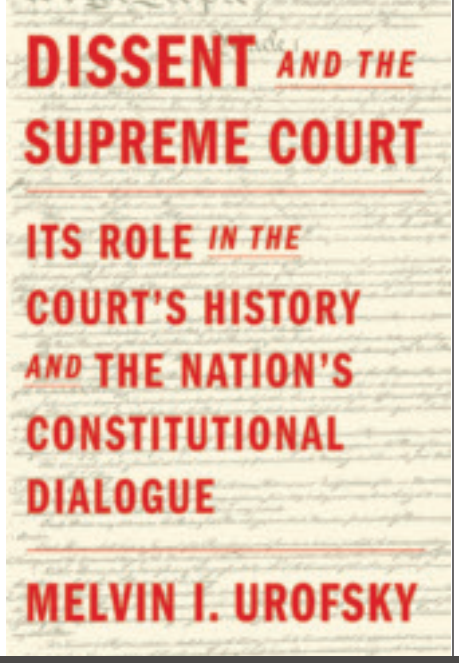

The Power of Dissent

BOOK REVIEW

Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue

By Melvin I. Urofsky
New York: Pantheon Books, 2015

Reviewed by Allen P. Mendenhall

In *Dissent and the Supreme Court*, Melvin I. Urofsky, a professor emeritus of history at Virginia Commonwealth University and the author of a celebrated biography of Justice Louis Brandeis,[1] explores the role of dissent in the shaping of our "constitutional dialogue," a phrase that refers not just to cases handed down by our nation's highest courts but to "discussions between and among jurists, members of Congress, the executive branch, administrative agencies, state and lower federal courts, the legal academy, and last, but certainly not least, the public."[2]

Among the epigraphs opening the book is a quotation from Irving Dilliard: "Judicial dissent [is] wholly necessary. Dissent is no less a requirement in our legal system than it is in our political system. Historically, dissent is the way a prophecy is first heard."[3] The choice of the word *prophecy* is striking in light of Oliver Wendell Holmes, Jr.'s definition of law as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious."[4] Holmes opined that our "body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years," consisted of "the scattered prophecies of the past upon the cases in which the axe will fall."[5] Holmes, who may have been an atheist, did not employ the term *prophecy* in the sense of a spiritual gift or divinely inspired word. He rather meant the ability to forecast or predict tractable outcomes based on recorded history, tested norms and lived experience. Dissents that reach beyond their moment to capture the prevailing ethos or attitude of some later moment can become prophesies, so defined, by their future vindication.

By multiplying the possible applications and perceptions of particular rules or principles, dissents also diversify the options for future judges and justices. Dissents provide practical alternatives and point out different, possibly better, approaches to pressing issues. Most dissents are forgotten, but some become "canonical" or "prophetic."[6] Just as

the several holdings of our highest courts combine to offer integrated direction to judges and justices confronted with concrete problems in need of urgent resolution, so dissents, with their persuasive appeals and less restrained rhetoric, serve as warnings and normative guides.

As just one example of the importance of dissenting opinions, Urofsky looks to *Dred Scott v. Sandford* (1857).[7] Calling Chief Justice Roger B. Taney's leading opinion "one of the worst he ever wrote,"[8] Urofsky examines the import and impact of the two dissents in *Dred Scott*, one authored by Justice John McLean and the other by Justice Benjamin Curtis. Justice Curtis considered his dissent so momentous that he forwarded a copy of it to a Boston newspaper before the case was released. Urofsky suggests that Abraham Lincoln learned from these dissents, which, he says, "played a key role in the political discourse of the 1858 and 1860 elections."[9] By shaping political discourse for decades to come, Justice McLean's and Justice Curtis's dissents "not only refuted … bad law and even worse history; they pointed the way to what should be."[10]

Urofsky reminds us that our constitutional precedents would not look as they do absent the contributions of dissenting justices. Without Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896),[11] for example, we probably would not have the landmark decision in *Brown v. Board of Education* (1954).[12] And without Justice Brandeis's dissent in *Olmstead v. United States* (1928),[13] the right to privacy would not be as expansive as it is today. Such cases demonstrate the value and merit of writing dissents.

Urofsky devotes considerable attention to the so-called Great Dissenters: Justices Harlan, Holmes and Brandeis. His history does not stop there, though. He walks us through the entire 20th century, pausing over important cases and justices and indulging in literary flourishes and storytelling to enliven his treatment of facts or issues that might otherwise bore a casual reader unfamiliar with the law. When he deals with current judges and justices, he tries his own hand at prophesy, speculating, for instance, about the lasting influence of Justice William Brennan's dissent in *McCleskey v. Kemp* (1987),[14] Justice Antonin Scalia's dissent in *Morrison v. Olson* (1988)[15] and Justice Ruth Bader Ginsburg's dissent (in part) in *NFIB v. Sebelius* (2012).[16]

Those who work in the judiciary are often asked why judges and justices dissent if their views do not obtain as law. *Dissent and the Supreme Court* is, in effect, a lengthy answer to that question. The reason judges and justices dissent, in short, is to keep the conversation going, to open the textual record to eventual change. Dissent, in a broader sense, is indispensable to democracy, ensuring that all views stand or fall on their merits rather than being suppressed or silenced by those who enjoy a disproportionate share of power or privilege.

"While contemporaries who agree with a dissent may proclaim it prophetic and bound for glory," Urofsky cautions, "for the most part we cannot tell at the time whether or not a dissent will succeed in its call to future generations."[17] Only the winnowing effects of time and experience will reveal a dissent's staying power, but Urofsky makes clear that judges and justices who are passionate about their beliefs ought to dissent, lest some future court lack grounds or reasoning for reversing course. It's up to posterity to act on the textual record, but it's up to present jurists to supply reasons for prospective action. ▲

Endnotes

1. Melvin Urofsky, Louis D. Brandeis: A Life (2012).
2. Melvin Urofsky, Dissent and the Supreme Court 4 (2015).
3. Id. at 3.
4. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).
5. Id. at 457.
6. Urofsky at 7.
7. 60 U.S. 393 (1857).
8. Urofsky at 67.
9. Id. at 79.
10. Id. at 78.
11. 163 U.S. 537 (1896).
12. 347 U.S. 483 (1954).
13. 277 U.S. 438 (1928).
14. 481 U.S. 279 (1987). See Urofsky at 416-18.
15. 487 U.S. 654 (1988). See Urofsky at 418-21.
16. 567 U.S. ____ (2012). See Urofsky at 421-23.
17. Urofsky at 414-15.

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