walz, *High Court Voids City's Ordinance Requiring Street Preaching Permit*, N.Y. TIMES, Jan. 16, 1951, at 1.

<sup>185</sup> 294 U.S. 240 (1935).

<sup>186</sup> See *supra* notes 115–121 and accompanying text.

<sup>187</sup> *Justice McReynolds' Remarks on Gold Case Decision*, WALL ST. J., Feb. 23, 1935, at 1. This version includes the Justice's explanation for putting aside his written opinion in favor of more informal comments. Rather than "covering [the situation] in a thousand words" he wished to offer "a plain, simple tale that you may understand without difficulty." *Id.*

### 3. Public Appeal

The differences in Justices' motivations for dissenting from the bench and the inconsistent reporting in the press are mirrored by the unpredictability with which some oral dissents become the stuff of Supreme Court legend. Some oral dissents became famous because they were emblematic of significant ideological struggles. Consider the fallout from Justice Harlan's oral dissent in *Pollock* in 1895.<sup>188</sup> According to one later study of this famous dissent, in the contemporary press Harlan's "performance was unanimously condemned."<sup>189</sup> The *Nation* published a critical article titled "Justice Harlan's Harangue," in which it criticized how "unbecoming the Justice's behavior was."<sup>190</sup> For the editors of this journal, the Justice's behavior was a demonstration of a larger issue, the national struggle taking place over social legislation: "The heat with which Justice Harlan . . . expounded the Marx gospel from the bench showed the brake was applied none too soon."<sup>191</sup> In linking an attack on Harlan's "unbecoming" judicial behavior with a critique of his constitutional position, the *Nation* created an attractive proxy through which to challenge a fervent and increasingly powerful movement for increased economic regulation.

Oral dissents likewise seemed to take on a broader significance if they served the role of encapsulating for observers story lines that were attractive for reasons having nothing to do with the fact or content of the oral dissents themselves. Justice Douglas's notoriously prickly personality, for example, was neatly illustrated by his angry pronouncements in relatively insignificant cases.<sup>192</sup>

Nor are these categories mutually exclusive. So, for example, Justice McReynolds's declaration that "the Constitution is gone!"<sup>193</sup> appeared in practically all the retrospectives about his life, demonstrating not only his reactionary constitutional commitments—"the unchangeableness that was McReynolds"<sup>194</sup>—but the passion with which he held to them. "This fervid dissent," recalled Solicitor General Philip B. Perlman in memorializing McReynolds in 1948, two years after his death, "accords with the view he himself had expressed many years before in another dissenting opinion that 'an amorphous dummy, unspotted by human emotions' is not 'a becoming receptacle for judicial power.'"<sup>195</sup>

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<sup>188</sup> *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

<sup>189</sup> Farrelly, *supra* note 107, at 178.

<sup>190</sup> *Justice Harlan's Harangue*, NATION, May 30, 1895, at 417.

<sup>191</sup> BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 175 (2009) (quoting Editorial, *The Income Tax Decision*, NATION, May 23, 1895, at 394).

<sup>192</sup> See *supra* text accompanying notes 165–74.

<sup>193</sup> See *supra* note 121 and accompanying text.

<sup>194</sup> Philip B. Perlman, Proceedings in the Supreme Court of the United States, *In Memory of Mr. Justice McReynolds*, 334 U.S. v, ix (1948).

<sup>195</sup> *Id.* at xi; see also Dean Acheson, *McReynolds, a Terror in Court, Was a Kindly Man*, WASH. POST, Aug. 25, 1965, at A18; Gold O.K. *Cheers New Deal*, *supra* note 116. This

One final lesson of the press coverage from earlier years is that a Justice cannot control or predict the course (if any) of public response to the dissent. In fact, observers may not even agree on what happened in the courtroom. There was widespread disagreement over precisely what McReynolds said about the demise of the Constitution in his *Gold Clause Case* oral dissent.<sup>196</sup> The announcement of the *Steel Seizure Case*<sup>197</sup> on June 2, 1952, likewise spawned competing accounts of “perhaps the most important [case] to come from the court in this century if not since the Dred Scott decision. . . .”<sup>198</sup> Justice Black announced the opinion of the Court, which took less than fifteen minutes.<sup>199</sup> One account noted that Black read “in a calm, low voice,” while the Solicitor General, who had argued on the losing side of the case, “listened glumly.”<sup>200</sup> Justice Frankfurter then followed with a thirty minute summary of his concurring opinion, during which, according to the *New York Times* reporter, he “scarcely referred to the printed page, except near the end of his opinion.”<sup>201</sup> Chief Justice Vinson then announced his dissent, which took over an hour to complete. The reporters covering the event for the *New York Times* and the *Washington Post* differed, however, in how to describe Vinson’s tone and attitude. Both agreed that his announcement was marked by sarcasm toward his fellow Justices, several of whom he singled out for inconsistencies in their positions on executive power.<sup>202</sup> But while the *Post* reporter described these remarks as showing “considerable scorn for his judicial brethren quite . . . obvious to those in the crowded courtroom,”<sup>203</sup> the *Times* reporter labeled them “friendly sarcasm,” noting that at one point during Vinson’s performance Justice Black caught

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memorial accorded with the conservative *Chicago Tribune*, which had lauded McReynolds’s “inspired” performance as characterized by “elegance and great feeling,” and predicted that it would earn the Justice “immortality in the annals of jurisprudence.”

<sup>196</sup> *Justice McReynolds’ Remarks on Gold Case Decision*, WALL ST. J., Feb. 23, 1935, at 1 (“No official stenographic report of the Justice’s observations was made. They have hitherto been reported only fragmentarily and it was feared that they were lost to posterity.”).

<sup>197</sup> *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952).

<sup>198</sup> Chalmers M. Roberts, *Vinson, Minton, Reed Dissent as Black Delivers Majority Opinion*, WASH. POST, June 3, 1952, at 1.

<sup>199</sup> Joseph A. Loftus, *Black Gives Ruling*, N.Y. TIMES, June 3, 1952, at 1.

<sup>200</sup> John Fisher, *Steel Shutdown Under Way: Truman’s Seizure of Industry Voided by Supreme Court*, CHI. TRIB., June 3, 1952, at 1.

<sup>201</sup> Loftus, *supra* note 199. In these spoken comments, Frankfurter “did not follow the precise language of his opinion.” *Id.* The *Times* noted a couple deviations from his text (including the use of the expression “almost a suckling knows that,” although the *Times* reporter noted that it was not clear to what Frankfurter was referring in this instance). *Id.* In his oral concurrence, Frankfurter also came to the defense of John W. Davis, who had argued for the steel companies in the case, and who Vinson in his dissent accused of inconsistency since he had asserted contrary legal arguments in a brief he wrote as Solicitor General in 1914. *Id.*

<sup>202</sup> *Id.*; see also Roberts, *supra* note 198. Justices Clark and Jackson had both served as Attorney General prior to coming to the Court, at which time both were on record as advocating for a more expansive view of the President’s power. Loftus, *supra* note 199.

<sup>203</sup> Roberts, *supra* note 198.

Jackson's eye and both grinned and that at another point Vinson's criticisms caused "a spontaneous burst of laughter" in the courtroom, in which Jackson joined.<sup>204</sup>

If nothing else, the history of oral dissents through the Warren Court demonstrates the hazards of generalizing about the phenomenon. Even contemporary observers often could not agree on what happened and whether it was of public significance. These features of oral dissents should, at a minimum, give us pause when trying to identify the predictors of oral dissents or when making claims about their likely impact.

### III. THE MODERN ERA: THE BURGER, REHNQUIST, AND ROBERTS COURTS

The study of oral dissents in the years following the Warren Court benefits greatly from the work of Jill Duffy, a librarian at the Supreme Court, and Elizabeth Lambert, a staff attorney for the District Court of the Eastern District of New York. Duffy and Lambert have set out to create the most comprehensive possible list of oral dissents from the beginning of the Burger Court in 1969 to the present,<sup>205</sup> drawing on press coverage, other published mentions of oral dissents, and at times, the Justices' papers,<sup>206</sup> as well as recordings of opinion announcements.<sup>207</sup> From October Term 1969 through October Term 2008, Lambert and Duffy have identified a total of 116 oral dissents in 110 cases. The *HMR* authors identified one additional case—*Missouri v. Jenkins*<sup>208</sup>—giving us a total of 111 cases. Table I lists the distribution of these cases—and of oral dissents—across the 1969 to 2008 Terms.

Although this list of 111 cases is the most comprehensive we know of, it is likely incomplete. Duffy and Lambert have listened to opinion announcements in only about half of all Supreme Court cases for the Terms they are studying.<sup>209</sup> Some recordings may not even exist.<sup>210</sup> Nonetheless, the list provides us with a valuable vantage point from which to view the more contemporary Justices' use of oral dissents and their reception by the press and the public.

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<sup>204</sup> Loftus, *supra* note 199.

<sup>205</sup> Duffy & Lambert, *supra* note 14, at 8.

<sup>206</sup> *Id.* at 11.

<sup>207</sup> Many such recordings are available on the Oyez website and Oyez is in the process of uploading recordings of all opinion announcements that exist at the National Archives Records Administration. *Id.* at 8, 13.

<sup>208</sup> 495 U.S. 33 (1990). *Missouri v. Jenkins* was identified by the *HMR* authors, who generously shared their list of cases with us. Technically, Justice Kennedy's opinion was not a dissent, but was a concurrence in part and concurrence in the judgment. *Id.* at 59. Substantively, it was a dissent.

<sup>209</sup> Duffy & Lambert, *supra* note 14, at 16. As of their summer 2009 posting, they had listened to 49% of opinion announcements from the October 1969 Term through the October 2007 Term. Nor were those 49% of cases evenly distributed. For some Terms, they had listened to as much as 99% of the opinion hand-downs, while, at the low end, the percentages ranged from 0% to 34%. *Id.*

<sup>210</sup> *Id.* at 13 (noting that during the 1980s, the Supreme Court did not deliver all recordings of opinion announcements to National Archives Records Administration).

**TABLE I: ORAL DISSENTS PER COURT TERM**

<b>Court Term</b>	<b>Cases with Oral Dissents</b>	<b>Oral Dissents</b>
1969: Burger Court	4	4
1970	4	4
1971	1	2
1972	2	2
1973	5	6
1974	1	1
1975	6	6
1976	3	6
1977	6	6
1978	3	3
1979	2	2
1980	2	2
1981	2	2
1982	1	1
1983	2	2
1984	0	0
1985	1	1
1986: Rehnquist Court	1	1
1987	1	1
1988	2	2
1989	2	2
1990	3	3
1991	2	2
1992	3	3
1993	2	2
1994	2	2
1995	2	2
1996	2	2
1997	2	2
1998	6	6
1999	3	4
2000	2	2
2001	4	4
2002	4	4
2003	6	6
2004	4	4
2005: Roberts Court	3	3
2006	7	7
2007	2	2
2008	3	3

*A. The Fall and Rise of the Oral Dissent*

The appointment of Warren Burger as Chief Justice marked the beginning of a trend toward limiting the use of oral dissents and, more generally, toward making decision announcements less noteworthy than they had been in previous decades. Burger advocated that the Court should abandon what he termed the “archaic practice” of reading opinions from the bench.<sup>211</sup> Most of the other Justices resisted. They eventually agreed to avoid the reading of opinions in favor of a policy of announcing only summaries—but not all Justices liked even this change.<sup>212</sup>

Unable to get the Court to agree to his original proposal, Burger sought on his own to downplay any sort of public spectacle associated with decision day at the Court. In most cases in which he wrote the majority opinion, he simply announced the judgment, providing no additional summary of the Court’s reasoning.<sup>213</sup> Even in a case as significant as *Swann v. Charlotte-Mecklenburg Board of Education*<sup>214</sup>—which *Newsweek* called “by far the most momentous Court pronouncement on school segregation since the landmark *Brown* decision of 1954”—Burger read only a summary of the opinion and its holding.<sup>215</sup>

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<sup>211</sup> O’BIEN, *supra* note 78, at 312. The idea to end the tradition of having the Justices announce their opinions from the bench might have come to Burger from his childhood friend and future colleague Harry Blackmun. Upon his appointment in 1969, Burger wrote Blackmun, who was then a judge on the U.S. Court of Appeals for the Eighth Circuit, asking for advice. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 42 (2005). Blackmun responded with an eight-page single-spaced memorandum with suggestions for reforming the Court, which included a proposal for getting rid of opinion announcements. *Id.* at 42–43. Other courts did not announce their opinions, Blackmun observed, and the Supreme Court’s practice was an “anachronism” and a waste of time. *Id.* at 43. Greenhouse notes the irony of Blackmun’s suggestion, since he would eventually become an enthusiastic practitioner of the oral dissent. *Id.*

<sup>212</sup> Unsurprisingly, Justice Black in particular did not favor Burger’s proposed changes. O’BIEN, *supra* note 78, at 311–12.

<sup>213</sup> SCHWARTZ, *supra* note 74, at 63–64.

<sup>214</sup> 402 U.S. 1 (1971).

<sup>215</sup> SCHWARTZ, *supra* note 74, at 63–64. Burger’s expressed disdain for bench opinions did not prevent him from on occasion issuing his own oral dissent. He delivered one, for example, in *Brewer v. Williams*, 430 U.S. 387 (1977), a case in which the Court reaffirmed its ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). Burger’s oral dissent was noted in news accounts of the decision: one report described him as “angry,” Caroline Rand Herron & R. V. Denenberg, *The Nation: Affirmation of Miranda*, N.Y. TIMES, Mar. 27, 1977, at 150; another as “emotional,” Lesley Oelsner, *Justices Spurn States’ Plea to Void Miranda Ruling*, N.Y. TIMES, Mar. 24, 1977, at A1. See also JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 401 (1994) (describing Burger taking “the unusual step of delivering his opinion orally, glaring down the bench at Powell as he read excerpts from his dissent”).

Burger was not alone in his efforts to tone down the bench dramatics in the announcing of opinions. Brennan was on record as asserting that judicial opinions “must stand on their own merits without embellishment or comment from the judges who write or join them.”<sup>216</sup> True to his word, Brennan almost never delivered an oral dissent.<sup>217</sup> Justice White followed Burger’s practice in majority opinion announcements, generally stating only that the lower court was affirmed (or reversed) “for reasons on file with the Clerk”<sup>218</sup>—although White also delivered a handful of notable oral dissents, including one in *Roe v. Wade*.<sup>219</sup>

Despite Burger’s efforts, however, the number of oral dissents issued each Term remained fairly high during the beginning of his tenure.<sup>220</sup> Justices Black and Douglas each continued to dissent from the bench as many as three times a Term until their retirements in 1971 and 1975, respectively.<sup>221</sup> Justice Stewart also was a relatively prolific oral dissenter; he dissented from the bench at least four times in each of October

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Burger perhaps had reason to disdain bench performances, since he seemed to have a propensity for finding himself in an uncomfortable position on decision day. In 1978, for example, he was made the target of a Justice’s bench announcement. This time it was Justice Stewart’s oral dissent in *Stump v. Sparkman*, 435 U.S. 349 (1978), in which the Court had held that a state judge who approved the sterilization of a fifteen-year-old girl without her knowledge or consent was immune from a damage suit. Although Justice White had written the majority opinion, the *Washington Post* reporter singled out Burger’s reaction to Stewart’s oral dissent as one of the stories of the day: “Chief Justice Warren E. Burger, one of the majority, was at Stewart’s right as the dissenter spoke in a strong, controlled voice. As one cutting phrase tumbled on another, Burger’s face reddened. Other justices also appeared to be uncomfortable. The tension struck observers as almost palpable.” Morton Mintz, *High Court Rules Judge Isn’t Liable*, WASH. POST, Mar. 29, 1978, at A1. The selective nature of the coverage of oral dissents can be seen by the fact that the *New York Times* reporter made no note of this “almost palpable” tension in the courtroom; in fact, he did not even mention that Stewart’s dissent was read from the bench. Warren Weaver, Jr., *High Court Rules Judge Immune to Lawsuit in Girl’s Sterilization*, N.Y. TIMES, Mar. 29, 1978, at A18.

<sup>216</sup> O’BRIEN, *supra* note 78, at 313; *see also* Duffy & Lambert, *supra* note 14, at 14 (quoting from a January 17, 1973, memorandum from Brennan to Blackmun in which Brennan wrote: “Our practice in the past has always been not to record [i.e., preserve in writing] oral announcements of opinions in order to avoid the possibility that the announcement will be relied upon as the opinion or as interpreting the filed opinion.”).

<sup>217</sup> The only Brennan oral dissent that either Duffy and Lambert or we could locate was in *Bakke*. Duffy & Lambert, *supra* note 14, at 25.

<sup>218</sup> O’BRIEN, *supra* note 78, at 313. White, for example, was the only Justice who wrote an opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) but did not summarize it from the bench. Four other oral dissents were issued that day. Duffy & Lambert, *supra* note 14, at 25–26 (noting oral dissents by Justices Brennan, Marshall, Blackmun, and Stevens).

<sup>219</sup> *See* Duffy & Lambert, *supra* note 14, at 10–11.

<sup>220</sup> Duffy & Lambert, *supra* note 14, at 23–27.

<sup>221</sup> *Id.* at 23–25.

Term 1973 and 1977 alone.<sup>222</sup> Stewart reportedly held a “firm conviction that the republic deserves an explanation of where its Supreme Court Justices stand on an issue—and why—[which] manifested itself in his policy of reading his dissents from the bench.”<sup>223</sup>

By the late 1970s, however, and certainly after Justice Stewart’s retirement in 1981, oral dissents became much rarer than they had been in previous decades. Newspaper accounts began to describe oral dissents as “unusual”<sup>224</sup> and “rare.”<sup>225</sup> “In recent years,” a *Washington Post* reporter wrote in 1978, “dissenters only infrequently have given opinions from the bench.”<sup>226</sup> The Justices themselves became more self-conscious about the decision to dissent from the bench. Beginning an oral dissent in a 1979 case,<sup>227</sup> Justice Powell explained: “I exercise the privilege we have—though rarely used—to dissent orally. This is a uniquely important case. . . .”<sup>228</sup> In the 1983 case of *INS v. Chadha*,<sup>229</sup> Justice White opened his oral dissent by stating: “I have not spoken orally in dissent in many years. . . . But this is no ordinary case.”<sup>230</sup>

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<sup>222</sup> *Id.* at 24–27.

<sup>223</sup> Johnson et al., *supra* note 14, at 1566–67 (quoting Laurence H. Tribe, *Justice Stewart: A Tale of Two Portraits*, 95 YALE L.J. 1328, 1331 (1986)). When Justice Stevens joined the Court in 1975, Justice Stewart told him “that John Harlan had asked him to make sure to preserve the tradition of making at least one oral announcement of a dissenting opinion each Term.” Duffy & Lambert, *supra* note 14, at 9 n.9 (quoting John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 272 (2005)). Justice Stevens, along with Justice White, then “advised Justice Scalia of that tradition” shortly before Justice Scalia gave his first dissent from the bench in *Morrison v. Olson*, 487 U.S. 654 (1988). *Id.*

<sup>224</sup> See, e.g., Blackmun, in *Unusual Action, Denounces 5-to-4 Ruling*, N.Y. TIMES, Nov. 3, 1976, at 70 (describing Blackmun’s oral dissent in *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976), as “an unusual statement from the bench”); Oelsner, *supra* note 215 (describing Burger’s oral dissent in *Brewer v. Williams*, 430 U.S. 387 (1977), as an “unusual step”).

<sup>225</sup> See, e.g., Morton Mintz, *High Court, 5-4, Rejects Dilution of Miranda Rule*, WASH. POST, Mar. 24, 1977, at A1 (describing Burger’s oral dissent in *Brewer v. Williams*, 430 U.S. 387 (1977), as a “rare action”); Al Kamen, *Stricter Limits Set on Inmates’ Rights*, WASH. POST, July 4, 1984, at A1 (describing Justice Stevens “tak[ing] the rare step of reading a dissent from the bench” in *Hudson v. Palmer*, 468 U.S. 517 (1984)).

<sup>226</sup> Mintz, *supra* note 215 (describing, inter alia, Justice Stewart’s oral dissent in *Stump v. Sparkman*, 435 U.S. 349 (1978)).

<sup>227</sup> *Davis v. Passman*, 442 U.S. 228 (1979).

<sup>228</sup> Duffy & Lambert, *supra* note 14, at 7.

<sup>229</sup> 462 U.S. 919 (1983).

<sup>230</sup> Fred Barbash, *Decision Alters Balance of Power in Government*, WASH. POST, June 24, 1983, at A1. Justice White’s oral dissent stirred Chief Justice Burger to break from his practice of stating nothing more than the Court’s holding in announcing an opinion. Burger, the author of the majority decision, initially had delivered nothing more than a brief statement of the result in the case. But White’s strongly worded oral dissent was followed by an awkward moment of silence, which Burger then filled with an extemporaneous explanation of the majority’s decision. Linda Greenhouse, *Supreme Court, 7-2, Restricts Congress’s Right to Overrule Actions by Executive Branch*, N.Y. TIMES, June 24, 1983, at A1. “The courtroom was half

Chief Justice Rehnquist, who was first appointed as an Associate Justice in 1973 and who succeeded Burger as Chief in 1986, followed in his predecessor's footsteps when it came to oral dissents. There is reliable evidence of him orally dissenting only once during more than three decades on the Court.<sup>231</sup> Nor did other Justices frequently dissent from the bench during the 1980s. Justice Sandra Day O'Connor did not announce her first oral dissent until 1991, a decade after her appointment to the Court.<sup>232</sup> By 1987, Justice Blackmun estimated that "about once a year, a dissent is announced from the bench,"<sup>233</sup> and by this point, his estimate appears to be about right.<sup>234</sup> From October Term 1980 through October Term 1989, there is evidence of an average of fewer than 1.4 oral dissents per Term; in October Term 1984, there is no record of any oral dissent.<sup>235</sup>

The 1990s appeared to bring a mild increase in oral dissents,<sup>236</sup> with two or three known instances of oral dissents in each of the years between October Term 1990 and 1997.<sup>237</sup> And in the late 1990s, the numbers began to increase some more. October Term 1998 saw six oral dissents, in five different cases.<sup>238</sup> For the remainder of the Rehnquist Court, the number of oral dissents per term fluctuated between two and four, with the exception of October Term 2003, when there were six oral dissents in five different cases.<sup>239</sup> Since the advent of the Roberts Court in October Term 2005,

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empty," Linda Greenhouse of the *New York Times* reported, "and it was unlikely that many of the tourists present knew what an unusual event they had happened upon." *Id.*

<sup>231</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). This is the only confirmed oral dissent Rehnquist issued, although Duffy and Lambert note that some have claimed that Rehnquist also read his dissent in *Roe v. Wade*, 410 U.S. 113 (1973). Duffy & Lambert, *supra* note 14, at 16–17. They could find no confirming evidence, however.

<sup>232</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); JOAN BISKUPIC, SANDRA DAY O'CONNOR 251 (2005); Duffy & Lambert, *supra* note 14, at 21.

<sup>233</sup> Duffy & Lambert, *supra* note 14, at 17 n.58 (quoting *In Search of the Constitution with Bill Moyers: Justice Harry A. Blackmun* (PBS television broadcast April 26, 1987)). The comment was in response to a question about *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which Blackmun delivered an oral dissent. *Id.*

<sup>234</sup> See Duffy & Lambert, *supra* note 14, at 27–28 (locating two oral dissents in October Term 1980, two in 1981, one in 1982, two in 1983, none in 1984, and one in 1985, 1986, and 1987).

<sup>235</sup> *Id.* at 21–23.

<sup>236</sup> Of course this increase, as reported by Duffy and Lambert, might be explained by the increase in recordings of bench announcements, so that by the 1990s fewer oral dissents were lost to history. See Duffy & Lambert, *supra* note 14, at 13–16, 29–33.

<sup>237</sup> *Id.* at 29–31.

<sup>238</sup> *Id.* at 32; see also Joan Biskupic, *Voicing Supreme Dissent: Rare, Loud, and Clear*, WASH. POST, July 5, 1999, at A19 (describing the "extraordinary hour of statements from the bench" on the last day of the term, which included three oral dissents); Linda Greenhouse, *States are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1 (describing the last day of the term as a "scene of extraordinary drama" which "held the audience spellbound").

<sup>239</sup> Duffy & Lambert, *supra* note 14, at 32–35.

oral dissents seem to have re-emerged as an important feature of the announcement of controversial decisions, although Chief Justice Roberts himself has yet to dissent from the bench. The high water mark to date was October Term 2006—the Term that sparked much of the current interest in oral dissents—when there were seven oral dissents, each in a separate case.<sup>240</sup>

### *B. The More Things Change . . .*

When viewed in a long-term perspective it is more accurate to identify the practices of the late Burger and Rehnquist Courts, with only a few reported oral dissents per term, as the aberrant period in the history of Supreme Court bench announcements. The apparent recent uptick in oral dissenting in the Roberts Court is more a return to past practice than an innovation. The oral dissents of recent years also reinforce the patterns we have identified in the historical record. The Roberts Court's oral dissent practices offer yet more examples of the diverse nature of these bench statements. An individual Justice may have different intentions for different oral dissents, practices vary from Justice to Justice, and over time changes in the Court's culture and customs make for different approaches to oral dissenting. Furthermore, oral dissents continue to be underreported in the mainstream press. And finally, the public significance of an oral dissent remains unpredictable. Efforts to identify the factors behind an oral dissent that resonates with the public must take into account not only the variety of types of oral dissents, but also the role of extrajudicial actors in interpreting and disseminating the oral dissent.

#### 1. The Perils of Generalizing

Oral dissents can take many different forms and Justices deliver them with many different goals in mind. The sometimes conflicting conclusions of the *HMR* authors and Blake and Hacker hint at this reality. Consistent with *HMR*, there are numerous examples of oral dissents characterized by ideological distance between the dissenter and the majority opinion author. Justice Stevens's dissent in *Printz v. United States*,<sup>241</sup> for example, fits this mold. In *Printz*, Stevens attacked Justice Scalia's majority opinion, which invalidated parts of the Brady gun control law, for its expansive reading of the 10th Amendment at the expense of congressional power.<sup>242</sup> Stevens is regularly

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<sup>240</sup> *Id.* at 36. Whether in fact “[o]ral dissents have enjoyed a resurgence over the last few years,” Guinier, *Foreword*, *supra* note 21, at 15, remains to be seen. The annual totals for the period from October Term 2000 to October Term 2008 (2, 4, 4, 6, 4, 3, 7, 2, 3) show no clear trend, although the yearly average has appeared to increase slightly from the 1990s. Duffy & Lambert, *supra* note 14, at 29–37.

<sup>241</sup> 521 U.S. 898 (1997).

<sup>242</sup> *Id.* at 939–40 (Stevens, J., dissenting).

identified as the most liberal member in the latter years of the Rehnquist Court, while Scalia is one of the most conservative.<sup>243</sup> And during the Rehnquist Court, there were many such cases in which Justices from the liberal wing orally (and bitterly) dissented from conservative holdings announced by the more conservative Justices.<sup>244</sup>

On the other hand, there are numerous examples to illustrate Blake and Hacker's finding that oral dissents are more likely when the ideological distance between dissenter and majority author is smaller.<sup>245</sup> Many of these cases are 5-4 decisions in which the majority author is the swing Justice—often either Justice O'Connor or Justice Kennedy. Since these Justices are situated at the middle of the Court, the ideological distance between them and any dissenter is necessarily smaller than in cases like *Printz*, in which the Justices writing the opinions are at the extremes at both ends of the spectrum. In *Davis v. Monroe County Board of Education*,<sup>246</sup> for example, Justice O'Connor announced the opinion of the Court allowing a student to sue a school district for failing to adequately address sexual harassment of the plaintiff by a fellow student. Justice Kennedy, who is widely seen as only slightly more conservative than O'Connor, dissented from the bench.<sup>247</sup> In such cases, it seems plausible that the oral dissent is motivated at least in part by frustration at the dissenter's failure to persuade a frequent ally, as Blake and Hacker hypothesize.<sup>248</sup>

Not surprisingly, both sets of empirical scholars conclude that oral dissents are more likely in closely decided cases. Even casual court watchers can identify any number of such cases (*Printz*, *Davis*, *Ricci*, *Citizens United*, and *Parents Involved* are only a few). But again, the "typical" case does not tell the whole story. Justice O'Connor and Justice Scalia each issued their first oral dissent in cases in which they were the lone dissenter.<sup>249</sup> In *City of Boerne v. Flores*,<sup>250</sup> the second of only three

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<sup>243</sup> See, e.g., Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145, 147 (2002); Sheryl Gay Stolberg & Charlie Savage, *Justice Stevens Retiring, Giving Obama a 2nd Pick*, N.Y. TIMES, Apr. 10, 2010, at A1; Richard L. Hasen, *Scalia's Retirement Party*, SLATE, Apr. 12, 2010, <http://www.slate.com/id/2250579>.

<sup>244</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (majority opinion by Justice Scalia; dissent by Justice Stevens); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (majority opinion by Justice Scalia; dissent by Justice Ginsburg); *United States v. Lopez*, 514 U.S. 549 (1995) (majority opinion by Chief Justice Rehnquist; dissent by Justice Breyer).

<sup>245</sup> Blake & Hacker, *supra* note 19, at 5.

<sup>246</sup> 526 U.S. 629 (1999).

<sup>247</sup> *Id.*; Duffy & Lambert, *supra* note 14, at 32.

<sup>248</sup> Blake & Hacker, *supra* note 19, at 21.

<sup>249</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (O'Connor, J., dissenting); *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting).

<sup>250</sup> 521 U.S. 507 (1997). Justice Souter, joined by Justice Breyer, dissented on completely different grounds. O'Connor's disagreement with the majority was over the scope of the Free Exercise Clause; Souter's was over the scope of congressional authority to enact prophylactic

known oral dissents Justice O'Connor issued in her more than twenty years on the Court, she was joined only by Justice Breyer. Justice White likewise issued two of his five known oral dissents in cases in which only one other Justice joined him,<sup>251</sup> and, in one of Justice Stevens's most recent oral dissents, he was alone.<sup>252</sup>

In contrast to these examples of Justices defiantly staking out unpopular positions, the Justices sometimes appear to be coordinating their efforts. On June 23, 1999, for example, the Court handed down three cases holding that Congress exceeded its authority when it authorized lawsuits against the states in the Fair Labor Standards Act,<sup>253</sup> the Trademark Remedy Clarification Act,<sup>254</sup> and a patent statute.<sup>255</sup> The three 5-4 cases were part of the Rehnquist Court's federalism revolution: its controversial effort to cut back on congressional power. The three cases handed down in June of 1999 provided the dissenters an opportunity to shine a light on this trend, and the primary dissenter in each case (Justices Souter, Breyer, and Stevens, respectively) announced his opinion from the bench.<sup>256</sup> Similarly, on June 28, 2000, the Court announced both its decision striking down the Nebraska partial-birth abortion ban<sup>257</sup> and its decision upholding a Colorado law restricting abortion protesters' activities near clinics.<sup>258</sup> This time it was three conservative Justices—Scalia, Thomas, and Kennedy—who dissented from the bench.<sup>259</sup> They used the opportunity to collectively attack the Court's abortion jurisprudence—even in *Hill v. Colorado*, which was ostensibly a First Amendment case.<sup>260</sup>

The subject matter of the cases in which there are oral dissents also varies. Consistent with the opinions just discussed, Blake and Hacker identify abortion and federalism as subject areas that are particularly likely to generate oral dissents.<sup>261</sup> But there are numerous other subjects that have been the subject of oral dissents. For

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legislation under Section Five of the 14th Amendment. Justice Souter did not issue an oral dissent.

<sup>251</sup> *INS v. Chadha*, 462 U.S. 919 (1983); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>252</sup> *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>253</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>254</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

<sup>255</sup> *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

<sup>256</sup> *Duffy & Lambert*, *supra* note 14, at 32.

<sup>257</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>258</sup> *Hill v. Colorado*, 530 U.S. 703 (2000).

<sup>259</sup> *Duffy & Lambert*, *supra* note 14, at 33.

<sup>260</sup> Justice Thomas read his dissent in *Stenberg*, while Justices Scalia and Kennedy orally dissented in *Hill*. *Id.* at 32–33, nn.181–83. *Stenberg* was a 5-4 decision, with Justice O'Connor joining the four liberal Justices in the majority. *Stenberg*, 530 U.S. at 918. *Hill*, however, was 6-3, with Chief Justice Rehnquist in the majority (along with Justice O'Connor). *Hill*, 530 U.S. at 705. *Hill*, then, may also fit Blake and Hacker's profile of the case in which the dissenters are particularly frustrated with what they may perceive as the defection of an ally.

<sup>261</sup> Blake & Hacker, *supra* note 19, at 8.

example, although Justice Ginsburg's most recent (and famous) oral dissents are in cases involving discrimination law and abortion rights,<sup>262</sup> she has also recently dissented orally in cases involving appellate jurisdiction<sup>263</sup> and access to attorneys' fees.<sup>264</sup> And of course, there are contentious and high-profile cases that do *not* result in oral dissents. The Michigan affirmative action cases,<sup>265</sup> for example, generated enormous controversy and attention, but the dissenters remained silent at the opinion hand-downs. Even some federalism and abortion cases do not result in oral dissents.<sup>266</sup>

## 2. The Underreporting of Oral Dissents

As described above, the evidence from the Stone, Vinson, and Warren years suggests that oral dissents were not always reported by the media. Nevertheless, in the modern era, commentators and observers generally assume that oral dissents are consistently reported by the press.<sup>267</sup> As one recent article notes:

The Supreme Court press corps has intimate familiarity with the Court, its procedures, and sometimes even the justices as individuals. A dissent from the bench, widely understood in Court circles as the preeminent “official” method of voicing disapproval, is an immediately recognizable signal to these reporters that a justice believes the majority opinion is of unusual significance. Thus, newspaper articles covering a Supreme Court decision involving a dissent from the bench will typically mention that the practice is reserved for special cases and will also attempt to convey the drama of the moment when an oral dissent is delivered.<sup>268</sup>

The assumption is that the specialized knowledge of the press corps translates into consistent reporting to the general public of—at the very least—the fact and significance

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<sup>262</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Title VII); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Title VII); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (abortion rights); see Duffy & Lambert, *supra* note 14, at 36–37.

<sup>263</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

<sup>264</sup> *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001); see Duffy & Lambert, *supra* note 14, 33–34.

<sup>265</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>266</sup> See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (federalism); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (abortion).

<sup>267</sup> See, e.g., Blake & Hacker, *supra* note 19, at 2 (“Journalists who cover the Court characterize a dissent being read from the bench as a statement of profound disagreement by a dissenting justice, which makes the impact of this rare phenomenon substantial.” (citing Biskupic, *supra* note 238; Greenhouse, *Ginsburg*, *supra* note 5)).

<sup>268</sup> Bleich et al., *supra* note 18, at 33.

of most if not all oral dissents.<sup>269</sup> Moreover, reporting of oral dissents is assumed to regularly go beyond a passing mention that a Justice read a dissent from the bench and to instead describe the content, drama, or emotion of the moment.

Such coverage, however, turns out to be surprisingly inconsistent. Recent and contemporary media reports of oral dissents are unpredictable, parsimonious, frequently superficial, and perhaps most surprisingly, sometimes nonexistent. This aspect of oral dissents came as a surprise to us. Like other observers, we had assumed that oral dissents are always noted and discussed by the Supreme Court press corps. But the data show otherwise.

#### *a. Quantitative Analysis*

We began by gathering information about the news coverage of Supreme Court cases with oral dissents. Using electronic databases like Lexis-Nexis, Westlaw, and America's Newspapers, we conducted a series of searches for press coverage of oral dissents in mainstream media outlets. Specifically, we attempted to find the immediate press coverage for the 111 cases identified as having oral dissents between October Term 1969 and October Term 2008. We focused in particular on the immediate reporting of the cases in major daily newspapers and by the Associated Press. The papers we searched were the *Boston Globe*, *Washington Post*, *New York Times*, *USA Today*, *Chicago Tribune*, *L.A. Times*, and *Wall Street Journal*. Because the databases we relied on had different dates of coverage for different news outlets, we were not able to search for the same number of cases in every news source. Table II sets forth the specific media resources we searched, the databases relied on, and the dates of coverage available.

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<sup>269</sup> See, e.g., Guinier, *Foreword*, *supra* note 21, at 30 ("Justices who deliver dissents from the bench know that the press is present and that their words will carry beyond the room."); Johnson et al., *supra* note 14, at 1562 ("As he gave this dissent from the bench Blackmun certainly appears to have been cognizant that his words would have a clear effect on the public's view of *Webster*."); Bleich et al., *supra* note 18, at 33 ("[A] dissent from the bench allows a justice to communicate to the public the gravity of the Court's decision and the depth of his or her disagreement with it."); *id.* at 34 ("A dissent from the bench can also call attention to an important decision that might otherwise have flown under the radar and can likewise serve as the catalyst for changing the law.").

The Justices themselves also seem to accept this assumption. See, e.g., Justice Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2001), available at [http://www.supremecourt.gov/publicinfo/speeches/sp\\_10-21-07.html](http://www.supremecourt.gov/publicinfo/speeches/sp_10-21-07.html) ("A dissent presented orally . . . garners immediate attention.").

This assumption is also implicit in Blake and Hacker's effort to build a dataset of oral dissents by relying on press reports. In fairness to Blake and Hacker, at the time of their study, there was no comprehensive list of oral dissents, and their list was superior to what existed before it. But their article contains no discussion of the possibility that their dataset is skewed in some way by its reliance on press reports.

**TABLE II: DATES OF COVERAGE**

<b>Press Resource</b>	<b>Electronic Database(s)</b>	<b>Date Database Coverage Begins</b>	<b>Total Cases With Confirmed Oral Dissents Announced During Dates Covered</b>	<b>Total Cases for Which Press Coverage Was Identified</b>
Associated Press	Westlaw	1/1/1984	69	64
Boston Globe	America's Newspapers	12/12/1979	76	55
	LexisNexis	9/1/1988	64	
Chicago Tribune	America's Newspapers	1/1/1985	67	58
	LexisNexis		67	
Los Angeles Times	LexisNexis	1/1/1985	67	60
New York Times	LexisNexis	6/1/1980	76	74
	Westlaw		76	
USA Today	America's Newspapers	1/1/1985	67	51
Wall Street Journal	LexisNexis	1/1/1984	71	54
Washington Post	America's Newspapers	1/1/1977	88	76
	LexisNexis		88	

Note: Where two databases are noted, we used both to search for press coverage. We did not separately track which databases contained articles about which cases. Although there were some cases for which we were unable to find articles in particular news sources, we do not assume that such press coverage was necessarily absent.

For each of these news sources, we searched for coverage of each case on our list decided within the timeframe covered by the relevant databases. We focused on

straight news articles appearing within a day or two of the decision.<sup>270</sup> If we identified such coverage, we noted whether the coverage included mention of the fact that an oral dissent was delivered. The results are reported in Table III.

**TABLE III: REPORTING OF ORAL DISSENTS IN MAINSTREAM NEWSPAPERS**

Press Source	Total Cases With Identified Press Coverage	Cases With Press Coverage Not Mentioning Oral Dissent	Cases With Press Coverage Mentioning Oral Dissent
Associated Press	64	40 (62.5%)	24 (37.5%)
Boston Globe	55	41 (74.5%)	14 (25.5%)
Chicago Tribune	58	29 (50.0%)	29 (50.0%)
Los Angeles Times	60	23 (38.3%)	37 (61.7%)
New York Times	74	38 (51.4%)	36 (48.6%)
USA Today	51	26 (51.0%)	25 (49.0%)
Wall Street Journal	54	47 (87.0%)	7 (13.0%)
Washington Post	76	17 (22.4%)	59 (77.6%)

The most striking aspect of our findings is the pervasive underreporting of oral dissents in a significant percentage of cases. Some news sources, including those—like the *New York Times* and the *Washington Post*—that we might expect to provide the most comprehensive and consistent information about oral dissents in fact mention them only sometimes. Specifically, the *New York Times* mentions only about half of them; the Associated Press—whose wire stories appear all over the country—mentions them only slightly more than one third of the time.

Even the *Washington Post*, with the highest rate of mentioned oral dissents, omits mention of about a quarter of them. Moreover, some news coverage may mention the *fact* of an oral dissent, along with a generic statement that Justices rarely dissent orally and only when they have particularly strong feelings about a case but often provides no information about the content or tenor of the particular dissent. For some news sources, like the *Boston Globe*, the frequency with which oral dissents

<sup>270</sup> For purposes of this count, therefore, we did not include news analysis, op-eds, or editorials.

are reported varies with the identity of the reporter. During the years when Lyle Denniston—now a reporter for SCOTUSblog.com and, at more than 50 years,<sup>271</sup> the longest serving member of the Supreme Court press corps—covered the Supreme Court for the *Boston Globe*, his articles almost always mentioned—but did not elaborate on—oral dissents when they were given. When other reporters were at the helm, however, the *Globe*'s coverage rarely mentioned oral dissents at all.

*b. Examples*

A few examples demonstrate the surprisingly inconsistent press coverage of oral dissents. In June of 2000, when the Court announced its decisions in *Stenberg v. Carhart*,<sup>272</sup> Justice Thomas read his dissent in *Stenberg*—apparently the first time he had ever dissented from the bench.<sup>273</sup> On the same day, Justices Scalia and Kennedy both read their dissents in *Hill v. Colorado*, which upheld Colorado's law restricting abortion protesters.<sup>274</sup>

The news coverage of the oral dissents in these cases varied widely. *USA Today*, the *L.A. Times*, and the *Wall Street Journal* did not mention any of them.<sup>275</sup> The *Washington Post*, the only news outlet we examined that mentioned all three oral dissents, noted only that “[t]he two decisions also provoked heated dissents, portions

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<sup>271</sup> Lyle Denniston, *The Shrinking Supreme Court and Its Dwindling Press Corps*, 59 SYRACUSE L. REV. 417, 425 n.24 (2009).

<sup>272</sup> 530 U.S. 914 (2000).

<sup>273</sup> Duffy & Lambert, *supra* note 14, at 33. Lambert and Duffy do not report any earlier instances of Justice Thomas orally dissenting. Due to the incompleteness of their survey of opinion hand downs, however, such cases may yet be identified. Interestingly, Thomas himself seemed to forget about his *Stenberg* dissent. Six years later, when he dissented orally in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), he said that it was the first time he had ever done so. See Adam Liptak, *In a Polarized Court, Getting the Last Word*, N.Y. TIMES, Mar. 8, 2001, at A12 (noting that “Justice Thomas’s memory failed him” when he announced his *Hamdan* dissent).

<sup>274</sup> 530 U.S. 703, 741 (2000) (Scalia, J., dissenting); Duffy & Lambert, *supra* note 14, at 32–33. Scalia’s dissent in *Hill* is a classic example of demosprudence. He complains explicitly that because the Court has declared abortion constitutionally protected, those people who oppose abortion as a matter of conscience have no way to try to stop abortions without trying to persuade individual women not to have them. In that context, he deplored *Hill*’s holding that would prevent what might be the most effective form of such persuasion.

<sup>275</sup> Joan Biskupic, *Abortion Debate Will Continue to Rage: Despite Ruling, ‘Need to Speak Out’ Is Strong*, USA TODAY, June 29, 2000, at 9A; Joan Biskupic, *Court Sharply Divided: ‘Partial Birth’ Abortion Ban Struck Down; Scouts Can Reject Gay Leader*, USA TODAY, June 29, 2000, at 1A; Robert S. Greenburger, *High Court Strikes Down Nebraska Abortion Law*, WALL ST. J., June 29, 2000, at A3; Patrick O’Driscoll, *Ruling Upholding ‘Bubbles’ at Clinics Hailed, Denounced*, USA TODAY, June 29, 2000, at 9A; David G. Savage, *Supreme Court Decisions: High Court Strikes Down ‘Partial-Birth’ Abortion Ban*, L.A. TIMES, June 29, 2000, at A1.

of which were read aloud in the tense court chambers by Justices Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas.”<sup>276</sup>

In contrast, the *Chicago Tribune* reported that Justice Thomas “read portions of his dissent aloud in the courtroom and spared no detail, using explicit terms to inform spectators how D&X [dilation and extraction] abortions, a ‘horrific procedure bordering on infanticide,’ are performed.”<sup>277</sup> The *Boston Globe* likewise noted that Justice Thomas “deplored [the *Stenberg* decision] as ‘grievously wrong’ and morally indefensible,” contributing to “drama inside the chamber on the last day of the high court’s term.”<sup>278</sup> But neither paper said anything about the equally dramatic oral dissents in *Hill*. The *New York Times*, on the other hand, reported that in *Hill*, “Justice Scalia and Justice Kennedy read their impassioned dissenting opinions in the courtroom this morning for more than half an hour, making clear that this First Amendment debate was in many respects a proxy for the court’s ongoing abortion debate.”<sup>279</sup> But the *Times* said nothing whatsoever about Justice Thomas’s oral dissent in *Stenberg*, despite the novelty of it being his first, the inclusion of graphic descriptions of the abortion procedure that Nebraska wished to outlaw, and Justice Thomas’s assertion that “many find this hard to distinguish from infanticide.”<sup>280</sup>

Even Justice Breyer’s famous line in *Parents Involved*—“it is not often in the law that so few have so quickly changed so much”<sup>281</sup>—was not immediately reported by many news outlets. No mention was even made of the fact that he gave an oral dissent, much less of his unwritten addition, in the immediate coverage by the *Chicago Tribune*.<sup>282</sup> In the *Boston Globe*, the initial report of the case did not mention either the oral dissent or the famous line,<sup>283</sup> although both were mentioned in a subsequent

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<sup>276</sup> Edward Walsh & Amy Goldstein, *Supreme Court Upholds Two Key Abortion Rights*, WASH. POST, June 29, 2000, at A1.

<sup>277</sup> Jan Crawford Greenburg, *Late-Term Abortion Ban Voided*, CHI. TRIB., June 29, 2000, at 1.

<sup>278</sup> Mary Leonard, *High Court Voids Nebraska Ban on Type of Abortion: Ruling Cites Obstacle to a Woman’s Right to End Pregnancy*, BOSTON GLOBE, June 29, 2000, at A1.

<sup>279</sup> Linda Greenhouse, *Court Rules That Governments Can’t Outlaw Type of Abortion*, N.Y. TIMES, June 29, 2000, at A1 [hereinafter Greenhouse, *Type of Abortion*].

<sup>280</sup> Transcript of Opinion Announcement, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830) (Thomas, J., dissenting), available at [http://www.oyez.org/cases/1990-1999/1999/1999\\_99\\_830/opinion](http://www.oyez.org/cases/1990-1999/1999/1999_99_830/opinion). In fact, the *New York Times* barely even mentioned Justice Thomas’s written dissent. Greenhouse, *Type of Abortion*, *supra* note 279.

<sup>281</sup> See *supra* note 10 and accompanying text.

<sup>282</sup> Naftali Bendavid, *High Court Strikes Down School Integration Plans*, CHI. TRIB., June 29, 2007, at 1. The Bendavid article was an analysis and reaction piece. The *Tribune* also ran a short summary of the opinions from the *New York Times News Service*. That summary, at least as it appeared in the *Tribune*, also contained no mention of the oral dissent. *School Decision Divides Justices*, CHI. TRIB., June 29, 2007, at 26.

<sup>283</sup> Charlie Savage, *Justices, in Shift, Reject 2 Race-Based School Plans*, BOSTON GLOBE, June 29, 2007, at 1A.

summary article about the Court's shift to the right.<sup>284</sup> Even Charles Ogletree, in an op-ed piece that ran in the *Globe* the day after *Parents Involved* was decided, did not mention Breyer's oral dissent<sup>285</sup>—despite being one of the three civil rights lawyers whom Guinier says Breyer looked at directly during his bench statement.<sup>286</sup> In both *USA Today* and the *Washington Post*, the principal report of the case mentioned that Breyer dissented orally, but did not quote his scathing remark.<sup>287</sup> Indeed, in the initial coverage of the case, the *New York Times* was the *only* paper we have found that quoted his “most pointed words” and noted that they “appeared nowhere in his 77-page opinion.”<sup>288</sup>

We do not mean to suggest that news outlets *should* always report on oral dissents or should do so in detail. Space is limited; Supreme Court decisions must compete with other news for column inches. When many cases are announced at once, they must even compete with each other.<sup>289</sup> Frequently, the reporter must choose between a variety of possible emphases in writing the article. In the 2000 abortion cases, for example, Linda Greenhouse for the *New York Times* emphasized Justice Kennedy's surprising role.<sup>290</sup> As one of the Justices who authored the famous opinion refusing to overrule *Roe* in *Casey*,<sup>291</sup> his willingness to uphold an abortion restriction was particularly notable. Other reporters emphasized the upcoming presidential election and the significance of a 5-4 abortion ruling in light of the likelihood that the next president would be able to appoint at least one Justice.<sup>292</sup> The appropriate emphasis is often a judgment call, and choosing one emphasis often precludes another.

Interestingly, the print reporters who are most famously associated with their coverage of the Supreme Court—Linda Greenhouse for the *New York Times*, Joan Biskupic for the *Washington Post* and more recently for *USA Today*, and Lyle Denniston, who has reported for a range of publications<sup>293</sup>—may be more likely to note the existence of an oral dissent than other less established reporters. Yet there is a surprising incongruity. These reporters' coverage of the oral dissent is likely to be either without

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<sup>284</sup> Charlie Savage, *High Court Remains Politically Divided: More 5-4 Rulings Mark Shift to Right*, BOSTON GLOBE, June 30, 2007, at 1A.

<sup>285</sup> Charles J. Ogletree, Jr., Op-Ed, *Brown's Legacy Lives, but Barely*, BOSTON GLOBE, June 29, 2007, at 17A.

<sup>286</sup> Guinier, *Foreword*, *supra* note 21, at 7 n.1, 10 n.21.

<sup>287</sup> Robert Barnes, *Divided Court Limits Use of Race by School Districts*, WASH. POST, June 29, 2007, at A1; Joan Biskupic, *School Diversity Programs in Doubt: Ruling Limits Use of Race as Factor*, USA TODAY, June 29, 2007, at 1A. In *USA Today*, the famous line did appear in an analysis of the entire Term that appeared the same day. Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA TODAY, June 29, 2007, at 8A.

<sup>288</sup> Greenhouse, *Integration Plans*, *supra* note 18.

<sup>289</sup> Denniston, *supra* note 271, at 423.

<sup>290</sup> Greenhouse, *Type of Abortion*, *supra* note 279.

<sup>291</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 833 (1992).

<sup>292</sup> See Leonard, *supra* note 278; Savage, *supra* note 275; Walsh & Goldstein, *supra* note 276.

<sup>293</sup> Denniston, *supra* note 271, at 425 n.24.

substance—a mere passing mention—or focused primarily on the drama of the presentation, not on the content. Thus, the most knowledgeable and expert reporters do little to highlight the uniquely accessible aspects of oral dissents. They instead seem more interested in the inside baseball—what the emotional tenor of an oral dissent tells us about the personalities and relationships of the Justices. This interest may arise from the nature of their work. They spend hours reading briefs and opinions and have little or no actual contact with the people they cover. So when they do catch a glimpse of a Justice’s emotional side, that may stand out for them as particularly unusual and interesting. But while this kind of coverage is unquestionably fascinating to the court watcher, the lawyer, and the informed elite reader, it may ill serve the average reader, even the average well-informed and educated reader. It certainly does not promote public dialogue.<sup>294</sup> Regardless of its effects, however, the selective coverage of the existence and content of oral dissents thus illustrates the role of the press in identifying and publicizing only those oral dissents (or aspects of them) that the reporters and their editors deem interesting or important.

### 3. Sparking Public Dialogue or Blowing Off Steam?

In light of the media’s inconsistent treatment of oral dissents, important questions arise about the Justices’ own desire and expectation that oral dissents will foster public, even democracy-enhancing dialogue. As an institution, the Court appears deeply ambivalent about its relationship with the public, and, the conduct of the Court itself—or at least of some of the Justices—suggests a rejection of Guinier’s vision of a democratic dialogue between the Court and the people.

Specifically, an examination of the Justices’ actions and attitudes suggests ambivalence—or at least some disagreement—about whether oral dissents are public events that the Justices expect or hope will be covered in the press and therefore will have some public impact. Some Justices have deliberately used the bench as a platform for speaking publicly. As already noted, Justice Stewart regularly dissented from the bench due to his “firm conviction that the republic deserves an explanation of where its Supreme Court Justices stand on an issue—and why . . . .”<sup>295</sup> When Justice Ginsburg dissents from the bench, for example, she circulates a written copy of her oral remarks to the press.<sup>296</sup> And on one occasion, Stevens dissented orally in part due to his concern “that what the court had done might get lost in the rush of other ‘newsworthy’ opinions handed down” that day.<sup>297</sup>

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<sup>294</sup> When reading some of the most informative coverage, such as Charlie Savage of the *Boston Globe*, it is impossible to tell whether the reporter was even present for the opinion announcement.

<sup>295</sup> Johnson et al., *supra* note 14, at 1567 (quoting Tribe, *supra* note 223, at 1331).

<sup>296</sup> Ruth Bader Ginsburg, *Informing the Public about the U.S. Supreme Court’s Work*, 20 LOY. U. CHI. L.J. 275, 275 (1998). She does the same for bench statements announcing majority opinions. *Id.*

<sup>297</sup> Kamen, *supra* note 225.

On the other hand, some Justices, like Burger, White, and Brennan, who generally eschewed oral dissents and were even inclined to give up the practice of bench announcements of majority opinions, believed that the written opinions should stand on their own. For them, speaking to the public through an oral dissent (or through the press) was simply improper. Chief Justice Rehnquist once told a group of journalists, “You know, the difference between us and the other branches of government is that we don’t need you people of the press.”<sup>298</sup> And Justice Scalia once gave a speech criticizing the media’s coverage of the Supreme Court. “[L]aw is a specialized field, fully comprehensible only to the expert” and newspaper reporters regularly fail to accurately represent the complexities of Supreme Court opinions.<sup>299</sup>

The Court’s institutional practices with respect to the press, moreover, diminish the likelihood that a Justice’s oral dissent will have a public impact or spark a public dialogue. As it stands now, no one outside the Court knows when any particular case might be decided.<sup>300</sup> Towards the end of the Term, of course, in late June, Court watchers know which cases (often the most controversial of the Term) are still outstanding, and by the last day, everyone knows which cases are left.<sup>301</sup> But during the rest of the Term, opinions might be announced at any point along the way. Many Supreme Court opinions carry little or no widespread political implications; they are technical regulatory or statutory cases that are often unanimous. Yet scattered among those cases throughout the Term are many important and controversial cases, some of which have involved dramatic but strikingly underreported oral dissents.<sup>302</sup> News outlets without a full-time reporter assigned to the Court (and the number that have them are dwindling)<sup>303</sup> are unlikely to have a presence in the courtroom when those significant cases are announced. While the cases and written opinions will likely be reported in major news outlets, those outlets will rely either on reporters who have read the opinions but were not in the courtroom or on wire service reports.<sup>304</sup> As a result, any theatrics in the courtroom are likely to go unreported in most news outlets.

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<sup>298</sup> Tony Mauro, *The Chief and Us: Chief Justice William Rehnquist, the News Media, and the Need for Dialogue Between Judges and Journalists*, 56 SYRACUSE L. REV. 407, 410 (2006).

<sup>299</sup> JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 145 (2009) (quoting Antonin Scalia, *Is Law Too Complicated for General Media to Cover?*, CHI. DAILY L. BULL., Oct. 1, 1990).

<sup>300</sup> See generally Linda Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1558–59 (1996) [hereinafter Greenhouse, *Court’s Story*] (describing the unpredictable nature of the Court’s calendars).

<sup>301</sup> *Id.* at 1558.

<sup>302</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), for example, was decided on March 21, 2000. Of the mainstream newspapers we surveyed, we found only one (the *Washington Post*) that mentioned Justice Breyer’s oral dissent. Joan Biskupic, *FDA Can’t Regulate Tobacco, Supreme Court Rules 5 to 4*, WASH. POST, Mar. 22, 2000, at A1.

<sup>303</sup> Denniston, *supra* note 271, at 420–21.

<sup>304</sup> The major wire services do have full-time reporters at the Supreme Court. *Id.* But the wire service articles are likely to be subject to more ruthless cutting than are articles by staff

Other aspects of the Court's practices with respect to the press also reduce the likelihood that oral dissents will reach many in the public or even be mentioned at all. Especially late in the Term, when oral dissents are more likely because many of the most contentious cases are being announced, the Court is also likely to have what the press calls "heavy" days, when a large number of opinions are announced.<sup>305</sup> Reporters do not like heavy days. If there are too many cases announced at once, especially too many significant cases (as, again, is likely towards the end of the Term), the reporters may not be able to give each case the space he or she thinks it deserves (or any space at all).<sup>306</sup> Or the reporters may be so pressed for time that they are unable to do a thorough job of explaining the reasoning and significance of each one. Linda Greenhouse, for example, wryly recalled one occasion on which she "ran out of time" to cover a significant grant of certiorari due to having to cover a major abortion case decided the same day.<sup>307</sup> As a result, her article covered only the abortion case and the *New York Times* had to run a wire service article about the other.<sup>308</sup> The Court's practice of handing down many cases on a single day has been a bone of contention for its press corps for years.<sup>309</sup> Although the Court long ago made some adjustment to the media's complaints—in 1965, it agreed to no longer hand down cases only on Mondays—it continues its practice of handing down cases as they are ready, with no apparent regard for the effect on those who must report those cases to the public.<sup>310</sup> As Linda Greenhouse argues, the Court is in general "quite blithely oblivious to the needs of those who convey its work to the outside world . . . ."<sup>311</sup>

The Court's longstanding failure to respond to many of the press's concerns suggests that the Court has little interest in promoting coverage of the Justices' bench statements.<sup>312</sup> This reality suggests that the Justices may very well perceive the audience for the oral dissent to be a primarily internal one—their colleagues, the law clerks, the

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reporters for a newspaper, *id.*, at 422, reducing the chances of information about an oral dissent appearing in most papers even if the wire service reporter mentioned it.

<sup>305</sup> Greenhouse, *Court's Story*, *supra* note 300, at 1558 (describing the last day of a term as a "journalistic nightmare" due to the volume and significance of decisions issued that day).

<sup>306</sup> *Cf.* Kamen, *supra* note 225.

<sup>307</sup> Greenhouse, *supra* note 300, at 1550.

<sup>308</sup> *Id.*

<sup>309</sup> RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 36, 116–17 (1994); Greenhouse, *Court's Story*, *supra* note 300, at 1558; Mauro, *supra* note 298, at 408; Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059, 1073 (1998).

<sup>310</sup> DAVIS, *supra* note 309, at 117.

<sup>311</sup> Greenhouse, *Court's Story*, *supra* note 300, at 1559; *see also* DAVIS, *supra* note 309, at 36–37, 116–17; Ginsburg, *supra* note 296, at 281. As recently as 2006, one of the Court's longtime reporters complained about this practice in print. *See* Mauro, *supra* note 298, at 408; *see also* Denniston, *supra* note 271, at 423 (writing in 2009 about a day when the *New York Times* was able to cover only two of six cases decided).

<sup>312</sup> Greenhouse, *Court's Story*, *supra* note 300, at 1559.

handful of knowledgeable Court watchers in the room. This in turn implies that, for the Justices, the purpose of the oral dissent may be largely motivated by emotional and interpersonal factors.

#### 4. Making History

If oral dissents are not deemed newsworthy simply by virtue of their existence, and if the Court as an institution fails to promote oral dissents as significant events, how is it that some oral dissents can nonetheless capture considerable attention? For the most recent high-profile oral dissents that have become publicly significant, as for the older ones, observers and commentators have identified and promoted narratives into which the dissents fit. Consider, for example, Justice Ginsburg's oral dissent in *Ledbetter*.<sup>313</sup> Justice Ginsburg's explicit hope in both her oral and written opinions that Congress would override the Court's decision<sup>314</sup> was realized when President Obama signed into law The Lilly Ledbetter Fair Pay Act.<sup>315</sup>

Any causal connection between Justice Ginsburg's oral dissent and this legislative action is far from clear, however, despite claims and inferences to the contrary.<sup>316</sup> The quick congressional action *and* the fame of the oral dissent may both be a result of fortuitous timing. *Ledbetter* was decided in the spring of 2007, as the 2008 presidential campaign was beginning. In that campaign, the case and its sympathetic plaintiff became a cause around which many rallied—including presidential candidates Barack Obama and Hillary Clinton.<sup>317</sup> *Ledbetter* herself spoke at the Democratic National Convention in 2008. Justice Ginsburg's oral dissent fit well into the story that was playing out, and it was therefore natural for her dissent to become part of the larger story. But it seems likely that the same things would have happened even if Justice Ginsburg had not read her dissent from the bench; the oral dissent cannot be said to have caused the events that followed it.

Likewise, in *Parents Involved*,<sup>318</sup> a few members of the press and legal commentators elevated Breyer's oral dissent into a central story of the decision. Some accounts made note of the unusual length of time Breyer held the stage in reading

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<sup>313</sup> Transcript of Opinion Announcement, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074) (Ginsburg, J., dissenting), available at [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_1074/opinion](http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion).

<sup>314</sup> *Id.*

<sup>315</sup> See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

<sup>316</sup> See, e.g., Guinier, *Courting the People*, *supra* note 22, at 542 (“Democrats in Congress responded quickly” to Ginsburg's oral dissent); Robert Barnes, *Ginsburg Gives No Hint of Giving Up the Bench*, WASH. POST, April 12, 2009, at A1; Liptak, *supra* note 13.

<sup>317</sup> Editorial Board, *The Democrats' Secret Weapon: Lilly Ledbetter*, N.Y. TIMES, CAMPAIGN STOPS (Aug. 28, 2008 7:12 PM) <http://campaignstops.blogs.nytimes.com/2008/08/28/the-democrats-secret-weapon-lilly-ledbetter/>.

<sup>318</sup> 551 U.S. 701 (2007).

his dissent—over twenty minutes.<sup>319</sup> Most emphasized—often in quite dramatic terms—the unusual emotion the typically reserved Justice displayed. Writing in the *Washington Post*, Dahlia Lithwick characterized Breyer’s oral dissent as a “lash[ing] out” at the majority and labeled his most quoted line—“It is not often in the law that so few have so quickly changed so much”—as an “outburst.”<sup>320</sup> Reporting for CNN directly following the announcement of the opinion, Jeffrey Toobin sought to capture the high drama of the scene:

Boy, . . . 15 minutes ago the Supreme Court was at war with itself in a drama that is rarely seen inside that room. You had two justices basically shouting out, not literally, but talking about the very premises of what it means to be an American. That was what was at stake in the court today. And the drama and the anger and the passion was something that’s rarely seen in that courtroom.<sup>321</sup>

In response to Breyer’s claim about the alarming nature of the majority’s redirection of desegregation law, in Toobin’s words, “both Justice Alito and Chief Justice Roberts looked over at Breyer and went, whoa, that’s pretty personal by the standards of the Supreme Court.”<sup>322</sup>

Yet as we have already noted, much of the immediate press coverage of *Parents Involved* did not mention Breyer’s statements at all.<sup>323</sup> The process of elevating his oral dissent—of in effect *creating* its significance—took some time. In fact, in arguing for the importance of Breyer’s bench statement, Guinier herself added to the fame and drama of his remarks with her vivid description of the opinion announcement, as seen through the eyes of “three prominent black civil rights lawyers.”<sup>324</sup>

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<sup>319</sup> See, e.g., Greenhouse, *Integration Plans*, *supra* note 18; Anthony Lewis, *The Court: How ‘So Few Have So Quickly Changed So Much*, N.Y. REV. BOOKS, Dec. 20, 2007 (review of TOOBIN, *supra* note 11).

<sup>320</sup> Dahlia Lithwick, *It Isn’t Tilting in the Same Old Ways*, WASH. POST, June 15, 2008, at B1; see also Greenhouse, *Integration Plans*, *supra* note 18; Lewis, *supra* note 147 (describing Justice Breyer as “usually a cheerful optimist, win or lose”).

<sup>321</sup> Toobin, *School Ruling ‘a Victory for Conservatives*, CNN.COM, ON THE SCENE (June 28, 2007 3:37 PM), <http://www.cnn.com/2007/LAW/06/28/toobin.ots/>.

<sup>322</sup> *Id.*; see also TOOBIN, *supra* note 11, at 336 (“At this direct slap, Alito roused himself and stared across the bench at Breyer. Roberts didn’t change expression, but the muscles in his jaw twitched. Above all, Breyer was taking a stand against the agenda that was born in the Reagan years, nurtured by the Federalist Society, championed by the right wing of the Republican Party, and propelled by the nominations of Roberts and Alito.”).

<sup>323</sup> See *supra* notes 8–12 and accompanying text.

<sup>324</sup> Guinier, *Foreword*, *supra* note 21, at 7. The lawyers are Professors Charles Ogletree, John Payton, and Ted Shaw. Guinier’s recreation of the details and tone of the scene come in part from her interviews with Professors Ogletree and Payton. See *id.* at 7 n.1, 10 n.21.

Moments after Chief Justice Roberts finishes speaking, a voice both incredulous and distressed pierces the High Court's etiquette. Bristling with barely concealed anger but tempered by the circumspection of the law professor he once was, Justice Stephen Breyer informs those assembled that he takes strong objection to Chief Justice Roberts's pronouncement of the law. . . .

On a nine-person bench where the give and take between judges and lawyers usually involves rapid-fire exchanges, Justice Breyer proceeds to "hold court" alone for the next twenty-one minutes. . . . The five Republican appointees, he suggests, are dictating their own policy preferences in the name of the law. Justice Breyer denounces Chief Justice Roberts's temerity with sixteen memorable words: "It is not often in the law that so few have so quickly changed so much."<sup>325</sup>

In an interview with Guinier, Charles Ogletree, one of the civil rights lawyers who was present in the courtroom, added that Justice Breyer "was looking right at [the three of] us as he was reading his dissent. This was his coming out as a dissenter. I felt overwhelmed by it."<sup>326</sup> In fact, however, Justice Breyer "came out" as a dissenter in his very first Term on the Court, when he dissented from the bench in *Lopez*.<sup>327</sup> Since then, he has dissented from the bench eight more times, not including *Parents Involved*.<sup>328</sup> But Ogletree's visceral response to Breyer's *Parents Involved* oral dissent illustrates its particular significance for the civil rights community and may help explain the oral opinion's fame.

Not only did Breyer's dissent from the bench become a focal point for a larger public debate over the role of racial classifications in American life but also as much for the debate over direction of the Roberts Court. In a speech soon after the decision, Senator Charles Schumer identified Breyer's now famous so-few-so-quickly-so-much line as "the most pithy and poignant indictment of the new Court's direction."<sup>329</sup> One reporter described Breyer's line as "the liberal summation of the whole [October 2006] Term."<sup>330</sup> All the attention to Breyer's words even aroused some conservatives to claim media bias. One conservative commentator claimed that the rightful sound-bite winner from *Parents Involved* was Chief Justice Roberts's line, "The way to stop discrimination on the basis of race, is to stop discriminating on the basis of

<sup>325</sup> *Id.* at 8–9 (citations omitted).

<sup>326</sup> *Id.* at 10 n.21.

<sup>327</sup> *United States v. Lopez*, 514 U.S. 549 (1995); Duffy & Lambert, *supra* note 14, at 30.

<sup>328</sup> Duffy & Lambert, *supra* note 14, at 30–37.

<sup>329</sup> Senator Charles Schumer, Speech to American Constitution Society (July 27, 2007), available at [http://schumer.senate.gov/new\\_website/record.cfm?id=280107](http://schumer.senate.gov/new_website/record.cfm?id=280107).

<sup>330</sup> Guinier, *Foreword*, *supra* note 21, at 9 n.20 (quoting Telephone Interview with Robert Barnes, Supreme Court Reporter, *Wash. Post* (July 16, 2008)).

race<sup>331</sup>—a line that *did* actually appear in his written opinion of the Court.<sup>332</sup> Control of the narrative can be contentious.

The numerous descriptions of Breyer's oral statement in *Parents Involved*—by the media, by scholars, and by social activists—is a recent example of how bench statements can take on a life of their own as they are described and recalled in the days, months, and years afterwards. Certain decision announcements may even take on a kind of legendary quality, particularly when there are significant deviations from the written opinions, when the emotion of the scene is particularly dramatic, or when the oral dissent illustrates a narrative already attractive to observers. Guinier, in other words, may be wrong about the novelty of oral dissents and she may overstate their likely impact, but she is undoubtedly correct that these bench statements are most likely to contribute to public dialogue when they speak to social movements or norm entrepreneurs already poised to exploit them. This is all the more true because of the media's underreporting of such dissents and the Justices' own choice not to exercise what little control they might have over how oral dissents are received by the public.

#### CONCLUSION

This Article has sought to use the lessons of history to provide some much needed perspective on contemporary oral dissent practices. These lessons include, most obviously, that recent claims of the novelty of the practice or the inherent newsworthiness of an oral dissent are wide of the mark. There is a long and rich history of dramatic and emotional dissents from the bench. Our analysis further demonstrates the critical role that the media, academics, and activists play in creating the meaning and significance of any particular oral dissent. The details of what exactly was said in a bench announcement, the tone with which it was delivered, how different people reacted to the statements, how to understand the significance of the statement—all of this is filtered through the perspective of the courtroom observer and then retold and reshaped in subsequent accounts. It is in this practice of dissemination and retelling that the significance of an oral dissent is established. From this perspective, the story of Justice Stevens's oral dissent in *Citizens United* has only just begun. Justice Stevens stepped down at the end of the Term in which he issued that dissent. Perhaps, then, the sense of his oral dissent as the “twilight” of the “Stevens era”<sup>333</sup> will solidify. And if activists and politicians unhappy with the Court's opinion succeed in passing new legislation or even in amending the Constitution, Justice Stevens's remarks may come to be seen as having instigated a movement for legal change. Future scholarship on oral dissents would benefit from a shift in focus from the internal decisionmaking of the Justices to the critical role of external actors and events in establishing the public meaning of an oral dissent.

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<sup>331</sup> Kristen Fyfe, *NBC Quotes Breyer Not Roberts in Supreme Court Ruling on Race*, NEWSBUSTERS.ORG (June 29, 2007 4:02 PM), <http://newsbusters.org/node/13837>.

<sup>332</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>333</sup> Liptak, *Stevens Era*, *supra* note 2.

At the same time, should the Justices decide that they are genuinely interested in using bench announcements to spark or contribute to public dialogue, there are certain institutional reforms that would help. They could seriously consider, for example, same-day release of audio (or, even, video) of these events. There would, undoubtedly, be changes in the public meaning of oral dissents (and majority opinion announcements) should the Court decide to do so. If the fact and content of oral dissents were more widely available, the interpretive process would, at a minimum, involve more participants and different types of participants than it currently does. More people would hear about, listen to, and comment on oral dissents. In addition, the interpretive process itself might carry less significance than it currently does, and it might become less likely that the understanding of any particular oral dissent would coalesce around a particular story line—as it did in *Parents Involved*<sup>334</sup> or the *Gold Clause Case*.<sup>335</sup> Instead, the Justices' spoken words would likely become part of the irrepressible and often irreverent political dialogue on the internet and on television. In other words, the significance of any particular oral dissent might still depend on whether it fits into a broader public narrative, but the potential authors of this story would no longer be confined to a handful of Supreme Court reporters, commentators, academics, and activists.

The effects of such changes on public attitudes toward the Court, or toward particular decisions, is difficult to predict. Nonetheless, the Court, however reluctantly, inevitably participates in many of our most divisive public debates. It might well benefit the nation for the Justices to recognize this fact, and to consider way in which their contributions could be more effectively heard.

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<sup>334</sup> 551 U.S. 701 (2007).

<sup>335</sup> 294 U.S. 330 (1935).