DISSENTING FROM THE BENCH: THE RHETORICAL AND PERFORMATIVE ORAL JURISPRUDENCE OF RUTH BADER GINSBURG AND ANTONIN SCALIA

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At least one dissent per year is read aloud from the bench by a U.S. Supreme Court Justice. These occasions are often among the most dramatic events of the Court's calendar, as they feature a Justice speaking directly, and often passionately, to an audience which includes her fellow Justices. So, which cases tend to prompt these oral dissents, and what are the Justices' rhetorical strategies when they speak rather than just write their dissents? This Article will explore the answers to these questions by examining the oral dissents of Ruth Bader Ginsburg and Antonin Scalia from the year 2000 to the times of their respective deaths. These Justices were selected because they were two of the most prolific oral dissenters and because they embody starkly contrasting judicial philosophies. The Article canvasses the concept and purpose of oral dissent and details the kinds of cases in which each Justice was more likely to orally dissent. This Article argues that Scalia's rhetoric evinces a view of the law as "autonomous," operating independently of the facts of the case and ignoring the impact of the law on the litigants. He directed his dissents at the academy, perhaps in an effort to create a conservative counter canon. In contrast, Ginsburg's feminist jurisprudence espouses a view of the law as responsive to the facts and the need for social change. Her oral dissents often targeted cases involving discrimination, and she frequently spoke directly to those affected by unequal treatment, having experienced such treatment herself.

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I. INTRODUCTION

"[Law] is constitutive, for through its forms of language and of life, the law constitutes a world of meaning and action: it creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist; in so doing it establishes and maintains a community, defined by its practices of language."[1]

1. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM xiv (1994).

On November 7, 2018, United States Supreme Court Associate Justice Ruth Bader Ginsburg fell and broke three ribs.[2] The response from her fanbase was swift and overwrought. People humorously responded on Facebook, Twitter, and Instagram, offering to wrap her in bubble wrap, or even donate their own ribs to her.[3] Ruth Bader Ginsburg achieved such cult-like status that she had a rapper name, a lookalike bobblehead doll, and she counted Stephen Colbert among her fans.[4] Clips and memes of her doing push-ups and lifting weights abound on the internet.[5] A movie, a documentary, and multiple books have all celebrated her extraordinary contributions to the law and introduced her to a broader audience.[6] There can be no doubt that she has a place in popular culture.

This level of fame may seem odd given that many Americans are unable to identify any Supreme Court Justice;[7] Ginsburg is one of the few exceptions. Moreover, Ginsburg did not exactly shy away from her fame but rather used it to draw attention to and amplify her opinions, both informally and on the Court. She opined on the number of women on the Supreme Court and penned scathing dissents in several landmark cases.[8] Ginsburg even went so far as to

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2. Tucker Higgins, *Supreme Court Justice Ruth Bader Ginsburg, 85, Breaks Ribs in Fall*, CNBC (Nov. 8, 2018, 1:18 PM), https://www.cnbc.com/2018/11/08/supreme-court-justice-ruth-bader-ginsburg-85-has-broken-her-ribs-in-a-fall.html. This Article was written prior to the death of Justice Ginsburg on September 18, 2020.

3. Megan McCluskey, *People Promptly Offer Bones of Their Own After Ruth Bader Ginsburg Fractures Her Ribs*, TIME (Nov. 8, 2018, 10:54 AM), https://time.com/5449074/ruth-bader-ginsburg-broken-ribs/.

4. The Late Show with Stephen Colbert, *Protect Ruth Bader Ginsburg at All Costs*, YOUTUBE (Nov. 9, 2018), https://www.youtube.com/watch?v=GXNr9kkquyQ (CBS television broadcast originally aired Nov. 9, 2018).

5. *See, e.g.*, Valentina Zarya, *If You Could Do as Many Push-Ups as Ruth Bader Ginsburg, You Wouldn't Retire Either*, FORTUNE (Sept. 22, 2016, 11:45 AM), https://fortune.com/2016/09/22/ruth-bader-ginsburg-pushups/.

6. *See, e.g.*, RBG (Betsy West and Julie Cohen 2018); IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015); ON THE BASIS OF SEX (Focus Features 2018).

7. Chris Cillizza, *Can You Name a Supreme Court Justice? You're in the Minority*, WASH. POST (Mar. 21, 2017, 11:35 AM), https://www.washingtonpost.com/news/the-fix/wp/2017/03/21/people-have-absolutely-no-clue-who-is-on-the-supreme-court/. The article claimed that only about 43 percent of likely voters polled could name one Supreme Court Justice; meaning 57 percent of likely voters could not even name one. Most Justices were still unknown to that 43 percent of voters, with only Justice Ginsburg, Justice Thomas, and Chief Justice John Roberts reaching double digits in terms of percentage of voter knowledge.

8. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 739–72 (2014) (Ginsburg, J., dissenting); Gonzales v. Carhart, 550 U.S. 124, 169–91 (2007) (Ginsburg, J., dissenting). In 2012 at the Tenth Circuit Bench & Bar Conference at the University of Colorado in Boulder, Ginsburg was discussing the status of women in the law and observed, "[n]ow the perception is, yes, women

read several of these dissents aloud from the bench. Moreover, she treated those bench dissents as performances, by donning her special "dissenting collar" to signal to her audience what was to come.[9]

Although the practice of reading dissents aloud from the bench is not new, it has become more pronounced in recent years.[10] Additionally, Ginsburg was not the only Justice to adopt this practice. Justice Scalia, among others, was also known for reading his most scathing dissents aloud relatively frequently and using his larger-than-life persona to expand his devoted following.[11] While a divided and more politically partisan Court may help explain why the practice has become more common in recent years,[12] it does not fully account for the phenomenon or answer the most basic questions: Why dissent, and for whose benefit? In particular, what kinds of cases prompt a Justice to dissent in this performative manner, and finally to whom are they speaking, and what do they anticipate accomplishing with these performances?

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are here to stay. . . . And when I'm sometimes asked when will there be enough [women on the Supreme Court] and I say when there are nine, people are shocked. . . . [But no one] ever raised a question [when there were nine men]." *Ginsburg Wants to See All-Female Supreme Court*, CBS (Nov. 27, 2012, 10:06 AM), https://washington.cbslocal.com/2012/11/27/ginsburg-wants-to-see-all-female-supreme-court/.

9. Kavitha George, *The Powerful Meaning Behind Each One of RBG's Collars*, BUSTLE (Sept. 19, 2020), https://www.bustle.com/p/what-do-ruth-bader-ginsburgs-collars-mean-each-one-has-a-special-story-9288551.

10. Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1566–67 (2009). The authors note that "[t]he reading of dissents from the bench [on the Roberts Court] demonstrates disharmony on the Court . . . ." *Id.* at 1563. Suzanna Sherry has suggested that the phenomenon of the Justices making their opinions through dissenting opinions has become problematic because Justices are driven by "aspirations of celebrity." *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 194 (2020). She asserts that the Court should return to issuing its opinions *per curiam*. *Id.* at 197–200.

11. Scalia read approximately 7.9 percent of his dissenting opinions from the bench while Ginsburg read about 10.6 percent of her dissenting opinions aloud according to William D. Blake & Hans J. Hacker, *"The Brooding Spirit of the Law": Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J., no. 1, 2010, at 1, 6. Justice Breyer is also known for reading some of his dissents aloud from the bench. *Id.* at 6. Scalia had a devoted following among conservatives. *See* Jeffrey Rosen, *What Made Antonin Scalia Great*, THE ATLANTIC (Feb. 15, 2016), https://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/. Rosen asserts, "[m]ore than any justice since the liberal lion William Brennan, Scalia changed the way Americans debate the Constitution, and for that he deserves great respect." *Id.*

12. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, SUP. CT. REV., 2016, at 301, 302–04, 310–11, 314–20.

This Article will attempt to answer those questions by closely examining the dissents that have been read aloud from the bench by Justice Ginsburg and Justice Scalia during the period from 2000 through 2019.[13] It will offer up several alternative explanations in an effort to answer these questions but will start by positing two important precepts: one, that the questions cannot be asked in a vacuum without exploring the general role of dissent in our legal system; and two, that there is something different about the rhetorical situation when a Justice speaks from the bench as opposed to authoring a written dissent. When one speaks one's opinion aloud, it implies that a Justice is initiating a conversation, as opposed to making a pronouncement. That conversation may not only be directed at her fellow Justices for posterity but at other contemporary audiences too.[14]

According to Mikhail Bakhtin,[15] speaking and writing imply an audience or audiences that are ready to respond. Who are these audiences, and what does the fact that the Justices are engaging in oral conversation through dissents say about their view on the role of the Court and the role of dissent in society? We generally see the role of the Court as to "close what has been open" by deciding cases in an authoritative manner.[16] This Article argues that Justices who choose to orally dissent are challenging that notion by suggesting that the case is not necessarily closed and that even though one's fellow Justices have not been persuaded, there are other receptive audiences that might respond. Justice Ginsburg engaged in a discussion with

13. This period was chosen because at least one dissent was read orally from the bench in each year of this period. Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices*, 102 LAW LIBR. J. 7, 33–37 (2010). Justice Scalia died on February 13, 2016, so his dissents for the period 2000–2015 are canvassed.

14. It is generally accepted that judges use their dissents to "speak" to the majority, among other audiences. Justice Ginsburg admitted as much when asked about her audiences noting that "there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation." Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010). *See generally* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, SUP. CT. REV., 2007, at 283–344 (examining the history of dissenting opinions in the United States Supreme Court).

15. Mikhail Bakhtin espoused the view that just as the author had the responsibility of creating an answerable discourse, so too was the listener required to respond in some way. Bakhtin argued "[r]esponsive understanding is a fundamental force, one that participates in the formulation of discourse, and it is moreover an *active* understanding, one that discourse senses as resistance or support enriching the discourse." M.M. BAKHTIN, THE DIALOGIC IMAGINATION 280–81 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981).

16. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1564 (1990).

the public when she chose to dissent, while Justice Scalia attempted to cement his position in posterity when he dissented. The Article will canvass the forms of rhetoric used by Justices Scalia and Ginsburg in their oral dissents and explore what motivated the Justices to publicly become the faces of oral dissenting opinions. Among these factors were their ideologies and a desire to send a message to particular audiences. With respect to Justice Scalia, this Article suggests that he had a desire to burnish his judicial reputation and even to write dissents worthy of becoming "canonical." The Article further suggests that Justice Ginsburg was much more concerned with a more immediate response to her dissents, with effecting change, and with engaging a broader audience. Because Scalia and Ginsburg had very different judicial and political philosophies and very different audiences, the cases on which they chose to orally dissent help identify the motives behind these oral performances.

This Article will proceed in five parts: Part II will first provide a historical overview of the development of dissenting opinions, describing how the Court moved from *seriatim* opinions to oral dissents in the *Dred Scott*[17] case. Part III will briefly canvass the autonomous and responsive views of the law and suggest that those legal philosophies are embodied by Justices Scalia and Ginsburg respectively. Part IV will describe the methodology of the study which examined the bench dissents of Justice Scalia during the period from 2000 to 2015 and Justice Ginsburg's oral dissents from 2000 to 2019. Parts V and VI will provide a detailed multi-faceted analysis of cases where Justices Scalia and Ginsburg orally dissented. In doing so, these parts will discuss notions of rhetoric, audience, tone, and the kinds of authorities on which the Justices relied to convince their listeners. Part VII will conclude.

II. THE HISTORY, FUNCTION, AND PURPOSE OF DISSENT

Although current society has become relatively comfortable with dissent, that was not always the case, particularly in the early years of the republic.[18] Permitting dissent is, in effect, a statement that one is confident enough that a young democracy can withstand what may be perceived as threats to the legal order, where a court of final appeal openly displays disagreement. Thus, in the early days of United States legal history, dissenting opinions were not always welcomed, as they signaled to the public a lack of consensus on the issue, which might undermine the weight of the judgment.

17. 60 U.S. (1 How.) 393 (1857).

18. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L. Q. 137, 137–38 (1999).

A. *The Historical Development of Dissents*

In developing a judicial identity, the Supreme Court in the early years of the founding of the United States looked to what it knew and modeled itself after the High Court in the United Kingdom.[19] Its practice thus initially, in the first decade of its existence from 1790 to 1800, was to issue decisions *seriatim*, whereby all of the Justices issued their own opinions and thereafter announced a short summary of issues agreed on by the Justices.[20] The role of dissent was minimal in these situations as the summaries sought to highlight what the individual Justices had in common, in order to determine the opinion, rather than issues on which they disagreed. Occasionally, too, the Court during that period would issue a *per curiam* opinion.[21] Many of these opinions were limited to cases where no reasoning or legal analysis was attached to the opinion, and they essentially amounted to merely an order. Hence, dissent was not a salient feature of the Court in its early years.[22]

During this period, the Court also initiated the practice of issuing an opinion by the Chief Justice "for the Court," rather than by the author of the opinion himself.[23] This was a practice that would later be enthusiastically adopted by Chief Justice Marshall, whose particular philosophy about the role of the Court was that it should present a united front to endow the opinion with more authority.[24] He considered dissents anathema and fortunately had the personality to bring the other Justices around to his way of thinking; *per curiam* opinions thus became common during his tenure.[25]

The practice of one Justice issuing an opinion "for the Court" made sense given the time and context in which that practice developed. For a new democracy that had thrown off the colonial yoke and drafted a new constitution, it was important that the law be clear and consistent. Unanimity, or what was shared in common, was more important than the Justices' personal interpretations and differences. In that spirit, a *per curiam* opinion was rarely challenged with a

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19. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 187–91 (1959).

20. *See* Henderson, *supra* note 14.

21. Kelsh, *supra* note 18, at 139–40.

22. *Id.* at 140.

23. *Id.* at 141–42 (noting that this practice attaches a significant amount of weight to the opinion of one Justice, usually the Chief, which may give rise to issues of doctrinal consistency).

24. *Id.* at 143–44.

25. *See* R. Kent Newmyer, *John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship*, 71 U. COLO. L. REV. 1365, 1369, 1378–79 (2000) (noting that "Marshall settled for a constitutional union which would weather 'the various crises of human affairs,' as he put it in *McCulloch v. Maryland*").

dissent; even concurrences were relatively rare.[26] For example, in his concurrence in *Sims v. Irvine*,[27] Justice Iredell was at pains to point out his general agreement with the Court, noting, "[t]hough I concur with the other Judges of the Court in affirming the Judgment of the Circuit Court, yet as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly."[28]

Thomas Jefferson strongly disliked the Court's new habit of issuing one opinion on behalf of the Court and argued that judges were shirking their responsibilities by moving away from *seriatim* opinions.[29] However, Marshall was fairly successful at keeping both *seriatim* opinions and dissents to a minimum. Todd Henderson notes that it was not until 1804 that the first dissent was recorded after the appointment of William Johnson to the Court.[30] It is no surprise that Jefferson, a true Republican, had appointed Johnson, as their philosophies regarding the role of judges coincided.[31] After Johnson's appointment, dissents were occasionally issued; however, this was not a frequent practice, largely due to the personality of Marshall, who urged compromise during conferences and required all the Justices to live in the same boarding house during the Court's term.[32] This practice forced the Justices to interact frequently both at the Court and in the evenings when they dined together. They were thus often able to resolve any disputes about cases that came before them outside of the courtroom and out of the public eye. There were also strong sociopolitical norms that frowned on dissent. For example, in 1898, the Albany Law Journal urged that "[t]here never should be a dissenting opinion in a case decided by a court of last resort."[33] Its rationale for this position was that "[n]o judge, lawyer or layman should be permitted to weaken the force of the court's decision, which all must accept as an unappealable finality."[34]

Henderson notes that "as factions developed within the Court, the percent of cases with a dissenting opinion increased from four percent under Marshall to nearly ten percent under his immediate

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26. *See* Kelsh, *supra* note 18, at 142–43.

27. 3 U.S. (3 Dall.) 425 (1799).

28. *Id.* at 457 (Iredell, J., dissenting). *See also* Brown v. Md., 25 U.S. (12 Wheat) 419, 449 (1827) (Thompson, J., dissenting) (announcing his dissent "with some reluctance, and very considerable diffidence").

29. Kelsh, *supra* note 18, at 145–46.

30. Henderson, *supra* note 14, at 317.

31. *See id.* at 317–18 (referring to "a series of letters between Jefferson and Johnson in 1822, [in which] the former urged the latter to dissent in nearly every case"). Jefferson apparently did so in order to break Marshall's grip on the Court and his practice of writing opinions for the Court. *Id.* at 318.

32. *Id.* at 313, 321.

33. Henry Wollman, The Stability of the Law – The Income Tax Case, Address before the Greenwood Club, Kansas City, Mo. (1898), *in* 57 ALB. L.J. 74, 74 (1898).

34. *Id.*

successors."[35] But to focus only on the low number of dissents and laud the role of the Chief Justices in achieving that stated goal, is to ignore the fact that dissents do not really threaten the unity of the country or the fabric of democracy. It also undermines the importance of dissents to a robust democracy. As Robert Ivie has noted, "[d]emocracy exists only in the presence of dissent."[36] It was during Marshall's successor Roger Taney's term as Chief Justice that one of the Court's most impactful dissents was read aloud from the bench.[37] In fact, not just one but two dissents were read in the *Dred Scott* case.[38] The entire process of announcing the opinion and reading the dissents aloud took about five hours and began the tradition of oral dissents that has prevailed for over two hundred years. Nowadays, however, the Justices summarize their dissenting opinions when they read them from the bench. These summaries themselves afford the Justices another opportunity to convey their opinions on the case, as the Justices do not merely limit themselves to reading their opinions aloud—they can use more colorful or colloquial language or choose to emphasize certain parts of the dissent.

B. The Dred Scott *Case and Dissenting from the Bench*

Dred Scott provides some insight into the multiple functions served by oral dissents. Scholars generally concur that the dissent proffered by Justice McLean was designed not only to express his disagreement with the majority but, in large part, was designed to preserve and advance his political aspirations—he wished to run for president.[39] Thus his dissent may have been designed in part to enhance his status, be mentioned in the press, and thereby reach a particular audience (potential voters). McLean's dissent was therefore more of a political statement than a measured insightful legal analysis. It is not surprising, then, that it is often overshadowed by Justice Curtis's dissent, as the latter comprised a methodical rebuttal of each of the points raised by the majority.[40]

Justice Curtis's dissent in the *Dred Scott* case is ranked among the anti-canonical dissents, and it enjoyed a particular status even at

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35. Henderson, *supra* note 14, at 321.

36. Robert Ivie, *Enabling Democratic Dissent*, 101 Q.J. SPEECH 46, 49 (2015).

37. *See* Kelsh, *supra* note 18, at 154 ("As a whole the Taney Court had a higher non-unanimity rate than the Marshall Court (20% vs. 11%).").

38. Dred Scott v. Sanford, 60 U.S. 393, 529–64 (1857) (McLean, J., dissenting); *id.* at 564–633 (Curtis, J., dissenting).

39. *See, e.g.*, Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 564 (2009); William G. Ross, *Legal Scholarship Highlight: Presidential Ambitions of Supreme Court Justices*, SCOTUSBLOG (Apr. 9, 2012, 12:39 PM), https://www.scotusblog.com/2012/04/legal-scholarship-highlight-presidential-ambitions-of-supreme-court-justices/.

40. *See* Stuart A. Streichler, *Justice Curtis's Dissent in the* Dred Scott *Case: An Interpretative Study*, 24 HASTINGS CONST. L.Q. 509, 510 (1997).

the time it was disseminated.[41] Abraham Lincoln was said to be so inspired by Curtis's dissent that he kept a copy of the dissent in his pocket and even specifically addressed it in a speech.[42] It was said to have inspired the Republican party and the antislavery movement.[43] Even Taney, who took a counter position to Curtis, crafted his opinion in response to Curtis's dissent, almost entirely overlooking McLean's.[44] The press took note of this, reporting on the case as a battle between Taney and Curtis and publishing those two opinions in full, while summarizing the rest of the Court's.[45] Justice Curtis appeared to be aware of the intense interest in the case, turning over his dissent to a reporter shortly after delivering it, in contrast to Justice Taney, who withheld his own opinion both from the Court and eager reporters.[46] The intense interest in the Curtis dissent allowed Justice Curtis to enhance his own status. This is an important benefit that may be attained by dissenting from the bench that current Justices are not unaware of.

Although the *Dred Scott* case commenced the practice of orally dissenting, the practice did not take hold immediately. While the number of separate opinions increased slightly after Marshall resigned, the practice of unanimity dominated the Supreme Court for over one hundred years.[47] That was in large part because of the judicial philosophy of Taft who stated:

> I don't approve of dissents generally, for I think in many cases where I differ from the majority, it is more important to stand

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41. Richard Primus, Essay, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 256 n.48 (1998) (listing commentators who regard Justice Curtis's dissent in *Dred Scott* as canonical). Not all scholars agree on the anti-canonical or canonical status of *Dred Scott*. *Id.* at 256. Jack Balkin and Sanford Levinson argue that there are "a baker's dozen reasons why *Dred Scott* continues to deserve a central place in the canon of American constitutional law." Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 49–50 (2007).

42. Streichler, *supra* note 40, at 510. In a speech on June 26, 1857, Lincoln urged Americans not to accept the *Dred Scott* decision as settled precedent. He stated, "[b]ut we think the *Dred Scott* decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no *resistance* to it." 2 Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* COLLECTED WORKS OF ABRAHAM LINCOLN 398, 401 (Roy P. Basler ed., 2001), https://quod.lib.umich.edu/l/lincoln/lincoln2/.

43. Paul Finkelman, Essay, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 36 (1996); Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 97 (2011).

44. *See* Streichler, *supra* note 40, at 516.

45. *Id.* at 511 n.16.

46. Ross E. Davis, Essay, *The Last Word*, 11 J. APP. PRAC. & PROCESS 229, 253–55 (2010).

47. *See* Kelsh, *supra* note 18, at 174–78.

> 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.[48]

Brandeis concurred with this approach, famously writing that "[i]t is more important that the applicable rule of law be settled [. . .] than that it be settled right."[49] He went on to note that "he would join opinions he disagreed with just for the sake of settling the law."[50] Norms against dissent, for example, were so prominent in the 1920s that they were explicitly embraced in Canon 19 of the American Bar Association's 1924 edition of the Canons of Judicial Ethics: "It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision."[51]

That approach has not been the approach of the contemporary Court regarding dissents. Moreover, the number of dissents read from the bench also seems to have increased exponentially in recent years.[52] Aside from the politically partisan confirmation hearings that have produced a divided Court and that seem to have rendered existing divisions more contentious,[53] there is more attention given to the Court by the media, in part because it has recently been deciding politically contentious cases.[54] Moreover, the audience for the Court is more varied than in the Court's earlier existence. Robert Post posits that "[t]he authority of our Supreme Court is different from

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48. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 61 (1964).

49. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Ironically, Brandeis issued this statement while dissenting himself.

50. Henderson, *supra* note 14, at 284.

51. CANONS OF JUD. ETHICS Canon 19 (AM. BAR ASS'N 1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf (last visited Mar. 26, 2021).

52. *See* Blake & Hacker, *supra* note 11, at 7–8; *cf.* Kelsh, *supra* note 18, at 174–78 (discussing the dramatic increase of the rate at which dissent was expressed beginning in 1941).

53. Blake and Hacker refer to a "declining norm of consensus [which] reflected the changing role of the Court in American life . . . and was expressed in the ideological differences among the justices . . . ." Blake & Hacker, *supra* note 11, at 4.

54. The Court has recently decided, or will shortly be deciding, some contentious cases involving the scope of executive power. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (separation of powers); Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (the census citizenship question); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (racial gerrymandering); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (immigration). All of these cases appeared in the headlines and attracted public attention. Moreover, as Suzanna Sherry has argued, some of the justices seem to be cultivating a celebrity-type public persona in part through dissenting in contentious cases. *See* Sherry, *supra* note 10, at 185–93.

that of the Taft Court because modern opinions now routinely engage in an ongoing dialogue with American legal academia. Supreme Court opinions both reflect and constitute the role of the Supreme Court itself."[55] Moreover, since there is no serious question about the Court's legitimacy, the Court does not need to present a united front, and dissent is not seen as threatening the Court's stability.[56] This is clearly illustrated by the relative lack of unanimous decisions in Supreme Court cases during the 1990s,[57] as compared to the Taft Court, which tended to be more unified.[58]

III. AUTONOMOUS AND RESPONSIVE VIEWS OF THE LAW AND THE IMPLICATIONS FOR DISSENTS

While it has become clear that Justices feel free to dissent in cases on which they feel strongly, since society's tolerance for dissents has risen, and dissents have even come to be valued by the academic community as a means of providing insight into the Court's deliberative process, these reasons do not fully explain why or in what circumstances a Justice may choose to dissent from the bench. Analyzing the facts and legal issues in the cases in which Justices orally dissent and assessing those vis-a-vis the Justices' legal philosophies and their views on the role of the Court may assist in predicting the kinds of cases which prompt oral dissents. If Justices view their roles and the role of the Court as being to articulate established general legal principles to resolve not only the litigants' legal issues but to clarify and maintain certainty in the law, then they will likely dissent generally only when the majority appears to ignore

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55. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1275 (2001).

56. This may no longer hold true as Richard Fallon has suggested that divisions over confirmations of Justices, like those occurring in Justice Kavanaugh's confirmation, threaten the legitimacy of the Supreme Court. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 165–67 (2018).

57. Adam Feldman has noted that there was a 90 percent unanimity rate in the 2013, 2016, and 2019 terms in respect to the first ten decisions of each term. Adam Feldman, *Empirical SCOTUS: Amid Record-Breaking Consensus, the Justices' Divisions Still Run Deep*, SCOTUSBLOG (Feb. 25, 2019, 1:28 PM), https://www.scotusblog.com/2019/02/empirical-scotus-amid-record-breaking-consensus-the-justices-divisions-still-run-deep/. Feldman has also asserted that "[t]he court under Roberts (and Chief Justice William Rehnquist) steadily increased the percentage of unanimous decisions across terms so that reaching a level of unanimous decisions in orally argued cases of 50 percent is no longer an anomalous occurrence." *Id.*

58. Post notes that "[o]f the 1,554 full opinions announced by the Taft Court during the 1921–1928 Terms, 84% were unanimous; of the 507 full opinions announced by the Court during the 1993–1998 Terms, only 27% were unanimous." Post, *supra* note 55, at 1283.

or misstate the rules. This would align with the view that the Court's role is to "'sufficiently . . . elaborate the principles, . . . to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law.'"[59] If however, a Justice's judicial philosophy predisposes her to be more responsive to the facts and context of cases, she may be more likely to dissent in cases with hard facts or cases which expose deep societal issues.

However, while some may argue that Justices also dissent for personal philosophical and jurisprudential reasons, these reasons usually align with or are related to the respective Justice's views on the role of the Court and on the role of law in society generally. Robert Post has identified two primary views of the role of the Court and the role of law; he ascribes to Nonet and Selznick's terminology, referring to these views as the autonomous view and the responsive view.[60] Post describes the autonomous view as asserting that "[t]he task of the judiciary is to maintain fidelity to a system of certain and definite rules, even at the cost of 'the adaptation of law to social facts.'"[61] This view seeks to use precedent in such a way so as to create a sense of the inevitability of the outcome.[62] Rules, principles, and authority are all important, and the particular facts of the case are less so. One may identify a Justice's affiliation with the autonomous view by closely analyzing both the rhetoric and analytical methodology of that Justice's opinions. As Burke and others have pointed out, in crafting judicial opinions, judges who subscribe to the autonomous view speak with authority, finality, and even a sense of inevitability.[63] They consider opposing arguments and address those by distinguishing the authority cited by the losing side. They give short shrift to facts and focus almost entirely on the law. This all contributes to the sense of inevitability and certainty that is commonly found in these types of judicial opinions. Robert Ferguson points out how "[t]he monologic voice, the interrogative mode, and the declarative tone build together in what might be called a rhetoric of inevitability."[64] Justices who favor this approach use precedent in such a way that a particular

59. *Id.* at 1304 (footnote omitted).

60. *See id.* at 1381–82.

61. *Id.* at 1381 (footnote omitted); *see also* PHILIPPE NONET & PHILIP SELZNICK, LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 64 (Transaction Publishers 2001) (1978).

62. *See* Post, *supra* note 55, at 1381–82.

63. *See* ROBERT A. FERGUSON, PRACTICE EXTENDED: BEYOND LAW AND LITERATURE 126 (2016) (quoting KENNETH BURKE, A GRAMMAR OF MOTIVES 258–59, 379–80 (Berkeley: University of California Press 1969) (1945)) ("Burke sees present and future things in terms of a now fixed past; legal precedents establish just such a relationship by creating an 'immutable scene . . . of "eternal truth, equity, and justice."'").

64. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMANS. 201, 213 (1990).

outcome seems a foregone conclusion, despite the fact that most cases that reach the Supreme Court do so because there are circuit splits; there are strongly contested and often polarized views of what the law is or ought to be; or, there are important policy considerations at stake.[65] Moreover, Justices who ascribe to the autonomous view tend not to be moved by the facts of the case before them or any sociological or extralegal forms of authority. Their opinions may be identified by a commitment to textualism, originalism, and strict use of precedent.[66]

If, however, a Justice believes that the law should be responsive to social change and should evolve to take into account changing social circumstances or the facts of a particular case, that Justice's view of the law may be described as responsive. Philippe Nonet and Philip Selznick describe this approach as requiring the law to assume an "openness and flexibility" that does not comport with strict rule-bound decision making.[67] Under the responsive model, the results of a case may be less predictable as it becomes "more difficult to distinguish legal analysis from policy analysis, legal rationality from other forms of systematic decision making."[68] Judges who subscribe to this approach are more keenly aware of social forces and are more likely to be persuaded by policy and factual arguments. They will likely refer to the facts more directly in their opinions. This approach appears to be favored by Justice Ginsburg, who has shown herself to be attuned to social change, particularly the changing roles of women in society and the discrimination that persists despite those changes. Post has pointed out that when lawyers cease to understand the law as "a grid of fixed and certain principles designed for the settlement of disputes" and come instead to understand it as "the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes,"[69] then dissents may be used as part of an ongoing societal conversation about the appropriate course of action in achieving those purposes.

IV. JURISPRUDENTIAL PHILOSOPHIES, COGNITIVE CLARITY, AND THE ORAL DISSENTS OF JUSTICES SCALIA AND GINSBURG

Whether Justices ascribe to the autonomous or responsive approach has significant implications for the ways in which they write their opinions or dissents, the audiences they seek to persuade, the authorities on which they rely, and the rhetorical choices that they make in choosing what to emphasize and de-emphasize in their opinions. H.L.A. Hart once asserted that dissenting opinions "have

65. *See id.* at 213–16.
66. *See* Post, *supra* note 55, at 1381–82.
67. NONET & SELZNICK, *supra* note 61, at 78.
68. *Id.* at 83.
69. Post, *supra* note 55, at 1274.

no consequences within the system . . . because no one's rights or duties are altered thereby."[70] However, that assertion only stands if the "system" is "defined narrowly as the set of legal rules and not the institutions through which law is pronounced and through which it acquires social legitimacy."[71] More recently, dissent has come to be seen as a healthy component of democracy, as a challenge to the monologic voice of the majority opinion, and as a more democratizing form of judicial speech that engages an audience and invites a response.[72]

Dissenting has become a well-established practice of the Court, in contrast to earlier years when the practice was frowned upon.[73] Indeed Justice Douglas wrote that:

> The right to dissent is the only thing that makes life tolerable for a judge of an appellate court . . . the affairs of government could not be conducted by democratic standards without it. . . . It is the right of dissent, not the right or duty to conform, which gives dignity, worth, and individuality to man.[74]

Nowadays, dissents offer a space for the dissenting Justice to advance alternative interpretations of the law. As Guinier has pointed out, oral dissents may provide opportunities for "instantiating and reinforcing the relationship between public engagement and institutional legitimacy."[75] Because Justices Scalia

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70. H. L. A. HART, THE CONCEPT OF LAW 141 (3d ed. 2012).

71. Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J. L. & HUMANS. 507, 533 (2012).

72. Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence—Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 (2009) [hereinafter Guinier, *Demosprudence and the Law/Politics Divide*]. Guinier asserts that "Demosprudence is a democracy-enhancing jurisprudence. It describes lawmaking or legal practices that inform and are informed by the wisdom of the people. Demosprudence, unlike traditional jurisprudence, is not concerned primarily with the logical reasoning or legal principles that animate and justify a judicial opinion. Demosprudence is instead focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites. Demosprudence through dissent attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents." Lani Guinier, Foreword, *The Supreme Court, 2007 Term: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15–16 (2008) [hereinafter Guinier, *Demosprudence Through Dissent*].

73. *See, e.g.*, Post *supra* note 55, at 1283 (asserting that in the Court's early years there were norms and established institutional practices that operated against dissent. Those norms and practice are no longer in place and dissenting opinions have become relatively routine). *See also* Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 365 (2001).

74. WILLIAM O. DOUGLAS, AMERICA CHALLENGED 4–5 (1960).

75. Guinier, *Demosprudence and the Law/Politics Divide*, *supra* note 72, at 544.

and Ginsburg were so well-known and had such a popular following, and because of the strongly-worded rhetoric of their dissents, they created rhetorical spaces for their respective audiences to engage with them on the issues before the Court.[76] By speaking, and not just writing their dissents, they engaged with and demanded a response from their audiences in a way that written dissents did not.

A limited amount of research on oral dissents has been conducted. While they may be reported on in the popular press, until recently there has been no readily accessible database of bench dissents.[77] The practice of the Court is for the Chief Justice to announce who will deliver a summary of an opinion being handed down in a particular case; then, the Chief Justice will announce if there is to be an oral dissent and advise the onlookers who will deliver it.[78] In reading a dissent from the bench, a Justice may choose how much of the dissent to read, and whether or how to paraphrase it. My research shows that a Justice typically spends between five and twenty minutes reading his or her dissent.[79] The wording and organization of the oral dissent typically very closely track that of the written dissent, but the sentences used tend to be shorter and therefore are easier to understand and follow. Unlike in their published dissents, the Justices tend not to cite to authority in support of their assertions, unless it is to extremely well-known authority. This makes spoken dissents more accessible to the public and press.

This following Subpart will analyze the oral dissents of Justices Scalia and Ginsburg during the period from 2000 to 2019[80] and examine the subject matter, audiences, and rhetoric of their dissents. These two Justices were chosen for a number of reasons, not least of which is that they engaged in the practice of oral dissent at a much

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76. LORRAINE CODE & ROBERT AYSON, RHETORICAL SPACES: ESSAYS ON GENDERED LOCATIONS ix (1995) (describing rhetorical spaces as fictive places which "structure and limit the kinds of utterances that can be voiced within them with a reasonable expectation of uptake and 'choral support'"). Lloyd Bitzer concurs, noting the rhetorical situation is "a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance." Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 4 (1968).

77. In 2009, Jill Duffy and Elizabeth Lambert compiled a list of Supreme Court oral dissents which they have now begun updating. *See* Duffy & Lambert, *supra* note 13, at 23. Oral dissents are also available under each case on the Supreme Court website. *See* OYEZ, https://www.oyez.org/. A written transcription of the oral dissent is also available there, but there are often errors in the transcriptions. *Id.*

78. Duffy & Lambert, *supra* note 13, at 7–8.

79. *See, e.g.*, *infra* Subpart IV.A.

80. Oral dissents were analyzed from 2000–2015 in the case of Justice Scalia because of his death on February 13, 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

higher rate than their fellow Justices. Justice Scalia read approximately 7.9 percent of the dissents he authored from the bench.[81] Justice Ginsburg read around 10.6 percent of her dissents from the bench.[82] Moreover, these two Justices embody the two disparate approaches of an autonomous view and a responsive view of the law respectively, as well as having different jurisprudential ideologies (conservative versus liberal). This Article asserts that a Justice will usually choose to orally dissent primarily on ideological grounds and usually when she believes that the majority has reached so profoundly a wrong conclusion that a written dissent will not suffice.[83] Moreover, this Article posits that dissenting orally attracts more press attention and thus communicates the Justice's position to a broader audience whom she seeks to engage in dialogue over the issue. The Article argues that Justices use their popular personas to garner attention for the dissents, and that in doing so, the Justices begin a conversation about the issue that may result in legislative or policy changes.

A. Data and Methodology of the Study

The following Subparts will analyze the legal issues, facts, and authorities relied on, as well as potential policy considerations for dissenting, in the most recent oral dissents of Justices Scalia and Ginsburg. The Justices' rhetoric will also be explored, including their likely intended audiences, the tone of the dissents, and whether their judicial philosophies are communicated through their rhetoric. The tables attached as Appendices A and B categorize the types of cases in which each Justice dissented and rank the readability scores of those cases.[84] The underlying hypothesis of this study was that Justice Scalia would orally dissent in cases involving an interpretation of the Constitution that departed from originalism or in statutory cases where, in his opinion, the Court was departing from the plain meaning of the text. It was further anticipated that Justice Ginsburg would dissent in cases where the Court failed to recognize discrimination in its various guises, or where the Court ignored the factual realities of the litigants and the impact of the Court's decision on those litigants. These hypotheses were ultimately supported by the data. Moreover, a Justice was most likely to read a dissent from the bench when the Court was split 5:4. Justice Scalia dissented in

81. Blake & Hacker, *supra* note 11, at 7.

82. *Id.*

83. *See generally* Johnson et al., *supra* note 10 (establishing such premise).

84. The readability levels were evaluated using The Flesch Kincaid Grade reading level, the Gunning Fog scale, the Cole Liau Index and the SMOG scale. The Flesh Kincaid Grade reading level takes the most factors into account, so the analysis primarily relied on that score. Details about how the other scales evaluate the readability of the dissents is contained in the attached Appendices.

three cases out of fourteen in which there was not a 5:4 split.[85] Justice Ginsburg similarly dissented in three cases in which there was not a 5:4 split.[86]

The methodology for the analysis was as follows:

1. The legal issues were briefly analyzed in each case to determine if there was any predictable or common pattern in the types of cases in which Ginsburg and Scalia chose to orally dissent.

2. The oral dissents were then analyzed according to their cognitive and rhetorical complexities using Flesch Kincaid and other reading scales[87] to determine the readability level of these texts and ascertain whom the Justices might be inviting to engage in dialogue with them about the cases. Potential audiences for the dissents were canvassed, including information that Justices themselves provided about their audiences. While programs that measure reading ease and complexity like the Flesch Kincaid scale are not dispositive in respect of audiences, given that legal opinions are often inherently complex and difficult to read due to legal terminology and subject matter, any significant difference between the levels of complexity between the Justices may nevertheless shed some light on their audiences. Another limitation of using reading complexity is that these formulae do not measure cognitive clarity. Owens and Wedeking's concept of cognitive clarity were thus also canvassed.

3. The types of authorities and sources on which each Justice relied in the dissents were evaluated to ascertain if there is a predictability or pattern to the authorities on which dissenting Justices rely.

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85. The three cases in which Justice Scalia dissented were *King v. Burwell*, 576 U.S. 473, 498–518 (2015) (Scalia, J., dissenting) (the constitutionality of the ACA); *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting) (the constitutionality of Texas's anti-sodomy laws); and *Atkins v. Virginia*, 536 U.S. 304, 337–54 (2002) (Scalia, J., dissenting) (whether mentally disabled people should be excluded from the death penalty).

86. Ginsburg dissented in *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2103–13 (2019) (Ginsburg, J., dissenting) (a First Amendment case); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 893–914 (2011) (Ginsburg, J., dissenting) (a jurisdiction case); and *Cheney v. U.S. District Court for D.C.*, 542 U.S. 367, 396–405 (2004) (Ginsburg, J., dissenting) (a separation of powers case).

87. "A reading difficulty[, or readability,] measure can be described as a function or model that maps a text to a numerical value corresponding to a difficulty or grade level." *See* Michael Heilman et al., *An Analysis of Statistical Models and Features for Reading Difficulty Prediction*, *in* EANL '08: PROCEEDINGS OF THE THIRD WORKSHOP ON INNOVATIVE USE OF NLP FOR BUILDING EDUCATIONAL APPLICATIONS 71, 71 (Ass'n Computational Linguistics ed., 2008). The Flesch Kincaid, Gunning Fog, SMOG and other similar measures are examples of such scales.

4. The dissents were then subjected to a rhetorical analysis to evaluate the Justices' language, tone, and the figures of speech used.

The analysis revealed the following general results: Justice Scalia's dissents were unsurprisingly overwhelmingly issued in cases involving constitutional issues or textual questions involving issues of statutory interpretation. This is consistent with his judicial preferences for originalism, textualism, and federalism. However, his ideological preferences were also clearly indicated in his oral dissents, as his more vituperative rhetoric was reserved for cases involving LGBTQ rights, the Affordable Care Act ("ACA"), and the death penalty. His dissents required a slightly more sophisticated reading level than Justice Ginsburg's[88] but were cognitively clearer than hers, at least according to Owens and Wedeking's scale.[89] Scalia relied almost exclusively on the Constitution itself, the writings of the Framers, the statute in question, or on precedent as authority for his decisions.[90] In his dissents Scalia often specifically decried relying on sociological authority or taking any exigent factual circumstances or policy into account. He addressed the majority directly on multiple occasions, where his tone tended to convey his outrage at what he viewed as the Court overstepping its role. This outrage tended to be expressed by means of memorable phrases or metaphors which strongly denoted Justice Scalia's contempt for the majority's opinion. His phraseology suggests that the dissents were intended for the legal academy and posterity. Justice Scalia generally spent about ten

88. Complexity was calculated using the Flesch Kincaid reading ease scale which measures the average number of words used per sentence. Then the average number of syllables per word are factored in. The average number of words is then multiplied by 0.39 and added to the average number of syllables per word, multiplied by 11.8. 15.59 is then subtracted from the result. *See The Flesch Grade Level Readability Formula*, READABILITY FORMULAS, https://readabilityformulas.com/flesch-grade-level-readability-formula.php (last accessed Apr. 25, 2020). Both Justices' dissents were evaluated as around 40 which would make them difficult to read according to the Flesch Reading Ease scale.

89. This is according to Owens and Wedeking, who rank Justice Scalia's opinions and dissents as among the clearest of the Justices in their study. Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC'Y REV. 1027, 1043 (2011). Scalia's cognitive clarity in part derived from his originalist approach which adjudicated issues as constitutional based on whether the Founders would have viewed them as constitutional. *See infra* Part V. According to my results Justice Scalia's dissents require a full grade higher reading level than Justice Ginsburg's.

90. ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii–xxix (2012).

minutes reading his dissents aloud.[91] If one examines the types of cases in which Scalia dissented, they seem to constitute what could be construed as an anti-canon. Jamal Greene describes the anti-canon as being decided by "the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent, and the susceptibility of the decision to use as an antiprecedent."[92] Specifically, Justice Scalia took a particularly hostile view towards the majority's opinions in respect of the expansion of gay rights and limitations on the death penalty. If it was Scalia's intention in writing these dissents that his decisions would someday be seen as visionary and adopted by the majority, he appears doomed to be disappointed as gay rights now seem firmly entrenched in the law, as do the ethical considerations that the death penalty should not be imposed on minors or people with intellectual disabilities.

Justice Ginsburg's oral dissents, in contrast, tended to be issued in cases involving any form of discrimination, whether employment discrimination or in respect of access to reproductive rights. Her oral dissents are slightly more accessible to a broader audience than Justice Scalia's, in that the reading level required to comprehend them is lower than the level required by Justice Scalia's dissents.[93] However, they are cognitively more complex because they take disparate views into consideration and tend not to see the issue in shades of black and white.[94] Justice Ginsburg relied on a more diverse range of sources including sociological sources, factual evidence, testimony before Congress, and transcripts from the trial court record. She was also slightly more inclined to assert her own personal experience into the dissents and was more keenly attuned to the facts of the cases in which she dissented, as well as the impact that the decision would have on the litigants. Ginsburg also resorted to rhetorical techniques often associated with feminist jurisprudence to convey her points. This suggests that her audience was not necessarily the legal academy but may have included the majority, the press, the public, and the litigants themselves. She also often

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91. *See e.g.*, Oral Dissent of Justice Scalia at 14:29–24:10, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05–184), https://www.oyez.org/cases/2005/05-184.

92. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (emphasis omitted); *see also* Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681–82 (2005); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 329 (2009).

93. On average Justice Ginsburg's dissents required a thirteenth grade level to understand, while Justice Scalia's require a fourteenth grade level. *See infra* Appendices A and B.

94. At least according to Owens and Wedeking's definition of cognitive complexity. *See supra* note 89 and accompanying text.

exhorted Congress to act or the Court to change its mind. Her tone was notably less acerbic than Scalia's when she read her dissents, as if she was still attempting to persuade the Court or Congress. The Justice spent an average of about six minutes reading a summary of her dissents aloud.[95] In *Burwell v. Hobby Lobby Stores, Inc.*,[96] however, her oral dissent took approximately fifteen minutes.[97]

The data in the attached table in Appendix A illustrate that three of Scalia's fourteen oral dissents came in Eighth Amendment cases,[98] three came in respect to Fourteenth Amendment cases,[99] two in respect to habeas corpus, and one each in respect to the First, Fourth, and Sixth Amendments;[100] the rest pertained to Congress's taxing authority, federalism issues, administrative law, and statutory interpretation.[101]

In respect to Justice Ginsburg, the data attached in Appendix B shows that she orally dissented in nineteen cases during the period of 2000 to 2019. Not surprisingly, four of her dissents came in Title VII

95. *See infra* Appendix B.

96. 573 U.S. 682 (2014).

97. *See* Oral Dissent of Justice Ginsburg at 0:01–14:26, Part Two, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (No. 13–354), https://www.oyez.org/cases/2013/13-354.

98. Brown v. Plata, 563 U.S. 493, 550–51 (2011) (Scalia, J., dissenting); Roper v. Simmons, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).

99. Obergefell v. Hodges, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting); United States v. Windsor, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

100. *See* Maryland v. King, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting) (addressing the Fourth Amendment); Missouri v. Frye, 566 U.S. 134, 151–53 (2012) (Scalia, J., dissenting) (addressing the Sixth Amendment); Boumediene v. Bush, 553 U.S. 723, 826–27 (2008) (Scalia, J., dissenting) (addressing habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 655–56 (2006) (Scalia, J., dissenting) (same); McCreary County v. ACLU, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting) (addressing the First Amendment).

101. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 67 (2015) (Scalia, J., dissenting) (addressing statutory interpretation and federalism issues); King v. Burwell, 576 U.S. 473, 498 (2015) (Scalia, J., dissenting) (addressing Congress's taxing authority, administrative law, and statutory interpretation); EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 525 (2014) (Scalia, J., dissenting) (addressing administrative law and statutory interpretation); Arizona v. United States, 567 U.S. 387, 416–17 (2012) (Scalia, J., dissenting) (addressing federalism issues).

cases,[102] two came in equal protection cases,[103] one in respect to the right to abortion,[104] and one in respect to access to contraception.[105] The rest were a range of presidential powers, sovereign immunity, class action certification, injunction standards, and a Section 1983 claim.[106]

V. JUSTICE SCALIA'S AUTONOMOUS VIEW OF LAW: RULE -BASED DISSENTS AND THE LEGAL ACADEMY AS AUDIENCE

In their study of the complexity of Supreme Court opinions, Owens and Wedeking have found that Justice Scalia's opinions are the clearest out of those of a cohort of seventeen Supreme Court Justices.[107] Using the Linguistic Inquiry and Word Count ("LIWC") system of assessment, which focuses on cognitive clarity, (i.e., the clarity of the ideas discussed), Wedeking and Owens have found that Scalia consistently authors the clearest opinions, no matter what area of law is before the Court.[108] They further note that dissents tend to be written even more clearly than majority opinions, and once again, Scalia's dissents are the clearest among the Justices.[109] It should be noted that Owens and Wedeking based their assessment solely on cognitive clarity as opposed to doctrinal or rhetorical clarity.[110]

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102. Vance v. Ball State Univ., 570 U.S. 421, 451 (2013) (Ginsburg, J., dissenting); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 363 (2013) (Ginsburg, J., dissenting); Ricci v. DeStefano, 557 U.S. 557, 608 (2009) (Ginsburg, J., dissenting); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S 618, 643–44 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

103. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 334 (2013) (Ginsburg, J., dissenting); *Ricci*, 557 U.S. at 620 (Ginsburg, J., dissenting).

104. Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting).

105. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 739 (2014) (Ginsburg, J., dissenting).

106. *See* Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 45–46 (2012) (Ginsburg, J., dissenting); Connick v. Thompson, 563 U.S. 51, 79 (2011) (Ginsburg, J., dissenting) (addressing a Section 1983 claim); Cheney v. U.S. Dist. Ct. for D.C., 542 U.S 367, 395–96 (2004) (Ginsburg, J., dissenting) (addressing presidential powers and injunction standards).

107. The Justices include Alito, Black, Blackmun, Brennan, Breyer, Burger, Douglas, Ginsburg, Harlan, Kennedy, Marshall, O'Connor, Powell, Rehnquist, Roberts, Scalia, Souter, Stevens, Stewart, Thomas, and White.

108. Owens & Wedeking, *supra* note 89, at 1038–39, 1043.

109. *Id.* at 1033. The authors note, "*every* justice in our sample authors clearer dissents than majority opinions. All justices in recent history present their opinions differently when in dissent—and the difference is large for many justices. Look first at Justice Scalia . . . . When he authors a majority opinion, Scalia's complexity score is -0.099 [-0.464, 0.267]. When he authors a dissent, however, his complexity score drops to -2.788 [-3.246, -2.33]." *Id.* at 1046.

110. Rhetorical clarity is usually measured by the Flesch Kincaid and other scales, while doctrinal clarity would be assessed by analyzing the Court's

A. Justice Scalia: Cognitive Clarity, Textualism, and Originalism

> *"The Constitution that I interpret and apply is not living but dead, or, as I prefer to call it, enduring. . . . It means today not what current society, much less the Court, thinks it ought to mean but what it meant when it was adopted."* [111]

Wedeking and Owens define cognitive complexity as comprising differentiation and integration. They assert that:

> Differentiation represents the degree to which an individual acknowledges multiple perspectives or dimensions associated with an issue. In other words, . . . whether an individual perceives and explains events in black and white or sees the world in shades of gray. Integration, on the other hand, represents the degree to which a person recognizes relationships and connections among these perspectives or dimensions. It represents how an individual structures his or her thoughts and organizes decision-relevant information.[112]

Thus, judges who tend to disregard multiple perspectives and view things in more absolute terms tend to write clearer opinions. This may largely explain why Justice Scalia's opinions were determined to be the clearest. Scalia appears to have subscribed to the autopoietic or autonomous approach to law.[113] As previously referenced, the autonomous view of the law asserts that "law's intellectual and systemic development proceeds according to a logic, procedure, and rationale of its own."[114] In other words, law operates autonomously and without regard for social conditions and changed circumstances.[115] Adopting an autopoietic view of the law means that

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decisions in the same area of law to determine if the Court has used and applied terms and concepts consistently. *See id.* at 1038.

111. Jeffrey Toobin, *The Trump Impeachment Hearings and Justice Antonin Scalia*, NEW YORKER (Dec. 9, 2019), https://www.newyorker.com/news/daily-comment/the-trump-impeachment-hearings-and-justice-antonin-scalia (quoting Antonin Scalia).

112. Owens & Wedeking, *supra* note 89, at 1038–39.

113. Several authors have described the autonomous view of law as being an example of an "autopoietic system," that is, a system that is closed and reproduces itself by essentially only relying on its own constructs to validate itself. *See, e.g.*, Dimitris Michailakis, *Law as an Autopoietic System*, 38 ACTA SOCIOLOGICA 323, 329 (1995). *See also* Christopher Tomlins, *How Autonomous is Law?*, 3 ANN. REV. L. & SOC. SCI. 45, 46 (2007) (contrasting the autonomous view of the law to other socio-legal studies).

114. Tomlins, *supra* note 113, at 46.

115. *See id.* at 46–47 (defining the meaning of law as a closed system); *see also* Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 L. & SOC'Y REV. 291, 292 (1984) (quoting Humberto Maturana who describes such a system as one that "produces and reproduces its own elements by the interaction of its elements").

one ignores virtually any contextual, social, or political factors in determining the outcome of a case. Decisions made in the autopoietic process derive their validity from normative rules such as the texts of the Constitution, statutes, or existing precedent;[116] the judges making those decisions do not generally have recourse to nonlegal texts, facts, policy, or other extraneous considerations. There is a circularity and a certain self-referential structure to that process. As Michailakis has reiterated, "[t]his basal circularity of the law is the foundation for legal autonomy. One cannot speak of legal autonomy if conflicts are decided in the general context of political and social processes."[117] Whether one approves of this approach, it generally makes the outcome of a case clear because it is reached by applying fixed rules. Since this was Scalia's methodology, it is not surprising that his opinions rank as the clearest and easiest to read by Owens and Wedeking.

Scalia's deep commitment to originalism, formalism, and textualism prompted him to write opinions or dissents as if there could only be one correct outcome. That outcome was unfailingly dependent on the text or previously established authority, regardless of changed social circumstances or the facts of a particular case.[118] Alongside his reliance on originalism in interpreting the Constitution as the Framers understood it, Scalia saw his role generally as stating and implementing the law as it was written.[119] The "text is the law," he once wrote, and he endeavored to faithfully maintain that position despite compelling facts or legislative history.[120] "Of all the criticisms leveled against textualism," he once wrote, "the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The

116. Michailakis, *supra* note 113, at 327 (explaining that the "legal system determines what is in accordance with law and what is not").

117. *Id.* at 330 (quoting Teubner, *supra* note 115, at 295).

118. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989).

119. Mark Sherman, *In Victory or Dissent, Scalia was a Man of Strong Opinions*, CHI. TRIBUNE (Feb. 13, 2016, 5:43 PM), https://www.chicagotribune.com/politics/ct-scalia-strong-opinions-20160213-story.html.

120. Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 788 (2017). Berman writes: "In a coauthored book published fifteen years after *A Matter of Interpretation*, Scalia asserts that 'we are governed not by unexpressed or inadequately expressed "legislative goals" but by *the law*'; that 'the true law is' what an enacted text 'state[s]'; and that 'it is the *text's* meaning . . . that binds us as law.'" *Id.* at 791 n.25. Berman asserts, "Statements such as these all indicate a constitutive claim. Other passages in the same book, however, strongly indicate that Scalia continues to understand his project in prescriptive terms, as when he and Garner insist that the textual-originalist approach they advocate is 'unapologetically normative, prescribing what . . . courts *ought* to do with operative language.'" *Id.*

rule of law is *about* form . . . Long live formalism. It is what makes a government a government of laws and not of men."[121]

Scalia also urged the use of canons of interpretation, rather than legislative history, to interpret texts where the plain meaning was not obvious, insisting that if "judges followed these 'valid canons' they would be more constrained and law would be more predictable."[122] He also tended not to be moved by the facts of a particular case before the Court. He once chided that "[r]eporters cared too much whether the 'little old lady won or lost' before the Supreme Court."[123] "I couldn't care less," he noted, "as long as we get the law right."[124] This approach whereby law becomes essentially self-referential is, as Michailakis has noted, the medium by which the law itself reproduces its normative elements.[125]

Scalia urged a rigorously applied, rule-based philosophy, asserting:

> When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: "[w]ell, that earlier case had nine factors, this one has nine plus one." Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.[126]

Scalia seemed comfortable with the effect of these "mild substantive distortions" on the litigants. He even went so far as to suggest that the outcome of any one particular case might be irrelevant.[127] He decried "the *attitude* of the common-law judge—the

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121. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 25 (1997).

122. William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 534 (2013) (book review). Eskridge asserts that Scalia and Garner's "exegesis of dozens of canons actually undermines the conceptual theses of the book and of Scalia's legisprudence" in part because they cherry-pick their canons, as well as the fact that the canons themselves demand normative analysis. *Id.* at 535–37.

123. Sherman, *supra* note 119.

124. *Id.*

125. Michailakis, *supra* note 113, at 327; *see also* Teubner, *supra* note 115, at 295.

126. Scalia, *supra* note 118, at 1178.

127. As he told Harvard students with respect to one particular case, "if you think it is terribly important that the case came out wrong, you are not yet thinking like a lawyer—or at least not like a common lawyer. That is really secondary. Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one."

mindset that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'"[128] The Justice even once poked fun at this formulaic methodology of interpreting laws according to whether they would have been constitutional at the time of the Framers. In an interview with New York Magazine, Scalia noted:

> [I]f a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional. A lot of stuff that's stupid is not unconstitutional. I gave a talk once where I said they ought to pass out to all federal judges a stamp, and the stamp says . . . STUPID BUT CONSTITUTIONAL.[129]

This rule-based philosophy does generally have the effect of rendering opinions, whether majority or dissenting, clear. Although in their study Owens and Wedeking did not analyze the Justices' opinions and dissents according to doctrinal clarity, Scalia's opinions would presumably have ranked highly in clarity on that scale too, since his philosophy as an "honest originalist" was relatively consistent.[130] However, when analyzing Justice Scalia's oral dissents in respect to rhetorical clarity, because of their erudite references, they require a more educated listener or reader. Hence an analysis based on rhetorical clarity provides additional insights about the audience and purpose for his dissents.

B. Rhetorical Clarity and Justice Scalia's Dissenting Anti-Canon: Audience, Language, Tone, and Impact

> *"The language of the law, along with other discourses of the powerful, lays down the very terms within which subordinate groups are able to experience the world and articulate their aspirations."*[131]

Rhetorical clarity is often assessed in terms of how accessible the text is to the reader.[132] Among the most common assessment tools for

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Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, Lecture at Princeton University (Mar. 8–9, 1995)*, *in* THE TANNER LECTURES ON HUMAN VALUES, at 79, 82 (1978).

128. *Id.* at 88.

129. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10/.

130. *See id.* Scalia referred to himself as an honest originalist in a conversation with New York Magazine, noting "I try to be an honest originalist!" *Id.*

131. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 170 (1991).

132. Scott Consigny, *Transparency and Displacement: Aristotle's Concept of Rhetorical Clarity*, 17 RHETORIC SOC'Y Q. 413, 414 (1987) ("If the proper function

determining clarity, often used interchangeably with readability or accessibility, are the Flesch Kincaid Reading scale and other similar tools.[133] These tools focus on sentence length, the complexity of the vocabulary used, and the clarity of the ideas expressed.[134] Accessibility is often recorded as a grade reading level.[135] The idea that legal opinions should be rhetorically clear is not new. Judge Posner, for example, argued that judicial opinions should be readable by lay persons.[136] Assessing Justice Scalia's oral dissents using a combination of reading scales shows that his dissents rated slightly more complex than Justice Ginsburg's. They required a fourteenth grade reading level to comprehend them, while Justice Ginsburg's required a thirteenth grade level. This distinction held true for other scales like Coleman Liau, the SMOG Index, and the FOG scale, which also all measure similar factors. The reading ease level of Scalia's dissents was also slightly, but not significantly, higher than Ginsburg's.[137]

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of rhetorical speech is to transparently transmit the rhetor's meaning—namely, his reasoned interpretation of a given situation—without undue distortion or interference, then presumably Aristotle's rhetor should eschew deceptive verbal ornamentation.").

133. *The Flesch Reading Ease Readability Formula*, READABILITY FORMULAS, https://readabilityformulas.com/flesch-reading-ease-readability-formula.php (last visited Apr. 25, 2021). *See also The Coleman-Liau Readability Formula (also known as The Coleman-Liau Index)*, READABILITY FORMULAS, https://readabilityformulas.com/coleman-liau-readability-formula.php (last visited Apr. 25, 2021); *The Gunning's Fog Index (or FOG) Readability Formula*, READABILITY FORMULAS, https://readabilityformulas.com/gunning-fog-readability-formula.php (last visited Apr. 25, 2021); *How to Use the SMOG Readability Formula on Health Literacy Materials*, READABILITY FORMULAS, https://readabilityformulas.com/articles/how-to-use-smog-readability-formulas-on-health-literacy-materials.php (last visited Apr. 25, 2021).

134. *The Flesch Reading Ease Readability Formula*, *supra* note 133; *The Coleman-Liau Readability Formula (also known as The Coleman-Liau Index)*, *supra* note 133; *The Gunning's Fog Index (or FOG) Readability Formula*, *supra* note 133; *How to Use the SMOG Readability Formula on Health Literacy Materials*, *supra* note 133.

135. *The Flesch Reading Ease Readability Formula*, *supra* note 133; *The Coleman-Liau Readability Formula (also known as The Coleman-Liau Index)*, *supra* note 133; *The Gunning's Fog Index (or FOG) Readability Formula*, *supra* note 133; *How to Use the SMOG Readability Formula on Health Literacy Materials*, *supra* note 133.

136. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views*, 51 DUQ. L. REV. 3, 9 (2013) (arguing that a judicial realist appellate judge, among other factors "wants judicial decisions to 'make sense' in a way that could be explained to, and persuade, a lay person . . . [and] has a distaste for legal jargon and wants judicial opinions, so far as possible, to be readable by non-lawyers . . . .").

137. Scalia's reading ease number was 14.05 grade level required, while Ginsburg's was 13.3. This means Scalia's dissents were slightly more challenging

However, in assessing the rhetorical clarity of oral dissents, to focus only on readability indices ignores other important rhetorical components like the kinds of cases in which Justice Scalia dissented and what he actually said in dissent, along with his voice and tone. Moreover, just because his dissents were relatively accessible does not mean that his audience was the public. Although his oral dissents were reported in the press, the audience he was apparently targeting was more specific than the general public.

1. The Anti-Canon—Why Justice Scalia Tended to Dissent

One of the hypotheses of this study was that because of Scalia's commitment to originalism and textualism, he would reserve his most scathing dissents for cases where the majority focused on the particular circumstances of a case or achieving a particular outcome rather than the "text" or "rules" themselves. That hypothesis proved to be generally true. However, there was also an ideological pattern to Scalia's dissents which suggested that ideology played an outsized role—almost as if Scalia were trying to fashion a conservative anti-canon. If one looks at the pattern of his dissents, two were in death penalty cases: one involving a man with an intellectual disability, and one involving a defendant who had committed crimes while a minor.[138] In those cases, as discussed more fully below, Scalia disregarded factual evidence regarding the petitioners' mental disability and immature cognitive abilities, respectively, in favor of his assertion that defendants like them should nevertheless be executed. He was also outraged at the thought of providing habeas rights and due process for Guantanamo detainees[139] or upholding the ACA.[140] Finally, he was steadfast in his outspoken rejection of rights

than Ginsburg's. *See The Flesch Reading Ease Readability Formula*, *supra* note 133 (The specific mathematical formula is:

FKRA = (0.39 x ASL) + (11.8 x ASW) - 15.59

FKRA = Flesch-Kincaid Reading Age
ASL = Average Sentence Length (i.e., the number of words divided by the number of sentences
ASW = Average number of Syllable per Word (i.e., the number of syllables divided by the number of words)).

138. *See* Roper v. Simmons, 543 U.S. 551, 555–56 (2005); Atkins v. Virginia, 536 U.S. 304, 307 (2002).

139. Boumediene v. Bush, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting); Hamdan v. Rumsfeld, 548 U.S. 557, 655 (2006) (Scalia, J., dissenting).

140. King v. Burwell, 576 U.S. 473, 498 (2015) (Scalia, J., dissenting).

being accorded the LGBTQ community, as evidenced by his dissents in *Lawrence*,[141] *Windsor*,[142] and *Obergefell*.[143]

Based on the fact that he tended to dissent on ideological grounds, one might assume that Scalia aspired to write so-called canonical dissents—dissents that are later redeemed for their holdings by future courts, or serve as warnings for the future, and thus shape constitutional development.[144] Primus has suggested that dissents may become canonical because "of the identity of their authors, the number of Justices who joined them, their literary merits, the general philosophy they espouse, or the issues upon which they were written."[145] The major canonical dissents that are widely accepted are *Plessy*,[146] *Lochner*,[147] *Olmsted*,[148] *Korematsu*,[149] and the free speech dissents by Justices Holmes and Brandeis.[150] Scalia certainly generated the larger-than-life persona required of a canonical author, wrote eloquently and entertainingly, and made it clear that, at least on occasion, he was writing for the wisdom of a

141. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

142. United States v. Windsor, 570 U.S. 744, 798 (2013) (Scalia, J., dissenting).

143. Obergefell v. Hodges, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting).

144. Primus, *supra* note 41, at 243, 245 ("Constitutional law . . . has not only a canon composed of the most revered constitutional texts but also an anti-canon composed of the most reviled ones. *Lochner* and *Plessy* are anti-canonical cases.").

145. *Id.* at 250. *See also* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 784 n.11 (2000) ("It follows that, in order for a dissent to be canonized, it must both be famous and be the subject of frequent reference within the legal community. As fame is a difficult quality to measure, this Article gauges the status of individual dissents by the number of favorable references they have garnered in subsequent Supreme Court opinions—with ten references as a baseline for canonical status.").

146. Plessy v. Ferguson, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

147. Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

148. Olmstead v. United States, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting).

149. Korematsu v. United States, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

150. *See* Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). *See also* Krishnakumar, *supra* note 145, at 795 n.73 ("[Brandeis's concurrence in *Whitney*] is often considered a dissent because Holmes and Brandeis disagreed with the majority on substantive grounds, concurring in their judgment only because of a procedural issue (e.g., the defendant had failed to raise the clear-and-present danger defense, on which Holmes and Brandeis based their finding that his actions were lawful, at the trial level). The *Whitney* concurrence has been cited 51 times. . . . The dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting), has been cited 26 times.") (citations omitted).

future day.[151] Primus suggests that judges who ascribe to the autonomous view of law tend to see their audiences as the legal academy because of their intellectual contributions to the law.[152]

Consistent with this, Scalia himself acknowledged that his audience was primarily the legal elite and that the function of dissent is to put "the Court in the forefront of the intellectual development of the law."[153] Ferguson has noted that often "judges associate their own views with a correct course in history"[154] which Scalia seems to have done, as he used phrases like "[t]he Nation will live to regret what the court has done today,"[155] and this ruling "will almost certainly cause more Americans to be killed."[156] Ferguson asserts that:

> Even more than historians, they [judges] need to find themselves on the victorious side in a continuum of past, present, and future, and their natural recourse is the telling example, which brings history to bear in manageable doses. Judgment, after all, is not a record of the past; it uses the past selectively in an assessment of normality or, more rarely, in a prescription for a possible normalization.[157]

One may intuit Scalia's desire to normalize his own moral approach, and at the same time write canonical dissents, when examining some of the prophetic and sweeping phrases that he used. He opened his dissent in *Windsor* with the words, "[t]his case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."[158] In the same case, he closed his dissent, "[b]ut the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better."[159] In *Lawrence*, he accused the Court of having signed on to the "homosexual agenda," claiming that:

> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as

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151. Primus, *supra* note 41, at 278–79.

152. *Id.* at 251.

153. 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 112 (Cornell W. Clayton & Howard Gillman eds., 1999).

154. Ferguson, *supra* note 63, at 214.

155. Boumediene v. Bush, 553 U.S. 723, 850 (2008) (Scalia, J., dissenting).

156. *Id.* at 828.

157. Ferguson, *supra* note 63, at 214.

158. United States v. Windsor, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting).

159. *Id.* at 802 (Scalia, J., dissenting).

> scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream . . . ."[160]

In *King v. Burwell*,[161] he referred back to *National Federation*,[162] a case in which Justice Kennedy read their joint dissent from the bench, noting that "the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."[163] However in many of Scalia's dissents, he appears to be on the wrong side of history in that his dissents seek to deny rights to people like the LGBTQ community, criminal defendants who are mentally disabled or emotionally and cognitively immature, noncitizens seeking habeas and due process rights, or people who lack health care. The approach taken by Scalia in all of those respects does not bend towards justice. His dissents on those cases might then be considered part of a dissenting anti-canon, rather than the canon.

2. The Rhetoric of Rules—A Disregard for Facts

Justice Scalia demonstrated his stated philosophical approach about viewing law as a set of rules without regard to the parties before the Court in multiple oral dissents and, in so doing, dispelled any doubt that his audience was not the litigants. One of the most compelling examples of this was his dissent in the death penalty case of *Roper v. Simmons*.[164] Three years earlier in *Atkins*,[165] a death penalty challenge involving a mentally disabled defendant convicted of murder, Scalia orally dissented from the majority opinion which found the death penalty unconstitutional for individuals with mental disabilities.[166] In his oral dissent in *Atkins*, Justice Scalia spoke (and later wrote) dismissively about the trend among states of enacting statutes prohibiting the execution of defendants with mental disabilities, noting "the oldest of the statutes is 14 years old, five were

160. Lawrence v. Texas, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).
161. 576 U.S. 473 (2015).
162. 567 U.S. 519 (2012).
163. 576 U.S. 473, 518 (2015) (Scalia, J., dissenting) (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)).
164. 543 U.S. 551 (2005).
165. 536 U.S. 304 (2002).
166. Oral Dissent of Justice Scalia at 6:55, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452), https://www.oyez.org/cases/2001/00-8452.

enacted last year, over half were enacted in the past eight years."[167] Scalia showed little to no concern for the fate of the Petitioner himself and even questioned the level of his mental disability, referring to him as "mildly mental[ly] retarded."[168] Similarly in *Roper*, he wrote scathingly of "the evolving standards of decency of our national society,"[169] which the majority had found militated against the death penalty being imposed on defendants who had committed crimes while minors. Scalia derided the notion that a "national consensus" against executing minors could have developed over a period of a mere fifteen years and criticized the Court for taking into account the fact that most other countries have banned the execution of minors.[170] He also critiqued studies that suggested that the moral decision-making abilities of minors was not fully developed.[171] He seemed to be unconcerned that, if his approach were to be adopted, the executions of minors would continue (at least in some states) until a more evident consensus had emerged in society. To ignore the particular defendant before the Court and others similarly situated is to ignore the fact that the law is concerned with people.

James Boyd White urges young lawyers to consider the "humanity and inhumanity in speech, particularly in professional speech."[172] Scalia might have been advised to take that adage into account in respect to Simmons and others like him. Boyd White also poses the question, "[w]hat does the writer choose to say about himself and his subject in the way he chooses to write?"[173] When one reads *Roper* or *Lawrence* through the lens of that question, one is struck by Scalia's callous disregard of many of the individuals whose cases came before him, as he privileged the status quo and pure legal analysis over what Boyd White terms "the raw material of life."[174]

Scalia's rhetoric in these cases embodies the kind of tough mindedness that Wetlaufer has described in other contexts as a commitment to "orderliness in discourse, to objectivity, to clarity and logic, to binary judgment, and the closure of controversies."[175] This kind of impersonal voice and autopoietic approach, while it may be clear, ignores the lives and experiences of the litigants before the Court while purporting to neutrally dispense justice. Yet in so doing, it also ignores the fact that these "rhetorical commitments . . . disempower the already powerless . . . [and]

167. *Id.* at 12:00–12:12.
168. *Id.* at 8:44–8:51.
169. Oral Dissent of Justice Scalia at 10:00–10:10, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), https://www.oyez.org/cases/2004/03-633.
170. *Id.* at 10:11–10:19.
171. *Id.* at 12:50.
172. WHITE, *supra* note 1, at 109.
173. *Id.* at 110.
174. *Id.* at 243.
175. Wetlaufer, *supra* note 16, at 1552.

reinforce the existing distribution of power and wealth."[176] Moreover, although Scalia asserted that his dissent was motivated by the conviction that the Court should not substitute its judgment for that of legislatures,[177] he seemed willing to substitute his own judgment for the facts in some cases. In *Roper*, he noted in respect to studies submitted by the American Psychological Association to the effect that minors did not have the same moral capacity to reason as adults, "[a]t most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes."[178] Given that psychologists had testified that Christopher Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced,"[179] it seems extremely unlikely that Simmons fell into the category of minors who could fully appreciate the nature and consequences of his crimes. Moreover, as Justice Kennedy pointed out in the majority opinion, "[t]he experts testified about Simmons' background including a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence. Simmons was absent from home for long periods, spending time using alcohol and drugs with other teenagers or young adults."[180]

Scalia's focus on the "rule" as opposed to sociological evidence or the facts was also evident during other oral dissents. In *King v. Burwell*,[181] he demonstrated his commitment to his vision of legal legitimacy—textualism—urging in his dissent that "[t]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."[182] Despite the finding of the majority in upholding the ACA as a constitutional exercise of Congress's taxing power, Scalia reiterated his "plain meaning" approach in interpreting the statute, when he posited "[u]nder all the usual rules of interpretation, in short, the Government should lose this case."[183] He went on to note sarcastically "[b]ut normal rules of interpretation

176. *Id.* at 1596.

177. Scalia questioned in *Roper*, "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?" Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

178. *Id.* at 618 (Scalia, J., dissenting).

179. *Id.* at 559.

180. *Id.*

181. 576 U.S. 473 (2015).

182. *Id.* at 500 (Scalia, J., dissenting) (quoting Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925)).

183. *Id.*

seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved."[184]

Contrast that approach with Chief Justice Roberts's opinion for the majority, which he began by noting the history and purpose behind the enactment of the ACA. "The Patient Protection and Affordable Care Act . . . grew out of a long history of failed health insurance reform."[185] Roberts went on to point out that the "Act seeks to make insurance more affordable by giving . . . tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line."[186] In finding the ACA constitutional, he conceded that "[i]t is true that we generally try to avoid interpreting a statute in a way that makes some language superfluous. But we have said that is not an absolute rule, and it does not seem particularly helpful in interpreting this statute."[187] The dichotomy between Scalia's and Roberts's approaches epitomizes the purely analytical versus the narrative approach, as Boyd White would put it,[188] or the textual rule-based approach contrasted with one that took the sociological implications and legislative intent of the ACA into account. Roberts endorsed this approach when he asserted a "fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets not to destroy them."[189]

Scalia's preference for textual legal legitimacy and his disdain for the majority's reliance on sociological legitimacy was also manifested in *Obergefell v. Hodges*, an opinion in which he strongly dissented but did not read from the bench; Chief Justice Roberts read his own relatively lengthy dissent from the bench instead.[190] In response to the majority's finding that denying the benefits of marriage to same sex couples constituted a denial of equal protection and due process because it denied those couples dignity and the full protection of the law, Scalia noted dismissively, "[t]he world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis."[191] His

184. *Id.*

185. *Id.* at 479 (majority opinion) (citation omitted).

186. *Id.* at 482.

187. Oral Opinion of Chief Justice Roberts at 7:11–7:27, Part 1, King v. Burwell, 576 U.S. 473 (2015) (No. 14-114), https://www.oyez.org/cases/2014/14-114.

188. *See* WHITE, *supra* note 1, at 243, 245.

189. Oral Opinion of Chief Justice Roberts at 10:43–10:53, Part 1, King v. Burwell, 576 U.S. 473 (2015) (No. 14-114), https://www.oyez.org/cases/2014/14-114.

190. Oral Dissent of Chief Justice Roberts, Part Two, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556), https://www.oyez.org/cases/2014/14-556.

191. *Obergefell*, 576 U.S. at 720 (Scalia, J., dissenting).

disdain for relying on changed circumstances as a justification for the majority ruling also was strongly evident in *Lawrence v. Texas* and *United States v. Windsor*. In *Lawrence*, he posited that the majority's holding usurped the function of the legislature: "One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion."[192] He stated further, "[i]t is clear from this that the Court has taken sides in the culture war and in particular, in that battle of the culture war that concerns whether there should be any moral opprobrium attached to homosexual conduct."[193] He then chided the Court for being "so imbued . . . with the law profession's anti-anti-homosexual culture that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls discrimination against those who engage in homosexual acts is perfectly legal."[194] In *Windsor*, he rejected the notion that laws "favoring man-woman marriage no more demeans and humiliates other sexual relationships than favoring our constitution demeans and humiliates the governmental systems of other countries."[195] Thus, in both cases he rejected the sociological evidence cited by the majority that showed that laws denying equal protection to LGBTQ groups impacted their dignity in ways that the Court should take into account.[196] In *Windsor*, he registered his outrage when he decried the majority for essentially rendering anyone opposed to the traditional definition of marriage as "an enemy of human decency."[197]

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192. Oral Dissent of Justice Scalia at 14:23–14:35, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), https://www.oyez.org/cases/2002/02-102. He stated, "[s]ocial perceptions of sexual and other morality change over time and every group has the right to persuade its fellow citizens that its view of such matters is best, that homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining states that criminalized consensual homosexual acts, but persuading ones fellow citizens is one thing, and imposing ones views in absence of democratic majority will is something else." *Id.* at 13:01–13:35.

193. *Id.* at 11:02–11:16.

194. *Id.* at 11:56–12:18.

195. Oral Dissent of Justice Scalia at 5:22–5:35, Part Two, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), https://www.oyez.org/cases/2012/12-307.

196. In *Windsor*, he averred, "[t]he majority is sure . . . [the DOMA's] purpose is to disparage, injure, degrade, demean and humiliate our fellow human beings, our fellow citizens who are homosexual." *Id.* at 8:04–8:16. *See also supra* text accompanying notes 192–93 (describing Scalia's view that such discrimination is "perfectly legal" in "most states" and his displeasure with what he termed as the Court's involvement in a "culture war").

197. United States v. Windsor, 570 U.S. 744, 800 (2013) (Scalia, J., dissenting). In both versions of the dissents he also used the Latin phrase "*hostis humani generis*." *Id.* at 798.

However, while he presented himself as a strict textualist, Scalia did not always consistently follow that approach. While Scalia had criticized the majority's approach in *King*,[198] as being one that essentially focused on the desired result and worked to interpret the law to achieve that result, he was not as contemptuous of that type of approach when it came to *Brown v. Plata*.[199] In that case, the majority upheld an injunction that resulted in the release of forty-six thousand convicted criminals from California's overcrowded prisons.[200] The Court held that the release was mandated because of

> systemwide deficiencies in the provision of medical and mental health care that . . . subject sick and mentally ill prisoners in California to 'substantial risk of serious harm' and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society.[201]

Scalia viewed the case as one "whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa."[202] Although he had been critical of the Court's approach to reading the statute in *King*, he expressed surprise that the Court in *Brown* had declined to "bend every effort to read the law in such a way as to avoid that outrageous result."[203]

Scalia also went on to express his unhappiness with the district court's fact finding in respect to the impact that the release of prisoners would have on the safety and welfare of the California public.[204] The district court relied on expert testimony to conclude that "shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism,"[205] and that "slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety."[206] Scalia disputed the possibility that the court had been persuaded by the expert testimony, asserting without any apparent basis that, "the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs

198. *See* King v. Burwell, 576 U.S. 473 (2015).
199. 563 U.S. 493 (2011).
200. *Id.* at 501–02.
201. *Id.* at 505 n.3; *see also id.* at 551 (Scalia, J., dissenting).
202. *Id.* at 550 (Scalia, J., dissenting).
203. *Id.*
204. *Id.* at 556–57.
205. *Id.* at 556.
206. *Id.*

about penology and recidivism."[207] Scalia penned this despite the fact that even he himself acknowledged that "the District Court devoted nearly 10 days of trial and 70 pages of its opinion to this issue."[208]

Additionally, Scalia's emphasis on textualism and originalism obfuscates the fact that this approach serves to protect the status quo, which is not necessarily neutral, often favors the already privileged, and may well serve to entrench the patriarchy. Katharine Bartlett has argued that a feminist approach to law requires "looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination."[209] This approach is similar to that advocated for by critical race theorists or critical legal studies advocates, although their analysis of the law's potential discriminatory impact obviously extends beyond women. Critical race or legal theorists have exposed how law "can be substantively unfair or tilted toward the interests of the powerful"[210] and thus undermine or negate the interests of the least powerful, including people of color, the LGBTQ community, women, and the poor and disenfranchised. In emphasizing the Constitution as its Framers originally intended it, Scalia overlooked the impact of that approach on these groups.

It should also be noted that Scalia reserved some of his most outraged dissents for cases which contravened his jurisprudential philosophy—specifically instances where he asserted that the Court was fashioning the law to attain a particular end and, in doing so, had imposed the minority rule of an elite set of judges on the country.[211] Scalia urged that it was the reasoning of an opinion that commended it to its audience, noting that "an opinion that gets the *reasons* wrong gets *everything* wrong."[212] This is not to suggest that Scalia took dissenting lightly. He recognized the potential serious consequences

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207. *Id.* at 557.

208. *Id.*

209. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 843 (1990).

210. Jack M. Balkin, *Critical Legal Theory Today*, *in* ON PHILOSOPHY IN AMERICAN LAW 64, 67 (Francis J. Mootz III ed., 2009).

211. An example of this would be *King v. Burwell* where Scalia maintained that the Court was engaging in a convoluted interpretation of the Affordable Care Act and in so doing twisting the language of the statute to achieve the desired end. *See* King v. Burwell, 576 U.S. 473, 509 (2015) ("The Court has not come close to presenting the compelling contextual case necessary to justify departing from the ordinary meaning of the terms of the law. Quite the contrary, context only underscores the outlandishness of the Court's interpretation. Reading the Act as a whole, leaves no doubt about the matter: 'Exchange established by the State' means what it looks like it means.").

212. Antonin Scalia, *The Nineteenth Annual Lecture: The Dissenting Opinion, Address given to the Supreme Court Historical Society as the Society's Annual Lecture (June 13, 199)*, *in* J. SUP. CT. HIST. 33 (Dec. 1994).

of a dissent on the institution of the Court, noting that "[t]he foremost and undeniable external consequence of a separate dissenting or concurring opinion is to destroy the appearance of unity and solidarity."[213]

3. The Court and the Separation of Powers

Another consistent theme that emerges in several of Justice Scalia's oral dissents is that the Court is an elitist institution imposing its undemocratic will on the people and, in doing so, usurping the role of the legislature. Scalia seems to have believed that the federal government was impinging on the power of the states.[214] In distancing himself vociferously from the majority in those types of cases, Scalia metaphorically opened up a large conversational space into which he invited conservative legal academia, future readers, and the public. In some cases, Scalia's tone is outraged, but in others, he affects a disinterested tone as if he does not have a stake in the outcome of the cases. In *EPA v. EME Homer*,[215] for example, a case involving whether the Environmental Protection Agency ("EPA") could impose regulations to protect "downwind" states from the pollution of their "upwind" neighbors, he maintained that "these are not cases of earth shaking importance."[216] This pronouncement is similar to his affected disinterest in *Lawrence v. Texas*, wherein he asserted that despite his opposition to the Court finding Texas's law against sodomy unconstitutional, "[l]et me be clear that I have nothing against homosexuals, or any other group promoting their agenda through normal democratic means."[217] Scalia's word choice perhaps betrayed him as the idea that there is a "homosexual agenda" tends to be a claim advanced by the religious right.

Moreover, while Scalia's insistence on deference to legislatures sounds like a neutral resolution of these cases in accordance with Article I of the Constitution, it ignores the facts that one, it is exceedingly difficult to get a constitutional amendment passed; and

213. *Id.* at 35.

214. See *Printz v. United States*, 521 U.S. 898, 935 (1997), wherein he wrote "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* *Printz* involved the constitutionality of background checks under the Brady Act. *Id.* Much of Justice Scalia's majority opinion was devoted to a discussion of the Federalist Papers.

215. EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014).

216. Oral Dissent of Justice Scalia at 00:10–0:13, Part Two, EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014) (No. 12-1182), https://www.oyez.org/cases/2013/12-1182.

217. Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

two, our federal or even state legislatures are hardly truly representative bodies.[218] Scalia himself pointed out in respect of constitutional amendments that "I figured it out once, I think if you picked the smallest number necessary for a majority in the least populous states, something like less than 2 percent of the population can prevent a constitutional amendment."[219]

Moreover, if judges ignore the factual, social, and policy considerations in cases, this means that the law does not change, unless through legislative means. The law then continues to benefit those whom it has already privileged while often ignoring the needs of those who might most need its protection. Justice Kennedy foresaw a role for the Court in advancing justice when he noted that "when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking."[220]

4. Voice, Tone, and Audience

Justice Scalia seems to have enjoyed drafting dissents, as he had a chance to express himself freely therein without worrying about accommodating other Justices' views. He once wrote:

> [Dissent] makes the practice of one's profession as a judge more satisfying. To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important *and no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.[221]

He also seems to have taken pride in his dissents, noting in a speech that he had "hit lots of home runs in dissents, but they don't

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218. *See* William F. Connelly Jr. & John J. Pitney Jr., *How Representative Is Congress?*, THE BROOKINGS INST. (Mar. 23, 2017), https://medium.com/@Brookings/how-representative-is-congress-c4605c61000d. Connelly and Pitney note that the Framers would scorn those who argue that Congress is unrepresentative because demographic characteristics do not mirror those of the general population or that its decisions fail to reflect public opinion on key issues. They do however concede that "much of the demographic mismatch between Congress and the public has been a symptom of discrimination and unequal opportunity." *Id.* However, it should be noted that Congress remains extremely unrepresentative in respect of race and gender.

219. Senior, *supra* note 129.

220. Obergefell v. Hodges, 576 U.S. 644, 677 (2015) (citing Schuette v. BAMN, 572 U.S. 291, 313 (2014)).

221. Antonin Scalia, *Dissents*, 13 OAH MAG. OF HISTORY 18, 22–23 (1998).

make it to the scoreboard."[222] Audience and some kind of recognition therefore seems to have been important to Scalia. A few months before his death, he told students at St. Thomas School of Law that he wrote his dissents "for you guys."[223] He went on: "If I write it I know it will be in the casebook, because the professors need something to talk about."[224] He suggested that by doing so he hoped to preserve "what he believed to be true principles of law."[225]

Scalia's legal philosophy regarding dissents has implications in respect to the audience he might be attempting to persuade, as well as the sources to which he might cite in his dissents to substantiate his points and persuade that audience. The general public would likely have been oblivious to the nuances of Scalia's contentions that the majority was ignoring an originalist approach or subverting a textualist interpretation. Even in cases where he would read his dissents aloud from the bench and the press would report on these occasions, the public might not fully understand the essence of his philosophical disagreements with the majority opinions unless the case involved a salient issue like gay marriage. This suggests that Scalia's audience must therefore have been other lawyers, judges, the academy, and law students. He confirmed this when he noted that opinions are too complex for the press and regular people to understand.[226]

Additionally, although one might expect the tone of any dissent to convey a level of frustration that one's opinion is not being adopted by the majority, Scalia's dissents, particularly those read from the bench, were often scathing. A good dissent or opinion, as Ferguson

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222. Heather Sackett, *Supreme Court Justice Antonin Scalia Speaks at Conference in Mountain Village*, TELLURIDE DAILY PLANET (May 13, 2015), https://www.telluridenews.com/news/article_2e4e9b60-302e-57ad-92df-ceb0cd91a6b8.html.

223. Michael Stokes Paulsen, *Scalia at St. Thomas: Closing Arguments*, PUB. DISCOURSE (Feb. 18, 2016), http://www.thepublicdiscourse.com/2016/02/16501/.

224. *Id.*

225. *Id.*

226. Scalia did not have a high opinion of the citizenry or the press. He once noted, "They're just going to report, who is the plaintiff? Was that a nice little old lady? And who is the defendant? Was this, you know, some scuzzy guy? And who won? Was it the good guy that won or the bad guy? And that's all you're going to get in a press report, and you can't blame them, you can't blame them. Because nobody would read it if you went into the details of the law that the court has to resolve. So you can't judge your judges on the basis of what you read in the press." *Scalia's Superficial View Sells Americans Short*, HERALDNET (Oct. 25, 2006, 9:00 PM), https://www.heraldnet.com/opinion/scalias-superficial-view-sells-americans-short/ (quoting Supreme Court Justice Antonin Scalia at a talk sponsored by the National Italian American Foundation). *See also* Sackett, *supra* note 222 (statement of Justice Antonin Scalia) ("They would lose their readership if they tried to explain the case thoroughly.").

has noted, addresses and responds to the opposing viewpoint.[227] This is consistent with the Toulminian approach and classical rhetoric, whereby one builds one's own ethos and comes across as a reasonable person by acknowledging the limitations of one's own argument, as well as considering and responding to opposing perspectives.[228] Many of Scalia's bench dissents raised alternative views and approaches but did so in ways that Ferguson notes are "entirely within the controlling voice of the judicial speaker and with the foreknowledge that these alternatives will submit to that speaker's own authorial intentions."[229] When Scalia would canvass alternative views he often wrote of them dismissively, minimizing their validity and treating them with sarcasm and disparagement, as if no reasonable person could possibly entertain such an outcome.[230] In fact, Scalia tops the "sarcasm" index of all the Justices from 1986–2013 by a wide margin. The index was designed by Richard Hasen, who relied on scholars' descriptions of opinions and dissents in law reviews as "caustic" or "sarcastic."[231] While Hasen's methodology might be questionable, the fact that Scalia was rated as "sarcastic" or "caustic" seventy-five times over the period 1986–2013, while the rest of the Justices combined only had fifty-nine such references for that period, indicates a consensus as to Justice Scalia's negative tone.[232] This tone does not suggest that he was trying to persuade his judicial colleagues to adopt his viewpoint. As J. Lyn Entrikin has pointed out, his dissents would surely have been less acerbic had he intended to bring his colleagues around to his line of thinking.[233] Instead, the dissents often read like

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227. Ferguson, *supra* note 64, at 205 ("The goal of judgment is to subsume difference in an act of explanation and a moment of decision.").

228. Anthony John Kunnan describes the Toulminian argument as "a method of practical reasoning with a structured macrostructure of arguments. It has the following six categories: the *claim* or assertion or conclusion which is a statement including any *qualifiers* or certainty or limits, the *evidence* or grounds or data that support the claim, the *warrant(s)* or principle or authority or reasoning connecting the evidence to the claim, the *backing* or reasons or assurances or theory, if necessary for warrants, and the *rebuttal(s)* or exception(s) to the claims." Anthony John Kunnan, *Test Fairness and Toulmin's Argument Structure*, 27 LANGUAGE TESTING 183, 184 (2010).

229. Ferguson, *supra* note 64, at 205.

230. In fact, Justice Scalia ranks the highest of all justices on the "sarcasm" index, according to Richard L. Hasen. Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2D 215, 217 (2015), http://www.greenbag.org/v18n2/v18n2_ex_post_hasen.pdf.

231. *Id.* at 215–16 (finding "unparalleled" Justice Scalia's "nastiness, particularly directed at other Justices' opinions").

232. *Id.* at 216.

233. *See generally* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201 (2017) (noting that Scalia found professional pleasure in writing alone rather than with colleagues and claimed to write for the purpose of law students reading his work someday). Entrikin notes, "His dissents frequently reflected uncloaked scorn for

a castigation, pointing out the fallacy of the majority's approach. Rubin asserts that in dissent Scalia became "strident and contentious, appealing to popular political sentiments that lie beyond the boundaries of the case at issue."[234] Even Justice Ginsburg pointed out that she had suggested that he would "be more effective if he is not so polemical. I'm not always successful."[235]

If his colleagues on the bench were not his primary audience, neither was the general public in most cases, except perhaps on cases with major sociological implications, such as the gay rights cases and the ACA, as the public tends to be more concerned with the outcome of particular cases that engage the national interest. One is left with the conclusion that one of Scalia's intended audiences must have been posterity. He would likely want to be remembered for his consistent philosophy, rather than for his direct impact on his brethren or the public.

Justice Scalia's rhetoric, vocabulary, and the sources to which he tended to cite, also confirm that his targeted audience was the legal academy and/or posterity. His dissents speak to the more educated listener and reader. Part of this may be attributed to Scalia's love of rhetoric and fondness for erudite phrases. As Paul Clement has noted, "[h]e was willing to use an unfamiliar term, and risk losing a lazy reader unwilling to consult the dictionary, because words have meaning. He did not want to dilute his message by using a more familiar but less precise word."[236] He also took pride in his use of metaphors and memorable phrases. Robert Ivie has pointed out that metaphors are often used by dissenters as they are a "device for articulating a shift of perspective."[237] Scalia himself recognized that dissents "will not be cited, and will not be remembered, unless some quality of thought or of expression commends them to later generations."[238]

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the majority. And although he has been celebrated in death as a brilliant judicial giant, his departure from the custom of respectful dissent marked a turning point in the Court's tradition of collegiality and civility." *Id.* at 202. She goes on to assert, "[a]s one scholar observed, his 'dissents have not won over many adherents, and in some areas, despite the force of his protest, he may well be on the wrong side of history.'" *Id.* at 203 (quoting MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 407 (2015)).

234. Edward L. Rubin, *Question Regarding* D.C. v. Heller*: As a Justice, Antonin Scalia Is (A) Great, (B) Acceptable, (C) Injudicious*, 54 WAYNE L. REV. 1105, 1130 (2008).

235. Sherman, *supra* note 119.

236. Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 JUDICATURE 52, 54 (2017).

237. Ivie, *supra* note 36, at 51.

238. Clement, *supra* note 236, at 55. Clement noted, "[h]is opinions, in turn, could send the reader to the dictionary to look up words like 'panopticon' and

Additionally, Scalia's oral dissents often display some rhetorical trickery in the persona he affected. The fact that he did not have to persuade other members of the Court to sign on to the opinion allowed him to do so; he could adopt extreme views, make esoteric word choices, and use a more personalized style and voice. Although Scalia expressed the opinion that the Court's decisions are too complex for ordinary people to follow,[239] he often adopted the rhetorical persona of the ordinary "man in the street," apparently aghast at the position his elitist and undemocratic colleagues in the majority had adopted.

At times, therefore, he did appear to be speaking directly to ordinary, regular people, as if he were not a member of the legal and political elite. He accomplished this through a kind of "who do they think they are" tone (referring to the majority) in several of his dissents, along with the use of "folksy" language, colloquialisms, and metaphors. As Laura Krugman Ray has pointed out, in doing so, Scalia "attempts to position himself . . . as the champion of the people, respecting their values and speaking their language."[240] For example, she points out that in *Casey*,[241] he used informal phrases like "[i]t is beyond me,"[242] "come to think of it,"[243] and "even in the head of someone like me,"[244] as well as accusing his colleagues of engaging in a "verbal shell game."[245] In *EPA v. EME Homer City*, he noted that, as one of his grandchildren would say, "well, duh!"[246] Similarly, in his dissent in *Obergefell*, he quoted from the majority opinion which referred to the Court's "constitutional imperatives [to] define a

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'atavistic,' as well as allusions like 'Cheops' Pyramid,' and 'Marquis of Queensberry rules.'" *Id.* at 54.

239. Larry Kramer notes that "[c]onstitutional law is indeed complex, because legitimating judicial authority has offered the legal system an excuse to emphasize technical requirements of precedent and formal argument that necessarily complicated matters. But this complexity was created by the Court for the Court and is itself a product of judicializing constitutional law." Larry Kramer, *The People v. Judicial Activism: Who has the Last Word on the Constitution?*, BOS. REV. (Feb. 1, 2004), http://bostonreview.net/us/larry-kramer-we-people.

240. Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 229 (2002).

241. 505 U.S. 833 (1992).

242. *Id.* at 997 (Scalia, J., dissenting).

243. *Id.* at 994.

244. *Id.* at 998.

245. *Id.* at 987.

246. Oral Dissent of Justice Scalia at 06:59–7:04, Part Two, EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014) (No. 12-1182), https://www.oyez.org/cases/2013/12-1182. The written dissent is also replete with phrases like "[t]he majority reaches its result ('Look Ma, no hands!')," EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 525 (2014) (Scalia, J., dissenting), and "[c]all it 'pin the tail on the donkey,'" *id.* at 539.

liberty"[247] and followed it up with a bemused and colloquial "Huh?"[248] He also described his colleagues as a "select, patrician, highly unrepresentative panel of nine,"[249] in some ways distracting his readers and listeners from the fact that he was a member of that select panel and was a graduate of Harvard Law and a distinguished law professor prior to being elevated to the Court.[250] His use (or creation) of terms such as "jiggery-pokery"[251] to describe the majority's reasoning in upholding the ACA sounds quaint and amusing but draws attention away from the fact that without the protection of the ACA millions of Americans would find themselves without health insurance. Additionally, he criticized his colleagues for asserting that "the context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[252] He derided this as "pure applesauce" and combined this phrase with a more erudite reference when he went on to note "[i]mpossible possibility, thy name is an opinion on the Affordable Care Act!"[253] Some commentators have claimed that "[t]hese—typical—cheap-shot one-liners are the stuff of political attack TV ads, not of persuasive legal writing."[254]

VI. JUSTICE GINSBURG'S RESPONSIVE APPROACH: HER CONTEMPORARY AUDIENCE AND RECOGNITION OF SOCIETAL CHANGES

"The final cause of law is the welfare of society."

Justice Cardozo[255]

Although Justice Ginsburg was one of the Justices known for reading more dissents aloud from the bench than other Justices, she

247. Obergefell v. Hodges, 576 U.S. 644, 719 (2015) (Scalia, J., dissenting).

248. *Id.*

249. *Id.* at 718.

250. *See* Steven A. Rosenberg, *Antonin Scalia Remembered for Close Ties to Harvard*, BOS. GLOBE (Feb. 14, 2016, 6:52 PM), https://www.bostonglobe.com/metro/2016/02/14/scalia-remembered-for-close-ties-harvard/qL7tdJAUrDJGQKTN9ue0yH/story.html.

251. King v. Burwell, 576 U.S. 473, 506 (2015) (Scalia, J., dissenting).

252. *Id.* at 497.

253. *Id.* at 500, 507.

254. Simon Lazarus, *The Scalia Problem: It Wasn't Originalism or Textualism—It Was Trumpism*, AM. PROSPECT (Apr. 4, 2018), https://prospect.org/justice/scalia-problem-originalism-textualism-trumpism/; *see also* Lincoln Caplan, *Forget the Tone. It's Dissent That Matters*, WASH. POST (July 6, 2003), https://www.washingtonpost.com/archive/opinions/2003/07/06/forget-the-tone-its-dissent-that-matters/712efea0-6008-4f92-91d2-d2f78c2113b6/ (opining that "Scalia's dissents may be too sharp and his arguments too impassioned").

255. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

nevertheless appeared not to take that responsibility lightly.[256] She once cited Justice Scalia's words in noting, "[w]hen history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting . . . to look back and realize that at least some of the Justices saw the danger clearly and gave voice, often eloquent voice, to their concern."[257]

Giving voice to one's concerns presupposes a level of clarity in writing, yet Ginsburg's opinions have been singled out as among the most complex by Owens and Wedeking, whereas Justice Scalia's are often rated among the clearest.[258] However, the LIWC methodology used by Owens and Wedeking analyzes "attentional focus, emotionality, social relationships, thinking styles" and other features of language that combine to measure "cognitive complexity."[259] When one considers those factors in respect of Ginsburg's dissents, particularly the factors of emotionality and social relationships, one may see why Ginsburg's dissents rank as the most complex. Unlike Scalia, Ginsburg was not a strict textualist. Rather, she tended to look at the congressional intent and the impact of the case on the parties and on other people in the position of the parties, particularly women.[260] Additionally, Philip Tetlock and others have noted that language scored as more complex tends to "interpret events in multidimensional terms and to integrate a variety of evidence in arriving at decisions."[261] Ginsburg incorporated a lot of factual testimony into her opinions and dissents, including testimony before

256. Blake & Hacker, *supra* note 11, at 7 (asserting that she has read approximately 10 percent of her dissents from the bench, more than any other Justice).

257. Ginsburg, *supra* note 14, at 5.

258. *See* Owens & Wedeking, *supra* note 89, at 1043. The authors aver that "among all the justices in our sample, Justice Ginsburg's opinions were, by a significant margin, the most complex. Indeed, her average complexity score of 3.28 is over twice that of the mean justice (Brennan = 1.43), and roughly four times greater than those of Justices Scalia and Breyer." *Id.* at 1044. This may be because Justice Scalia focused on bright line rules ("the rule of law is a law of rules"), which are more easily communicated. Subsequent research by Ryan C. Black shows the situation may also be more complex, in that liberal Justices tend to write clearer opinions when public opinion is skewing more conservative and vice versa. *See* RYAN C. BLACK ET AL., U.S. SUPREME COURT OPINIONS AND THEIR AUDIENCES 137–38 (2016). Note that Black is writing about majority opinions rather than dissents.

259. Yla R. Tausczik & James W. Pennebaker, *The Psychological Meaning of Words: LIWC and Computerized Text Analysis Methods*, 29 J. LANGUAGE & SOC. PSYCH. 24, 24, 32 (2010).

260. *See* Deborah Jones Merritt, *Hearing the Voices of Individual Women and Men: Justice Ruth Bader Ginsburg*, 20 U. HAW. L. REV. 635, 635–39 (1998).

261. Philip E. Tetlock et al., *Supreme Court Decision Making: Cognitive Style as a Predictor of Ideological Consistency of Voting*, 48 J. PERSONALITY & SOC. PSYCH. 1227, 1228 (1985). Neither Scalia nor Ginsburg appear in the study as neither one was on the Court at that time.

Congressional Committees, facts from the district court case rather than simply the facts received from the appellate court, as well as general social and policy-based facts and studies.[262] This stands in contrast to a more rule-based approach like Justice Scalia's, which is dismissive of the facts and applies the rule, no matter the outcome. Another factor that sheds some insight into the complexity of Ginsburg's opinions is her word choice, as Gruenfeld has noted, "[l]anguage that scores as least complex relies on 'one-dimensional, evaluative rules in interpreting events' in which actors make decisions 'on the basis of only a few salient items of information.'"[263]

Interestingly, when one analyzes the oral version of dissents read from the bench using rhetorical clarity measures, such as the Flesch Kincaid and other readability tests, Justice Ginsburg's dissents are clearer than Justice Scalia's in terms of the levels of readability, the shortness of the sentences (which generally do not exceed two lines), the accessible vocabulary, the directness of the prose, and the clarity of the facts and examples provided. This all suggests that, in contrast to Justice Scalia's focus on posterity and the academy, Justice Ginsburg's audience for her oral dissents appeared to be the broader public (via the press) and the litigants (including people who may not be actual parties but who may be similarly impacted by the Court's decisions). Her audience was also clearly the Court itself and Congress where appropriate, as she spoke directly to them on occasion.

The following Subparts will explore several of Ginsburg's most prominent dissents with a view towards analyzing the kinds of cases in which she read her dissents aloud, her goals in doing so, and the audiences to whom the dissents are addressed. In canvassing the notion of audience, this Article will explore what the Justice herself said about her dissents, as well as the tone of those dissents and the authorities to which she cited, in both the oral and written versions. The Article will also help elucidate what these dissents tell us about the Justice's views on the role of the Court.[264]

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262. *See, e.g.*, Golan v. Holder, 565 U.S. 302, 326 (2012) (discussing congressional testimony); Ricci v. DeStefano, 557 U.S. 557, 643 (2009) (Ginsburg, J., dissenting) (discussing district court record).

263. Owens & Wedeking, *supra* note 89, at 1039 (quoting Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making*, 68 J. PERSONALITY & SOC. PSYCH. 5, 5 (1995)).

264. In an interview, Ginsburg noted, "'The Supreme Court doesn't have an agenda of its own,' she said, adding that 'it's a totally reactive institution, it depends upon people bringing cases before us that represent the issues.'" Caroline Kelly, *Ruth Bader Ginsburg: This Time in History Will Be Seen as 'an Aberration'*, CNN (Oct. 3, 2019, 10:18 PM), https://www.cnn.com/2019/10/03/politics/ruth-bader-ginsburg-justice-us-history-aberration/index.html.

A. Ginsburg's Dissenting Opinions as Advocacy: Context, Audiences, Rhetoric, Tone, Purpose, and Authorities

> *"As we know, the role of the* others *for whom the utterance is constructed is extremely great. . . . From the very beginning, the speaker expects a response from them, an active responsive understanding. The entire utterance is constructed, as it were, in anticipation of encountering this response."*[265]

An important foundational question is: In what circumstances or context do Justices choose to orally dissent? Blake and Hacker hypothesized that this occurs when there is profound disagreement on the outcome of cases, not only on legal or policy grounds, but also based on ideological differences among the dissenting Justice and the majority.[266] The authors also posit that the likelihood of dissenting from the bench increases in cases of "high salience," and when the case is closely decided, such as in a 5:4 split.[267] Although the authors found that their original hypothesis regarding ideological splits did not prove to be the most powerful motivator in a Justice choosing to orally dissent,[268] that factor may now have changed, as the Court has become more politically divided in the ten years since the study was conducted. When analyzing my results, as reflected in Appendix B, Justice Ginsburg appeared more likely to orally dissent in cases involving some form of discrimination, whether that was in respect to voting rights,[269] Title VII,[270] affirmative action,[271] class actions,[272] or access to contraception or abortion.[273] Given the Justice's background and judicial philosophies, these factors do not appear to be accidental.

Moreover, whom she is addressing and how she is addressing them, is also salient. In a recent interview, Justice Ginsburg was asked how easy it had been making the transition from an advocate to a Justice. Somewhat surprisingly, Ginsburg replied, "I think I'm still an advocate."[274] She went on to point out that when she writes dissents, she was "always hopeful that [her] advocacy will

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265. M. M. Bakhtin, *The Problem of Speech Genres*, *in* SPEECH GENRES AND OTHER LATE ESSAYS 60, 94 (Caryl Emerson & Michael Holquist eds., Vern W. McGee trans., 1986).

266. Blake & Hacker, *supra* note 11, at 4–5.

267. *Id.* at 9–10. My study confirmed this to be the case as fifteen out of eighteen of Ginsburg's oral dissents occurred in cases where there was a 5:4 split. The authors also found there are disincentives to orally dissent if one is the Chief Justice or a freshman Justice. *Id.* at 10.

268. *See id.* at 19.

269. *See* Shelby County v. Holder, 570 U.S. 529 (2013).

270. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

271. *See* Fisher v. Univ. of Tex., 570 U.S. 297 (2013).

272. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

273. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Gonzales v. Carhart, 550 U.S. 127 (2007).

274. Kelly, *supra* note 264.

persuade."[275] Ginsburg, like any good lawyer, is still mindful of her audience. "[I]t's a smaller audience," she noted, "[t]here's only nine of us."[276] Because Ginsburg was extremely cognizant of her colleagues on the bench, as well as the fact that today's dissent may evolve into a future majority opinion, her dissents sought to engage and persuade, which in turn influenced her word choices and her tone. All of these are very different from Justice Scalia's dissents, whose rhetoric often seemed designed to further alienate his fellow Justices on the Court. Ginsburg often began her dissents from the bench with a cordial: "Hello, fellow members of the Court."[277] Presumably she would have seen and greeted those fellow members prior to walking into the Courtroom, so addressing them personally in this way appears to be an attempt to engage them directly and ensure they are paying attention. Her language may also have helped to reassure those present and those who read about the oral dissent that the Court is an institution capable of handling dissent; and that even an oral dissent read aloud from the bench will not fracture it because the Court is still a unified body.

Kenneth Burke once defined rhetoric as "the use of language in such a way as to produce a desired impression upon the hearer or reader."[278] If one considers an oral dissent as a particular "rhetorical situation" to use Lloyd Bitzer's phrase,[279] then one must consider the context in which Ginsburg chose to orally dissent, to whom her dissents were addressed, and how she used language, tone, and specific authorities in an effort to persuade and become a "mediator of change."[280] One must also consider if the audience(s) for her oral

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275. *Id.*

276. *Id.*

277. *See e.g.*, Oral Dissent of Justice Ginsburg at 9:44–9:47, Ricci v. DeStefano, No. 07-1428 (U.S. June 29, 2009), https://www.oyez.org/cases/2008/07-1428; Press Release, Supreme Court of the United States, Statements from the Supreme Court Regarding the Death of Associate Justice Ruth Bader Ginsburg (Sept. 19, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/ pr_09-19-20 (listing opinions of other Justices describing Justice Ginsburg as "the essence of grace, civility and dignity," a "superb judge who gave her best . . . whether in agreement or disagreement," and who was always "civil, principled, [and] respectful" in her disagreements with other Justices).

278. KENNETH BURKE, COUNTER-STATEMENT 210 (3d ed. 1968).

279. Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 1 (1968). Bitzer defines a rhetorical situation as one where "rhetoric is a mode of altering reality, . . . by the creation of discourse which changes reality through the mediation of thought and action. The rhetor alters reality by bringing into existence a discourse of such a character that the audience, in thought and action, is so engaged that it becomes mediator of change. In this sense rhetoric is always persuasive." *Id.* at 4.

280. *Id.* at 4–5.

spoken dissents were different from those who read her much longer written dissenting opinions.

Justice Ginsburg was far more attuned to a contemporary and broader audience than Justice Scalia. She was also not shy about communicating directly with that audience. Therefore, overall, the tone of Ginsburg's oral dissents remained fairly polite, unlike the sometimes shrill tone of Justice Scalia's. As Cynthia Fuchs Epstein has noted, "[h]er style has always been very ameliorative, very conscious of etiquette."[281] While she was not hesitant to tell the Court where or how it has gone wrong in its majority opinion, she usually did so in a polite and restrained manner by urging Congress to act, if appropriate, or warning the Court that its decision would not stand, as it ignored the practical realities of people's lives.[282] She ascribed to Brennan's view that Justices have "an obligation to bring their individual intellects to bear on the issues that come before the Court . . . [W]here significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it."[283]

This sense of responsibility is an essential part of what Lani Guinier refers to as demosprudence.[284] Guinier characterizes this as occurring when a Justice is strongly opposed to the majority's position and the dissent is intended to "inspire nonjudicial actors to participate in some form of collective problem solving."[285] This presupposes that the dissent has a ready audience which will be responsive to, and engage with, the dissenting opinion. As Post has noted, "[C]ourts do not end democratic debate about the meaning of

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281. Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES (May 31, 2007), https://www.nytimes.com/2007/05/31/washington/31scotus.html.

282. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633, 1640 (2018) (Ginsburg, J., dissenting) (asserting that the majority's opinion striking down a provision of the National Labor Relations Act ignores the reality of employer-employee inequality that the Act was designed to mitigate, while signaling for Congressional correction of the Court's decision); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645–46, 661 (2007) (Ginsburg, J., dissenting) (contending the majority's interpretation of what qualifies as unlawful employment discrimination under Title VII discounts the realities of the workplace and calling on Congress to act to correct the Court's ruling).

283. William J. Brennan, Jr., *In Defense of Dissents*, *in* THE GREAT DISSENTS OF THE "LONE DISSENTER": JUSTICE JESSE W. CARTER'S TWENTY TUMULTUOUS YEARS ON THE CALIFORNIA SUPREME COURT xxxv, xliii (David B. Oppenheimer & Allan Brotsky eds., 2010). Ginsburg has claimed the right to intervene, noting, "[w]hen a Justice is of the firm view that the majority got it wrong, she is free to say so in dissent. I take advantage of that prerogative, when I think it important, as do my colleagues." RUTH BADER GINSBURG ET AL., MY OWN WORDS xviii (2016).

284. *See* Guinier, *Demosprudence Through Dissent*, *supra* note 72, at 16.

285. *Id.*

rights and law; they are participants within that debate."[286] However, if a Justice's goal was to reach a broader public audience so as to engage them as participants, an oral dissent must be accessible to that audience and will therefore not be too erudite or spend too much time citing largely inaccessible or incomprehensible case law.

Guinier's construct of demosprudence is embodied in Ginsburg's dissenting jurisprudence. Ginsburg's oral dissents show that she did not consider the Court's role "to close what has been open," to use Wetlaufer's phrase;[287] rather she used her position on the Court to engage others in conversation—whether those others were Congress or the public. Because of her own background and experiences, Ginsburg was acutely aware of the exclusion of and discrimination against women. Despite attaining the distinction of being at the top of her class, she struggled to find a job.[288] She was rejected for a Supreme Court clerkship and only attained her first position through the machinations of one of her professors from Columbia.[289] Her work with the American Civil Liberties Union ("ACLU") centered on litigating gender discrimination.[290] Her own background thus provided Ginsburg with an ethos with her audience. She had credibility because those who have been excluded by the legal system know that at one point, she suffered along with them. Ginsburg was acutely attuned to any form of discrimination and exclusion, and she endeavored to engage her colleagues on the bench in judicial problem-solving on these issues, using a form of narrative and feminist practical reasoning.[291] It is not surprising, therefore, that many of the cases in which she issued strongly worded dissents from the bench involved some form of discrimination. These included several Title VII and equal protection claims.[292]

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286. Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009).

287. Wetlaufer, *supra* note 16, at 1564.

288. *See Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/justices/ruth_bader_ginsburg.

289. *See id.*; Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87.

290. *See Ruth Bader Ginsburg*, *supra* note 288.

291. *See* Bartlett, *supra* note 209, for a discussion of feminist reasoning. Bartlett notes, "[w]hen feminists 'do law,' they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide the resolution of the dispute, and they apply those principles to the facts. This process unfolds not in a linear, sequential, or strictly logical manner, but rather in a pragmatic, interactive manner." *Id.* at 836.

292. *See supra* notes 102–06, 268–72 and accompanying text.

The fact that someone who had herself experienced discrimination gave voice to those who have been discriminated against is important. Erin Rand has noted that "a dissent written from a position of institutional power can provide recognition to a group that feels otherwise unheard and disenfranchised."[293] Moreover, Ginsburg was not a bland face of institutional power; she was someone with whom her audience felt a kinship—hence the RBG dolls, memes, and Halloween costumes. The relationship between Ginsburg and her audience was symbiotic, reciprocal, mutual, and responsive. Just as Ginsburg "recognized" the victims of discrimination in many of her dissents by voicing their concerns and using the personal pronoun "you,"[294] so too did her nonlegal audience in turn "recognize" her by paying homage to her in contemporary pop culture and in responding to her dissents, knowing she had "walked the walk." In turn, Ginsburg's recognition of, and identification with, her audience was illustrated by multiple factors. First, she signaled to her audience what was to come by walking into the Courtroom wearing her special dissenting collar.[295] Adorning herself with this symbol ensured that the assembled press corps would immediately pay attention and report on Ginsburg's words. She thus reached a broader audience she would not otherwise reach if she did not convey a sense of drama and instill the expectation that a performance was about to occur. She also signaled to her followers that she was performing for them by reading her dissent aloud. Additionally, the fact that Ginsburg intended for her words to reach a broad audience was evidenced by the fact that she incorporated many clearly understandable facts and statistics as well as sociological authorities in her dissents, rather than limiting herself to solely legal ones.[296] In doing so, she reminded the Court and the public that the Court's decisions were affecting the lives of real people.

According to Smith, a published dissent "may galvanize popular mobilization against unpopular decisions."[297] One such example of an audience reaction that took place as a direct response to Justice Ginsburg's dissent in *Hobby Lobby* occurred when activists, outraged at the exception to the ACA's contraception mandate that the majority carved out for Hobby Lobby, took it upon themselves to strategically place copies of Ginsburg's dissent in Hobby Lobby

293. Erin J. Rand, *Fear the Frill: Ruth Bader Ginsburg and the Uncertain Futurity of Feminist Judicial Dissent*, 101 Q. J. SPEECH 72, 78 (2015) (citing J. Louis Campbell, III, *The Spirit of Dissent*, 66 JUDICATURE 304, 311 (1983)).

294. *See* Guinier, *Demosprudence Through Dissent*, *supra* note 72, at 40.

295. *See* Safia Samee Ali, *Justice Ginsburg Wears "Dissent" Collar Following Contentious Election*, NBC NEWS (Nov. 10, 2016, 7:46 AM), https://www.nbcnews.com/storyline/2016-election-day/justice-ginsburg-wears-dissent-collar-following-contentious-election-n681571.

296. *See* Guinier, *Demosprudence Through Dissent*, *supra* note 72, at 43–44.

297. Smith, *supra* note 71, at 532.

stores.[298] They also included copies of the Seneca Falls Address and other texts on emancipation and women's rights.[299] It is interesting to contrast this approach, which took the form of a robust reaction to a dissent occurring shortly after the dissent has been issued, with Justice Scalia's notion of a canonical dissent that will reverberate some time later in history. Ginsburg seemed more concerned with the "here and now" impact of her dissenting opinions.

The strong reaction by members of the public to Ginsburg's dissents was not surprising. Michael Wells has suggested that when judges rely on sociological sources, their opinions appear to find more favor with the general public than when they rely on purely legal sources.[300] He notes that despite the fact that legal legitimacy indicates more fidelity to the law, sociological legitimacy "aims directly at public acceptance and its benefits can be grasped in the short term."[301] In this sense it "provides the public with a rationale it prefers."[302] Additionally, sociological concepts are generally more relatable than principles of textualism or originalism, which were more often relied on by Justice Scalia. But Ginsburg's audience was not narrow. She had multiple audiences: specifically, her colleagues on the bench whom she often addressed directly, the litigants and the general public who felt heard by her, and the academy and posterity. Many of these audiences were often specifically addressed in her dissents. For Katie Gibson, Ginsburg's "judicial rhetoric is transformative: it . . . shifts the language of the law to legitimate voices, experiences, and rights of groups traditionally excluded by the rhetoric of the law."[303]

Justice Ginsburg appeared to ultimately believe that the law was flexible enough to recognize and respond to social realities, and it is those social realities on which she often focused during her dissents. Unlike Justice Scalia's strict adherence to a narrow reading of the text, Ginsburg asserted that facts matter, and she endeavored to communicate that belief to a broader audience than just her colleagues. This belief and methodology appear to be rooted in a feminist practical reasoning approach. Katherine Bartlett described

298. Rand, *supra* note 293, at 80.

299. *Id.*

300. *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011 (2007). Wells asserts that "political and social aims may drive the outcomes of hard cases even when they receive comparatively little attention in the opinions." *Id.* at 1013–14. Wells defines the concepts of legal versus sociological legitimacy as follows: "[l]egal legitimacy requires that an opinion candidly state the reasons for the outcome. Sociological legitimacy is achieved by an opinion that secures public acceptance of the Court's rulings." *Id.* at 1014.

301. *Id.* at 1024.

302. *Id.*

303. Katie L. Gibson, *In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent*, 35 WOMEN'S STUD. COMM. 123, 124 (2012).

such an approach as resting on the understanding that an effective resolution of a legal problem depends "on the basis of the intricacies of each specific factual context."[304] The practical reasoning approach also incorporates the views and perspectives of those who have traditionally been considered "outsiders" by the law.[305] Kathryn Stanchi and Linda Berger have pointed out that "[f]eminist practical reasoning rejects the notion that there is a monolithic source for reason, values and justifications."[306] This way of viewing the law stands in stark contrast to the jurisprudence of Justice Scalia who believed that there was a general inherently valid body of authority: the Constitution as established by the Framers, the text, or established precedent.[307]

By adopting the practical reasoning approach in several of her oral dissents, Ginsburg pointed out the injustices being done by the majority and marshalled support for viewing the issue before the Court from the perspectives of those of whom the law has not traditionally taken notice. Ginsburg often pointed out the impact of the Court's decision not only on the litigants, but on others in the same position. This reaching out beyond solely the litigants before the Court and addressing the entire community of legal and nonlegal actors is important, as it illuminated Ginsburg's acknowledgment of "lived realities." It was a recognition of the people who were similarly situated to the petitioners or who cared about the issues that were before the Court. Ginsburg thus showed these people that she heard and understood their position and recognized the realities of their situation. As few people take the time to read a Supreme Court opinion and dissent,[308] having the press report on a dissent read from the bench communicates the opinion to a far broader audience—and

304. Bartlett, *supra* note 209, at 851.

305. *See generally* LAW AND OUTSIDERS: NORMS, PROCESSES AND 'OTHERING' IN THE TWENTY-FIRST CENTURY (Cian C. Murphy & Penny Green eds., 2011) (the editors select thirteen essays from leading young scholars to demonstrate "the way in which rules and processes are contributing to the creation of twenty-first-century 'others'" in different areas).

306. Kathryn M. Stanchi et al., *Introduction to the U.S. Feminist Judgments Project*, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 3, 15 (Kathryn M. Stanchi et al. eds., 2016).

307. *See* John S. Baker, Jr., et al., *Justice Scalia on Federalism and Separation of Powers, Panel Discussion Before 2016 National Lawyers Convention (Nov. 17, 2016)*, *in* 30 REGENT U. L. REV. 57, 65 (2017) (John S. Baker speaking).

308. *See* Adam Feldman, *Empirical SCOTUS: An Opinion is Worth at Least a Thousand Words (Corrected)*, SCOTUSBLOG (Apr. 3, 2018, 12:03 PM), https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/. Feldman's analysis has shown that these have increased in length in recent years with the average majority opinion coming in at around 2,800 words in 1955 to an average of 6,300 words in 2014. *Id.* Thus, it is unlikely the public would spend the time reading them.

in far more accessible language—than the published dissent. Moreover, the dissent was more likely to be reported on more widely because of the popular persona that Ginsburg created that has been augmented by props like her famous dissenting collar.

As someone who was trying to make the system more responsive to social change and bring about changes to the status quo, Ginsburg was more likely to focus on the facts of a particular case, or changed social circumstances, to illustrate that having recourse solely to existing precedent may entrench current inequalities.[309] This is consistent with the Aristotelian approach to argument, which asserts that history and context matter and that facts are extremely important.[310] In focusing on facts, Ginsburg was making particular rhetorical choices, wherein she often used the narratives of those particularly impacted by the Court's decision to communicate her opposition to the majority opinion. As Berger has pointed out, this type of "rhetoric is able to accommodate diversity and imagine change, based in human experience, sensitive to middle grounds, and in opposition to all-or-nothing judgments."[311] Hence it is no surprise that her dissents are the most complex of the Justices in Owens and Wedeking's study.

Aligning herself with the feminist narrative approach, which presents the facts of the case as a story, compels both the author and the reader to acknowledge the impact that the Court's decisions will have on the subject of the story.[312] Given how keenly attuned to stories of law's "outsiders" Ginsburg was, several trends emerge in Ginsburg's dissents: (1) They were more likely to occur in cases involving discrimination; she emphasized the facts of the case, particularly if they were egregious; (2) Her opinions were more accessible to the lay reader, (i.e., easily readable) as they were designed to speak directly to the people who had similar experiences as the litigants; (3) They often relied on sources other than traditional legal precedent to illustrate changing societal needs and expectations; and, (4) They urged Congress to act (if appropriate) or warned the Court that its majority opinion did not settle the matter.

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309. Ginsburg, *supra* note 14, at 6–7.

310. Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 3, 48–49 (2010).

311. *Id.* at 12.

312. *See generally* Linda L. Berger et al., *Learning from Feminist Judgments: Lessons in Language and Advocacy*, 98 TEX. L. REV. ONLINE 40, 57 (2019) (describing how feminist judgments often weave in the "stories of individuals affected by injustice").

B. Emphasizing the Facts and the Implications of the Majority's Decision

As Anthony Amsterdam and Jerome Bruner have noted, telling the stories of litigants is an important undertaking.[313] Facts are often interpreted by the hearer. Amsterdam and Bruner argue:

> [T]he framing and adjudication of legal issues necessarily rest upon *interpretation*. Results cannot be arrived at entirely by deductive, analytic reasoning or by the rules of induction . . . . There always remains the "wild card" of *all* interpretation—the consideration of context, that ineradicable element in meaning making. *And the deepest, most impenetrable feature of context lies in the minds and culture of those involved in fashioning an interpretation*."[314]

Ginsburg appears to have instinctively recognized this, particularly in respect to cases involving discrimination, where her practical, pragmatic, fact-based approach to legal problem-solving was evident in multiple dissents. In the Title VII cases for example, she pointed to the context in asserting "Title VII was meant to govern real world employment practices and that world is what the court ignores today."[315] In *Coleman,*[316] a case involving alleged violations of the Family and Medical Leave Act ("FMLA"), she argued that:

> The Act was designed to promote women's opportunities to live balanced lives at home having gainful employment. . . . The best way to protect women against losing their jobs because of pregnancy or childbirth, Congress determined was not to order leaves for women only, for that would deter employers from hiring them."[317]

She placed emphasis on the facts and context of the case and statute when she noted that "Congress received evidence from individuals and organizations documenting pervasive discrimination against women based on pregnancy or the potential to become pregnant."[318] She went on to point out "a woman's childbearing capacity and attendant myths about motherhood and women's lack of

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313. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW – AND OURSELVES 283 (2000).

314. *Id.* at 287.

315. Oral Dissent of Justice Ginsburg at 7:44–7:51, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074), https://www.oyez.org/cases/2006/05-1074.

316. Coleman v. Ct. of Appeals of Md., 566 U.S. 30 (2012).

317. Oral Dissent of Justice Ginsburg at 0:25–1:03, Part Two, Coleman v. Ct. of Appeals of Md., 566 U.S. 30 (2012) (No. 10-1016), https://www.oyez.org/cases/2011/10-1016.

318. *Id.* at 1:15–1:28.

commitment to work underlie the historic and not yet banished discrimination against women in gainful employment."[319] Similarly, in *Nassar*,[320] a case involving a claim for constructive discharge and retaliation after alleged discrimination and harassment by a supervisor against the complainant doctor, one could almost see her imagined public audience nodding along when she described how "[a]s anyone with employment experience can easily grasp, in-charge employees authorized to assign and control subordinate employees' daily work are aided in accomplishing the harassment by the superintending position in which their employer places them, and for that reason, the employer is properly held responsible for their misconduct."[321]

1. The Broader Accessibility of Her Oral Dissents

Oral dissents are often reported in the popular press, especially when Ginsburg dissented from the bench.[322] Knowing that she had to condense often lengthy written dissents to a brief ten-minute oral version, Ginsburg and other Justices who orally dissented had to choose their focus and determine which authorities would best and most accessibly convey their point. As a result, her message was often extremely direct, given its brevity and the minimal cites to precedent.

Additionally, Ginsburg's oral dissents often extended to a consideration of the broader implications of the Court's decisions. For example, in *Epic Systems*,[323] Ginsburg focused on the very practical costs involved in bringing an individual case for overtime pay against the company. The case involved the rights of workers to bring claims against their employer as a collective action after they had signed contracts agreeing to individual arbitration and waiving their rights to benefit from collective proceedings.[324] Ginsburg pointed out that "[t]he expenses entailed in seeking redress and the risk of employer retaliation would likely dissuade most workers from seeking redress alone. . . . [F]or workers striving to gain from their employer's decent terms and conditions of employment there is strength in numbers."[325] She cited calculations that showed that workers would likely "spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent

319. *Id.* at 2:47–3:02.

320. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

321. Oral Dissent of Justice Ginsburg at 3:52–4:18, Part Two, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (No. 12-484), https://www.oyez.org/cases/2012/12-484.

322. Ginsburg, *supra* note 14, at 2.

323. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

324. *Id.* at 1619.

325. Oral Dissent of Justice Ginsburg at 0:19–0:34, 1:37–1:48, Part Two, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285), https://www.oyez.org/cases/2017/16-285.

amount in liquidated damages."[326] She went on to note that "[t]he inevitable result of today's decision [is that] there will be huge underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[327] In the written dissent, she also performed an historical and text-based analysis of the relevant statutes and critiqued the majority extensively for its inappropriate use of the *ejusdem generis* canon.[328] Needless to say, this canon did not warrant a mention in the oral dissent, which was aimed at the press and a more popular, less erudite, audience.

In *Shelby County v. Holder*,[329] Ginsburg began her oral dissent with the following premise, describing the context within which the case unfolded: "First, race-based voting discrimination still exists, no one doubts that."[330] She went on to painstakingly describe facts that illustrated just how much of a problem it still is, noting:

> Over a span of more than 20 months, the House and Senate Judiciary Committees held 21 hearings heard from scores of witnesses, received numerous investigative reports and other documentation showing that serious and widespread intentional discrimination persists in covered jurisdictions.[331]

In her dissent, Ginsburg went into extensive factual detail to show that racial discrimination was still a congressionally recognized problem and that the Voting Rights Act ("VRA") was still necessary to police redistricting and racial gerrymandering when she pointed out:

> In all, the legislative records filled more than 15,000 pages, Representative Sensenbrenner, then the Chair of the House Judiciary Committee, described the record supporting the authorization as one of the most extensive considerations of any piece of legislation that the United States Congress had dealt with in the 27 and a half years he had served in the House.
>
> The Reauthorization passed the House by a vote of 390-to-33.

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326. *Epic Sys. Corp.*, 138 S. Ct. at 1647 (Ginsburg, J., dissenting) (citing Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011)).

327. Oral Dissent of Justice Ginsburg at 7:07–7:20, Part Two, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285), https://www.oyez.org/cases/2017/16-285; *see also Epic Sys. Corp.*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting) ("The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.").

328. *Epic Sys. Corp.*, 138 S. Ct. at 1638–39 (Ginsburg, J., dissenting).

329. 570 U.S. 529 (2013).

330. Oral Dissent of Justice Ginsburg at 0:06–0:13, Part Two, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96), https://www.oyez.org/cases/2012/12-96.

331. *Id.* at 3:05–3:26.

> The vote in the Senate was 98-to-0.
>
> President Bush signed the reauthorization a week after he received it, noting the need for further work in the fight against injustice and calling the extension an example of our continued commitment to a united America where every person is treated with dignity and respect.[332]

Likewise, in her oral dissent in *National Federation v. Sebelius*,[333] a case involving the constitutionality of the ACA, she pointed out the very practical, relatable fact that in 2009, approximately fifty million people were uninsured. She noted that "Congress was aware that the vast majority of those people lack insurance not by choice . . . ."[334] Her written dissent was more erudite as she referred to the Framers enacting the Commerce Clause in response to "the central problem that gave rise to the Constitution itself."[335] She cited to Madison's papers and a letter from George Washington to Madison, as well as Federalist No. 34 to support her position.[336] Her popular audience might be surprised by this.

2. An Acknowledgment of Changing Societal Needs and Practical Realities

Ginsburg viewed the access to contraception case, *Hobby Lobby*,[337] and the abortion case, *Carhart*,[338] as cases involving discrimination against women because they denied women access to the full range of reproductive rights. In *Hobby Lobby*, Ginsburg described how "[t]he ability of women to participate equally in the economic and social life of the Nation, . . . has been facilitated by their ability to control their reproductive lives."[339] She went even further

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332. *Id.* at 3:27–4:22.

333. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 589 (2012) (Ginsburg, J., concurring in part and dissenting in part).

334. Oral Dissent of Justice Ginsburg at 7:22–7:34, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 589 (2011) (No. 111-393), https://www.oyez.org/cases/2011/11-393; *see also Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 592.

335. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 599 (quoting EEOC v. Wyoming, 460 U.S. 226, 244, 245 n.1 (1983) (Stevens, J., concurring)).

336. *See id.* at 600–01 (citing language in support of a centralized national government equipped with the power to adapt to future societal changes).

337. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 740 (2014) (Ginsburg, J., dissenting) ("In the [majority's] view, [the Religious Freedom Restoration Act] demands accommodation of a for-profit corporation's religious beliefs no matter the impact . . . [felt by] thousands of women employed by [such corporations].").

338. *See* Gonzales v. Carhart, 550 U.S. 124, 170–71 (2007) (Ginsburg, J., dissenting) (referring to the Court's decision that "blesses [abortion restrictions] with no exception safeguarding a woman's health" as "alarming").

339. *Hobby Lobby*, 573 U.S. at 741 (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).

in *Carhart,* noting that challenges to the Partial Birth Abortion Act "hone-in on a woman's autonomy to decide for herself."[340] This, Ginsburg argued, was an example of the Court trying to "shield[] the woman by denying her any choice in the matter and this way of protecting women recalls ancient notions about women's place in society . . . ideas that have long since been discredited."[341] In *Ledbetter*,[342] an equal pay case, Ginsburg chided the Court for failing to "comprehend or [being] indifferent to the insidious way in which women can be victims of pay discrimination."[343] She pointed out the very practical and relatable fact that "[a]n employee like Ledbetter trying to succeed in a male dominated workplace in a job filled only by men before she was hired, understandably maybe anxious to avoid making waves."[344] Likewise, in *Fisher*,[345] an affirmative action case, she asserted, "I have several times explained why government actors including state universities need not blind themselves to the still lingering everyday evident effects of centuries of law sanctioned inequality."[346] The metaphor that she employed in *Ricci*[347] aptly summed up the Court's aversion to taking practical realities into account. It is, she claimed, "[l]ike the chess player who tries to win by sweeping the opponent's pieces off the table, the Court simply shuts this reality from view."[348] In *Texas v. Southwestern Medical Center*,[349] she chided that the "Court shows little regard for trial judges who must instruct juries in Title VII cases in which plaintiffs allege both status-based discrimination and retaliation. Nor is the Court concerned about the capacity of jurors to follow instructions conforming to today's decision."[350] Again in *Ricci* she scolded the majority: "Congress endeavored to promote equal opportunity. . . . The damage today's decision does to that objective is untold."[351]

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340. Oral Dissent of Justice Ginsburg at 9:13–9:17, Gonzalez v. Carhart, 550 U.S. 682 (2007) (No. 05-380), https://www.oyez.org/cases/2006/05-380.

341. *Id.* at 13:12–13:34.

342. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).

343. Oral Dissent of Justice Ginsburg at 4:01–4:12, Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) (No. 05-1074), https://www.oyez.org/cases/2006/05-1074.

344. *Id.* at 8:22–8:37.

345. *See generally* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).

346. Oral Dissent of Justice Ginsburg at 2:35–2:49, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (No. 11-345), https://www.oyez.org/cases/2012/11-345.

347. 557 U.S. 557 (2009).

348. Oral Dissent of Justice Ginsburg at 16:00–16:10, Ricci v. DeStefano, 557 U.S. 557 (2009) (No. 07-1428), https://www.oyez.org/cases/2008/07-1428.

349. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

350. *Id.* at 383 (Ginsburg, J., dissenting).

351. Oral Dissent of Justice Ginsburg at 19:27–19:40, Ricci v. DeStefano, 557 U.S. 557 (2009) (No. 07-1428), https://www.oyez.org/cases/2008/07-1428.

Ginsburg once again reminded the Court that context is important in *National Federation*, a case involving the ACA.[352] She pointed out that "[t]he provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's."[353] In citing to a blog post, she raised the practical consideration that "when hospitals divert time and resources to provide uncompensated care, the quality of care the hospitals deliver to those with insurance drops significantly."[354] She went on to remind her audience that "[a]ll of us will need health care, some sooner, some later, but we can't tell when, where or how dire our need will be. A healthy 21-year-old, for example, may tomorrow be the victim of an accident. . . . In the fullness of time, today's young and healthy will become society's old and infirm."[355]

3. Firing A Shot Across the Bow—A Call to Congressional Action

Her fellow Justices on the Court, the litigants themselves, and the public, were not Justice Ginsburg's only audiences. In several of her dissents she addressed herself to Congress directly. In *Epic Systems* she urged that "Congressional action is urgently needed in order to correct the Court's elevation of the Arbitration Act over workers' right to act in concert."[356] Ginsburg's exhortation to Congress was a familiar one. It is one that she made in *Ledbetter*, which resulted in Congress enacting the Fair Pay Act shortly thereafter.[357] Ginsburg did not pretend that she was not addressing Congress directly. When she visited Harvard to give a talk there, then-Dean Elena Kagan asked Justice Ginsburg to describe her intended audience in *Ledbetter*. Ginsburg replied: "[I]t was Congress. Speaking to Congress, I said, 'You did not mean what the Court said. So fix it.'"[358]

Some of Ginsburg's dissents seem to reflect a desire to create an antidiscrimination canon. She conveyed a sense of urgency, that the

352. *Id.* at 530.

353. *Id.* at 589 (Ginsburg, J., dissenting).

354. *Id.* at 594 (citing Sarah Kliff, *High Uninsured Rates Can Kill You—Even If You Have Coverage*, WASH. POST (May 7, 2012), https://www.washingtonpost.com/blogs/ezra-klein/post/%20high-uninsured-rates-can-kill-you-even-if-you-have-coverage/2012/%2005/07/gIQALNHN8T_print.html).

355. Oral Dissent Justice Ginsburg at 2:57–3:16, 4:20–4:28, Part Three, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (No. 11-393), https://www.oyez.org/cases/2011/11-393.

356. Oral Dissent Justice Ginsburg at 7:20–7:33, Part Two, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285), https://www.oyez.org/cases/2017/16-285.

357. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5.

358. Quoted in Lani Guinier, *Demosprudence and the Law/Politics Divide*, *supra* note 72, at 439.

situation must be remedied now. Her dissents embody a commitment to the idea that not only can things change—they should. In *National Federation* she opined that the Court's decision "should not have staying power"[359]—a sentiment she had earlier employed in *Ricci* in almost identical words.[360] In a potentially canonical dissent in *Shelby County*, she closed with the following prophetic words: "The great men who led the march from Selma to Montgomery and their call for the passage of the Voting Rights Act foresaw progress even in Alabama. 'The arc of the moral universe is long,'" she quoted, "'but it bends toward justice if there is a steadfast commitment to see the task through to completion.' That commitment has been disserved by today's decision."[361]

4. Tone of Voice When Reading Dissents

Although the New York Times has described Ginsburg's tone as impassioned when reading her dissents,[362] most of them were delivered in her normal quiet, well-modulated voice. A CNN article described Ginsburg's tone in *Epic Systems* as "forceful."[363] However, that tone emanated more from her language, which included phrases such as "egregiously wrong,"[364] and "destructive result,"[365] rather than her actual tone of voice. One of her friends agrees that her tone became more vehement, noting "she [was] seeing that basic issues she's fought so hard for are in jeopardy, and she is less bound by what have been the conventions of the court."[366]

VII. CONCLUSION

The problem with engaging in these types of conversations from the bench is that they challenge the very notion of the Supreme Court as the final arbiter of disputes and, in the eyes of some, undermines the authority of the Court. O'Donnell points out that "[w]hile a robust dissenting tradition encourages the free exchange of ideas, the Supreme Court unquestionably speaks most forcefully when it uses a

359. Nat'l. Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 590 (2012) (Ginsburg, J., dissenting). She also used this exact phrase in *Gonzales v. Carhart*, 550 U.S. 124, 191 (2007) (Ginsburg, J., dissenting).

360. Ricci v. DeStefano, 557 U.S. 557, 609 (2009) (Ginsburg, J., dissenting).

361. Oral Dissent Justice Ginsburg at 9:47–10:20, Part Two, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96), https://www.oyez.org/cases/2012/12-96.

362. Greenhouse, *supra* note 281.

363. Joan Biskupic, *Ruth Bader Ginsburg Takes Off the Gloves*, CNN (Aug. 13, 2018, 8:36 AM), https://www.cnn.com/2018/05/21/politics/ruth-bader-ginsburg-gloves-off/index.html.

364. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

365. *Id.* at 1645.

366. Greenhouse, *supra* note 281 (quoting Cynthia Fuchs Epstein).

single, unanimous voice."[367] However, these continuing conversations are important for the health of our democracy. The lessons of dissent in *Plessy*, *Korematsu*, and others show that the Justices have an obligation to speak not only to their colleagues on these issues but to Congress and the broader public too. Moreover, a dissent is not just for a future day. It is for the here and now. An oral dissent can engage a broader audience than just the profession in the conversation. A five- to ten-minute broadly accessible description of the issues in the case and the reasons why the Justice is dissenting engages the broader public in a dialogue.

As Guinier has noted, "oral dissents create salient moments of democratic accountability when constitutional law meets constitutional culture."[368] The judges are speaking in oral dissent. Where the conversations go from there is up to their respective audiences.

367. Michael O'Donnell, *What's the Point of a Supreme Court Dissent?*, THENATION (Jan. 21, 2016), https://www.thenation.com/article/archive/whats-the-point-of-a-supreme-court-dissent/.

368. Guinier, *Demosprudence Through Dissent*, *supra* note 72, at 54.

APPENDIX A

SCALIA'S ORAL DISSENTS

Case Name	**Split**	**Oral Dissent Time (minutes)**	**Reading Ease**	**Flesch Kincaid**	**Gunning Fog**	**Coleman Liau**	**SMOG**
Arizona v. U.S. (States' Rights - Immigration)	5:3	11.15	33.6	14.4	17.6	13	13.6
Atkins v. Georgia (Death Penalty)	6:3	10	39.8	14.9	18.7	11	13.5
Boumediene v. Bush (Military Commissions - Guantanamo)	5:4	6	32	16	18.2	12	13.9
Brown v. Plata (Prisoners' Rights - Injunction)	5:4	9.10	40.1	13.5	16.7	12	12.3
EPA v. EME Homer (Clean Air Act)	6:2	13	34.5	15.6	19	12	13.5
Missouri v. Frye (Right to Plea Bargain)	5:4	10.45	47.8	13.3	16.5	11	11.7
Lawrence v. Texas (Sodomy Laws)	6:3	5.20	29.8	17	20.5	12	15.5
Maryland v. King (4th Amendment)	5:4	11.04	55.5	10.7	14.1	10	10.3
McCreary v. ACLU (1st Amendment)	5:4	11	33.6	15.8	18.7	12	14.2
Roper v. Simmons (Death Penalty)	5:4	9	44.3	13.1	16.1	11	12
U.S. v. Windsor (DOMA)	5:4	12.28	46.9	12.6	15.4	11	11.1
Zivotofsky v. Kerry (Presidential Power - Passports)	5:4	6.55	42.7	12.7	14.6	12	11.8
Hamdan v. Rumsfeld (Habeas Corpus - Guantanamo)	5:3	20	33.3	15.8	18.7	12	14
King v. Burwell (ACA)	6:3	12	53.5	11.3	13.8	11	10
Average			**40.5***	**14.05**			

*Reading Ease Scores: 90-100 = Very Easy; 80-89 = Easy; 70-79 = Fairly Easy; 60-69 = Standard; 50-59 = Fairly Difficult; **30-49 = Difficult**; 0-29 = Very Confusing

APPENDIX B

GINSBURG'S ORAL DISSENTS

Case Name	Split	Oral Dissent Time (minutes)	Reading Ease	Flesch Kincaid	Gunning Fog	Coleman Liau	SMOG
Grupo Mexicano v. Alliance Bond Fund (Preliminary Injunction)	5:4	4	30.8	14.9	18.2	12	13.7
Hobby Lobby v. Burwell (Contraception Access - ACA)	5:4	14	38.5	13.8	16.8	13	12.7
Nat. Fed. v. Sebelius (ACA)	5:4	20	48	11.5	14.5	12	11
Ricci v. DeStefano (Title VII - Equal Protection)	5:4	10	37	12.7	15.5	14	11.4
Am. Ins. Ass'n v. Garamendi (HVIRA - Separation of Powers)	5:4	5	22.8	16.9	19.6	14	15.5
Cheney v. U.S. Dist. Ct. for D.C. (Separation of Powers)	7:2	5	44.3	12.4	14.5	12	11.5
Coleman v. Maryland Ct. of Appeals (FMLA - States' Rights	5:4	5.19	42.2	12.8	15.4	12	11.6
Comcast v. Behrend (Class Action Certification)	5:4	2.46	52.8	10.8	13	12	9.3
Connick v. Thompson (Brady Violation)	5:4	6	40	12.7	15.5	14	11.4
Epic Systems v. Lewis (Collective Arbitration - NLRA & FAA)	5:4	7.55	29.9	15.2	18.2	15	14.1
Gonzales v. Carhart (Abortion)	5:4	9	39.4	14.1	17.1	12	12.5

GINSBURG'S ORAL DISSENTS CONTINUED

Case Name	**Split**	**Oral Dissent Time (minutes)**	**Reading Ease**	**Flesch Kincaid**	**Gunning Fog**	**Coleman Liau**	**SMOG**
Ledbetter v. Firestone Tire (Title VII)	5:4	7	42.6	12.9	15.5	12	11.7
McIntyre v. Nicastro (Jurisdiction - Product Liability)	6:3	7.30	49.5	10.7	13.6	11	10.5
Am. Legion v. Am. Humanist Ass'n (1st Amendment - Cross)	7:2	5.30	46.5	12.4	15	11	11.7
Republican Party of Minn. v. White (1st Amendment - Rights of Electoral Candidates)	5:4	8	35.4	15.9	19.5	13	14
U. Texas SW Med. Ctr. v. Nasser (Title VII)	5:4	7.4	38.7	13.3	16.1	12	13.6
*Vance v. Ball State (Title VII)	5:4	*	*	*	*	*	*
Shelby County v. Holder (Voting Rights Act)	5:4	10.21	41.2	13.4	15.7	12	11.8
Buckhannon Bd. & Care v. W. Va. (Attorneys' Fees - Prevailing Party)	5:4	5.30	43.4	14.4	16.6	11	12.1
Average			**40.1**	**13.3**			

*Ginsburg's oral dissent in *Nasser* applied to both *Vance v. Ball State* and *Nasser*.