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Dissent: Divisive or Dialectical?
Examining the Cases of *Plessy*, *Korematsu*, and *Beazer*

I. Introduction

What is the value of the dissenting opinion in Supreme Court decisions? Could the dissent actually have an overall negative effect on the Supreme Court's jurisprudence and institutional legitimacy? Melvin Urofsky (2015) approaches this debate head on, examining some of the benefits and consequences of the judicial dissent en route to arguing in its favor. The author contends that the dissenting opinion "has an important role to play in our constitutional dialogue, which is part of our greater national colloquy on public policy."[1] This dialogue comprises all levels of government and society—from elected officials to legal academics to the general public—guiding the national conversation on policy for decades to come. But this very back-and-forth between the justices may also have adverse effects, as some argue that dissents can distract from and weaken the majority's decisions. However, in many circumstances, the benefits of the dissent outweigh the disadvantages in the long term, especially for significant cases and issues that recurrently come before the Supreme Court.

[1] Urofsky, Melvin. 2015. *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue*. New York: Pantheon Books.

I will first engage in a more in-depth review and discussion of the arguments for and against the Supreme Court dissenting opinion, following which I will analyze minority opinions from three cases that I believe demonstrate the value of publishing the justices' dissents—*Plessy v. Ferguson*, *Korematsu v. United States*, and *New York City Transit Authority v. Beazer*. Although its opponents present a strong argument against, the Supreme Court dissenting opinion, when written with sound legal reasoning and egalitarian rhetoric, can serve a role of great significance as a long-term corrective to flawed and even anti-canonical majority decisions.

II. Arguments for and against the dissenting opinion

When the Supreme Court was first established, each justice issued their own individual opinion, inheriting the British practice of *seriatim*. Though there were no official dissenting opinions, the resulting interpretation of the law became muddled. Under Chief Justice John Marshall, the Court consolidated its opinions, moving towards consensus-based and often unanimous decisions. But as the young United States underwent the process of industrialization and the Court began to face polarizing issues such as slavery more frequently, dissents became a more commonplace expression of divergence among the justices.[2] The need for a space for justices to articulate alternative Constitutional interpretations different from the majority has only grown since. Dissents occupy one side of the democratic process of policy-making, providing the counterpoint to majority opinions within the "constitutional dialogue" described by Urofsky (2015):

> The dialogue that shaped constitutional understanding has also formed us as a nation. The constitutional dialogue does not take place in a vacuum, and in developing our understanding of the Constitution, it also molds us as a people. When the justices talk

[2] Urofsky. 2015. *Dissent and the Supreme Court*.

> about the limits of free speech, for example, their decisions and the dissenting opinions create and most often expand how "We the People" can discuss and make our policy decisions. When the Court deals with difficult cases involving discrimination, it reflects the fissures in the broader society over how minorities will be treated and often not only serves to increase the rights of those groups but affects the public dialogue on those matters.[3]

The Court's decisions influence policy-making and public opinion—and vice versa—reflecting the sociopolitical climate at that point in time.

According to Urofsky, the judicial dissent helps refine the intra-Court dialogue during the justices' deliberation process, as "A draft dissent may win over sufficient votes to become the majority view. At other times, it may lead the majority to accept some of its points, and thus modify the holding. More important, the dissent tells lower courts and future justices that this rule needs to be examined carefully, and it should eventually be revised or overturned."[4] Often, dissenting justices present such strong arguments that their interpretations are folded into or even become the majority opinion. Even when their ideas are not completely incorporated, though, the justices themselves have acknowledged the value of dissents on opinion writing. In response to dissents, Justice Stephen Breyer would think, "'I better rewrite what I did. I better be certain that my argument is as good as I thought it was the first time.' The impact of your dissent will be, at the least, to make me write a better opinion."[5] The same sentiment appears across the ideological spectrum, with Justice Samuel Alito commenting, "You have to be ready to respond to the dissent, and the dissents here are very vigorous. They don't pull punches. So I think it ultimately improves the quality of the majority opinion."[6] Just as iron sharpens iron, justices writing for the

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[3] Urofsky. 2015. *Dissent and the Supreme Court*.
[4] Ibid.
[5] Ibid.
[6] Ibid.

majority also strengthen their opinions by pre-emptively considering and responding to criticisms leveled by their dissenting colleagues.

Additionally, both the intra-Court and constitutional dialogues take the form of dynamic processes that span generations. Dissents represent policy perspectives that are as of yet superseded by the majority but may in the future hold greater weight as the country's understanding of legal and social norms advances. Justice William Brennan observed firsthand how dissents affected and energized judicial philosophy over time:

> A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded. … The time periods in which dissents ripen into majority opinions depend on societal developments and the foresight of individual justices, and thus vary. Most dissents never "ripen" and do not deserve to. But it is not the hope of eventual adoption by a majority that alone justifies dissent. For simply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result.[7]

Under a *stare decisis* regime, it is important to publish dissents into the public record, even if they are ignored at the time. In cases where precedent is questioned, these documents demonstrate that the challenging legal interpretation already did exist at the time of the original opinion, even if only held by the minority. Such dissents could thus go on to gain new life as judicial doctrine evolves.

Yet criticisms of the concept of the dissenting opinion remain, notably that "the most frequent objection to a dissent is that it weakens the force of the decision and detracts from the

[7] Brennan Jr., William J. 1986. "In Defense of Dissents." Hastings Law Journal 37 (3): 435-436.

court's institutional prestige. … If people come to believe that the law is uncertain, that even learned judges cannot agree on what it means, they will lose respect for both the court and the law and feel free to disregard both."[8] This belief is exemplified by Chief Justice Earl Warren's successful endeavor to secure a unanimous 9-0 decision in *Brown v. Board of Education* in an attempt to circumvent resistance to integration.[9] However, this perception may not actually be the case in the real world. Salamone (2014) finds no correlation between the size of the decision majority and individuals' agreement with the decision, instead concluding that "ex ante opponents of the Court's policies may be persuaded to accept judicial decisions with which they disagree. The presence and dynamics of this effect, however, appear to be contingent on the salience of the policy under review."[10] For example, while majority size does not share a relationship with public opinion on contentious decisions about same-sex unions, it has an impact on less-relevant decisions on contract dispute resolution. This result would signal the pre-existing crystallization among the public on high-salience issues and potential for elite cues on low-salience topics. In fact, public support for marriage equality seems to have increased markedly following its legalization in *Obergefell v. Hodges* in 2015,[11] regardless of the 5-4 ruling. On the other hand, despite the unanimous vote in *Brown*, Southern states managed to avoid fully integrating for years. Perhaps on issues of such importance to the American public, the content of the decision and dissent may be just as important—if not more so—than the size of the majority.

Another critique emerges from research indicating that disagreeable features often characteristic of dissents—such as harsh rhetoric and the appearance of ideological

[8] Urofsky. 2015. *Dissent and the Supreme Court*.
[9] Ulmer, S. Sidney. 1971. "Earl Warren and the Brown Decision." *The Journal of Politics* 33 (3): 702.
[10] Salamone, Michael F. 2014. "Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority." Political Research Quarterly 67 (2): 331-332.
[11] Kazyak, Emily and Mathew Stange. 2018. "Backlash or a Positive Response? Public Opinion of LGB Issues After Obergefell v. Hodges." *Journal of Homosexuality* 65 (14): 2028.

division—can draw negative media coverage and decrease public support for the Court.[12] Since their mere existence sometimes contradicts the image of collegiality the Court seeks to project, dissenting opinions potentially erode the popular legitimacy of the judiciary. For example, Justice Antonin Scalia's (in)famous dissents included language such as "nothing short of ludicrous," "beyond the absurd," "entirely irrational," "no foundation in American constitutional law, and barely pretends to," among much more—rhetoric that has been described as setting a bad example for lawyers, other jurists, the press, and by extension the public.[13] Entrikin (2017) goes so far as to argue that Scalia's fiery rhetoric threatened "the Court's fragile hold on its own institutional legitimacy. … He frequently reminded his fellow Justices of the Court's tenuous hold on its own posterity. … his scathing dissents cast it into disrepute."[14] However, I argue that this criticism only applies to a specific subset of dissents. I will examine dissents from three cases—*Plessy*, *Korematsu*, and *Beazer*—that debate differing interpretations of the law with collegiality and also treat all parties and groups involved with respect and empathy.

Ultimately then, what makes for a lasting dissent? Urofsky (2015) concludes his book with Justice Brennan's commentary on successful dissents:

> These are the dissents, he said, "that often reveal the perceived congruence between the Constitution and the 'evolving standards of decency that mark the progress of a maturing society,' and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law."[15]

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[12] Zilis, Michael and Justin Wedeking. 2020. "The Sources and Consequences of Political Rhetoric: Issue Importance, Collegial Bargaining, And Disagreeable Rhetoric In Supreme Court Opinions." *Journal of Law and Courts* 8 (2): 208.
[13] Chemerinsky, Erwin. 2012. "A Failure to Communicate." BYU Law Review 2012 (6): 1707-1715.
[14] Entrikin, J. Lyn. 2017. "Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility." The Journal of Appellate Practice and Process 18 (2): 278.
[15] Urofsky. 2015. *Dissent and the Supreme Court*.

Brennan argued for a conception of the Constitution as a living document in order to keep up with the economic, physical, and moral changes in society. In other words, Brennan sought for the highest court in the land to apply "an interpretation that addresses the immediate needs of the community."[16] Such dissents adhere to the advantages and disadvantages of the concept of the dissenting opinion as a whole, as they promote the flow of a dynamic constitutional dialogue over time while ideally avoiding the division and harshness critics perceive in dissents. The dissents presented in the cases of *Plessy*, *Korematsu*, and *Beazer* uphold these principles and demonstrate the value of the judicial dissent.

III. *Plessy*: Mr. Justice Harlan, dissenting

Justice John Marshall Harlan was born into a prominent slave-holding family but still became the modern-day hero of *Plessy v. Ferguson*—the Great Dissenter. Harlan penned a remarkably forward-thinking dissent for its time:

> The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.[17]

Even as his dissent was still couched in the language of his white supremacist beliefs, Harlan in the very same paragraph placed the equality guaranteed by the Constitution above his own racial biases and set an example for the decades to come by acknowledging the nation's

[16] Urofsky. 2015. *Dissent and the Supreme Court*.
[17] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

color-blindness. Even as the lone justice to distinguish himself from the majority in *Plessy*, he boldly declared that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case,"[18] a view for which he would be truly vindicated. He chose not to review the past lower court decisions cited in the case arguments as most either predated the passage of the Reconstruction Amendments or occurred in the shadow of slavery and thus "cannot be guides in the era introduced by the recent amendments of the supreme law, which … obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law."[19] Looking forward instead of back into the past, Harlan deftly addressed the "immediate needs of the community" and was able to "seek to sow seeds for future harvest" for a maturing society, just as Brennan describes.

In *Plessy*, Harlan capably engaged in the constitutional dialogue of Urofsky (2015), establishing a clear four-part legal argument without maligning the opinion of the majority.[20] First, Harlan took the legal realist perspective:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[21]

While Justice Henry Brown, writing for the majority, all too easily accepted Louisiana's stated intention of "the preservation of the public peace,"[22] Harlan quickly discerned the state's more

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[18] *Plessy* (1896).
[19] Ibid.
[20] Amar, Akhil Reed. 2011. "*Plessy v. Ferguson* and the Anti-Canon." *Pepperdine Law Review* 39 (75): 84. Presented at the *Supreme Mistakes* symposium.
[21] *Plessy* (1896).
[22] Ibid.

sinister motives. The fundamental intention of the law was to provoke racial division and inequality, contrary to the Thirteenth and Fourteenth Amendments of the Constitution. Harlan's next argument was one of equal protection and citizenship.[23] He stated that, "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. … It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race."[24] Here Harlan laid out the juxtaposition between the egalitarian spirit of the Equal Protection Clause and what was actually happening in Louisiana. The justice's third argument[25] was about how the "arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds."[26] This statement sharply contrasted with the majority's stance on the plaintiff's argument about the badge of inferiority. Brown addressed the claim by asserting that, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[27] Instead of engaging with the argument, the majority dodged responsibility and instead blamed societal stigmas and stereotypes on the Black plaintiff's imagination. Harlan directly sparred with the majority opinion, taking on the more modern view of racial bias as exogenous. For his final argument, Harlan made an appeal to the Fifteenth Amendment, describing a possible future in

[23] Amar. 2011. "*Plessy v. Ferguson*." p. 86.
[24] *Plessy* (1896).
[25] Amar. 2011. "*Plessy v. Ferguson*." p. 86.
[26] *Plessy* (1896).
[27] Ibid.

which a simple extension of the "separate but equal" principle to the jury box[28] led to a world in which verdicts and voting are separated by race.[29] He ended the scenario with the conclusion that "I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the Constitution."[30] Harlan constructed this granular Constitutional interpretation for Americans present and future to recognize and understand. In that way, Harlan injected his unique ideas into the constitutional dialogue, even if only for future generations to take advantage of before the Court.

For almost six decades, Harlan's words in *Plessy* went almost entirely unheard. Despite his well-structured and curative dissent, "separate but equal" remained the law of the land—until future Supreme Court Justice Thurgood Marshall participated in the *Brown* decision in 1954:

> [When] Marshall was the lead attorney in the NAACP's fight to end segregation, he picked himself up in low moments by reading aloud from Harlan's dissent. And he cited it in *Brown v. Board of Education*, the 1954 case that finally overturned Plessy v. Ferguson. … "Marshall admired the courage of Harlan more than any justice who has ever sat on the Supreme Court. Even Chief Justice Earl Warren's forthright and moving decision for the court in Brown did not affect Marshall in the same way. Earl Warren was writing for a unanimous Supreme Court. Harlan was a solitary and lonely figure writing for posterity."[31]

Indeed, Harlan's dissent came back to life to lay down the path towards good law. Through a prescient sense for society's "evolving standards of decency" and sound legal interpretation,

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[28] Ibid.
[29] Amar. 2011. "*Plessy v. Ferguson*." p. 88.
[30] *Plessy* (1896).
[31] Thompson, Charles. 1996. "Plessy v. Ferguson: Harlan's Great Dissent." *Kentucky Humanities*. University of Louisville Brandeis School of Law. https://louisville.edu/law/library/special-collections/the-john-marshall-harlan-collection/harlans-great-dissent#:~:text=And%20he%20cited%20it%20in,sat%20on%20the%20Supreme%20Court.

Harlan re-imagined the future of the constitutional dialogue with his powerful dissent in *Plessy*, affirming the value of the dissenting opinion as a latent remedy to the anti-canon.

IV. *Korematsu*: Mr. Justice Murphy, dissenting

Justice Frank Murphy approached his work in the Court with such a strong commitment to fairness and equality that he was said to have administered "Justice tempered with Murphy."[32] That sort of empathy is quite apparent immediately in Murphy's dissent in *Korematsu v. United States*. He ended the first paragraph by declaring that the exclusion and internment of Japanese Americans "goes over 'the very brink of constitutional power,' and falls into the ugly abyss of racism."[33] He continued on to open the final paragraph, "I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life."[34] These strong statements in support of Japanese Americans were especially notable, as "In the 1940s, undoubtedly drawing on the terrible events in Europe, Justice Frank Murphy became the first Supreme Court Justice to use the word racism in a Court opinion."[35] Murphy was intensely serious in his opposition to the majority decision, using stronger, franker language on race than would be seen in any case until over twenty years later when *Loving v. Virginia* described the criminalization of interracial marriage as "white supremacy" in 1967.[36]

But this forceful rhetoric may have been perceived as closer to harshness than would be ideal for a strong, lasting dissent, seeing as Murphy's description of the majority opinion as the

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[32] Treanor, William Michael. 2009. "Justice Tempered With Murphy." *Forbes*. https://www.forbes.com/2009/08/06/sotomayor-justice-empathy-opinions-contributors-william-michael-treanor.html?sh=5a2babf265cd.
[33] *Korematsu v. United States*, 323 U.S. 214 (1944).
[34] Ibid.
[35] López, Ian F. Haney. 2007. "'A Nation of Minorities': Race, Ethnicity, and Reactionary Colorblindness." *Stanford Law Review* 59 (4): 998.
[36] Ibid.

legalization of racism "clearly stung the author of the majority opinion, Justice Hugo Black, a Southerner sensitive to the question of racial discrimination. Black vigorously rejected any suggestion that racism had guided either the Court or the officials responsible for evacuation."[37] However, even though a dissent that generates this sort of intra-Court controversy typically may not be as successful, the authoritativeness of the language helped meet other criteria of a strong dissent:

> Still, to buttress his conclusion, Black felt compelled to add to his original draft opinion some preliminary language distinguishing the case and justifying the extraordinary military urgency that led the Court to its ruling: … it resembled the first mention in the opinions of the Court of the idea of a privileged level of scrutiny for legislation in the area of minority rights.[38]

As a response to the aggressive critique levied by Murphy in his dissent, Black applied the strict scrutiny standard of review to a racial discrimination policy for the first time in the Supreme Court's history. Though the Court opined that the Japanese exclusion policy did pass this test, strict scrutiny would go on to greatly benefit minority groups challenging discrimination in the courts. Thus, this occurrence of constitutional and intra-Court dialogue further reinforces the importance of the written dissent. Furthermore, although essentially accusing the Court majority of legalizing racism generally does not make for a unifying dissent, in this case it may have been warranted.

Although *Korematsu* has never been explicitly overruled, its dissents "have been canonized because they demonize the Korematsu holding. … it has been disparaged by the Court at least since the 1970s. Indeed, in 1988, Congress formally repudiated the decision with the

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[37] Robinson, Greg and Toni Robinson. 2005. "'Korematsu' and Beyond: Japanese Americans and the Origins of Strict Scrutiny." *Law and Contemporary Problems* 68 (2): 31.
[38] Robinson and Robinson. 2005. "'Korematsu' and Beyond." p. 31-32.

passage of the Restitution for World War II Internment of Japanese Americans and Aleuts Act."[39] In fact, "the Court often has quoted the *Korematsu* dissents as a warning of the dangers attendant to the employment of racial preferences, or as an admonition against the blind acceptance of the 'exigent circumstances' rationale for restricting constitutional rights. … the chief referential function of the Korematsu dissent has been to warn against the repetition of past mistakes or their analogues."[40] The ruling was eventually seen as so discriminatory that it soon became part of the anti-canon of the Court's worst decisions, so perhaps Murphy was justified in his stark assessment of *Korematsu*'s racist outcome.

Regarding the purpose of the judicial dissent, Urofsky (2015) quotes Justice Brennan again as saying, "'When a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound by a larger constitutional duty to the community, to expose the departure and point toward a different path.'"[41] Murphy reflected this duty well, continuing on in his dissent to make strong social and legal arguments on behalf of the plaintiff and the Japanese American community:

> Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

[39] Krishnakumar, Anita S. 2000. "On the Evolution of the Canonical Dissent." *Rutgers Law Review* 52: 804-805.
[40] Krishnakumar. 2000. "On the Evolution." p. 805.
[41] Urofsky. 2015. *Dissent and the Supreme Court*.

The justice made a broad appeal to America's fundamental immigrant history and liberal democratic tradition in his attempt to address the immediate needs of Japanese Americans. He further added legal justification for the dissent, citing that "no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction, which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law."[42] This broadened the constitutional dialogue for future jurists and lawyers to understand the boundary between constitutional rights and wartime circumstances. Then, Murphy entered into a discussion of the "accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation."[43] For one, the Commanding General's Final Report that supported the exclusion program was based on a series of unfounded stereotypes. The report described Japanese people as "subversive," "an enemy race" whose "racial strains are undiluted," "over 112,000 potential enemies," and participants in "emperor worshipping ceremonies," among other racist imagery.[44] Murphy argued that none of this supposed evidence provided any legitimate basis for discriminatory actions against an entire racial minority, and in fact it turned out that "Not until 40 years later did it become clear that the Supreme Court had allowed itself to be hoodwinked. … the Justice Department and the Solicitor General had lied to the Court about the existence of a threat from West Coast Japanese Americans. … a 1943 report from General DeWitt, knowing full well that the recited facts were

[42] *Korematsu* (1944).
[43] Ibid.
[44] Ibid.

groundless."[45] Murphy thoroughly examined the erroneous report in his dissent, but Black, writing for the majority, did not:

> Why Justice Black refused even to mention, let alone analyze, General DeWitt's Final Report, remains a mystery. That report was certainly a military report, even with its highly partisan and sometimes bizarre statements. And it was also one of those "military imperative[s]" that Justice Black said should be considered and possibly respected, particularly in wartime. Had it been fairly analyzed, it would have forced the conclusion that "racial antagonism" so permeated the whole ejection and removal of citizens and residents of Japanese ancestry as to warrant imposing what Justice Black early in his opinion said: "[R]acial antagonism never can" justify curtailing "the civil rights of a single racial group."[46]

Perhaps if Black had participated more in the constitutional dialogue with Murphy's dissent, addressing some of his issues with the Final Report, the majority could have discovered early on that the root cause for the Japanese exclusion was most likely racial antagonism. Instead, *Korematsu* stands as one of the worst decisions in the Court's history.

Murphy's *Korematsu* dissent, however, continues to play an active role in the constitutional dialogue on issues such as military power and discrimination against minority groups. In 2004, Justice Sandra Day O'Connor cited his dissent in *Hamdi v. Rumsfeld* regarding the power of the judiciary to review civil liberties claims without infringing on military decisions.[47] Murphy's dissent also became very relevant in the 2018 case *Trump v. Hawaii* about a travel ban on select predominantly-Muslim countries. In her own dissent, Justice Sonia Sotomayor controversially pointed out possible similarities between the case at hand and *Korematsu*, even quoting Murphy about "'definite limits to [the government's] discretion,' as

[45] Dycus, Stephen. 2019. "Requiem for *Korematsu*?" Yamamoto, Eric K. *In the Shadow of Korematsu: Democratic Liberties and National Security*. New York: Oxford University Press.
[46] Gressman, Eugene. 2005. "'Korematsu': A Mélange of Military Imperatives." *Law and Contemporary Problems* 68 (2): 24.
[47] Dycus. 2019. "Requiem for *Korematsu*?"

'[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.'"[48] Though the majority did not utilize Murphy's dissent in its opinion, Chief Justice John Roberts, in part driven by Sotomayor's use of the *Korematsu* dissents, did officially acknowledge that "The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. … *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[49] It may have taken almost three-quarters of a century to accomplish the original goal, but Murphy's passion, empathy, and legal analysis in the *Korematsu* dissent made a lasting impact on Supreme Court jurisprudence.

V. *Beazer*: Mr. Justice White, dissenting

The final dissenting opinion I will discuss is Justice Byron White's in *New York City Transit Authority v. Beazer*. The case is certainly much less well known than either *Plessy* or *Korematsu*, and it is not regarded as a part of the Supreme Court anti-canon. The reason I chose this case for analysis is to demonstrate that relatively smaller-scale or lower-stakes dissents can provide value as well as those from landmark cases like *Plessy* and *Korematsu*. The literature seems to indicate a greater preference for the legal reasoning of White's dissent over the *Beazer* majority precedent, and I also wanted to examine what I found to be a striking level of empathy for the parties involved.

Scholarship suggests that the Court possibly treated the *Beazer* decision carelessly, as it contradicted an earlier precedent set in *Griggs v. Duke Power Company*, where "the defendant in

[48] *Trump v. Hawaii*, 585 U.S. ___ (2018).
[49] Ibid.

a Title VII case must bear the burden of proof once the plaintiff shows disparate impact."[50] Furnish (1983) goes on to explain:

> The problem with the *Beazer* interpretation of the defense is that it allows an employer to exclude all persons with a particular characteristic, or lack thereof, from all jobs because most of the persons with that characteristic cannot perform some jobs. Taken to a logical extreme, such a rationale would permit a university to require a college degree for all university jobs, from full professor to maintenance crew, on the theory that most or all persons without a college degree could not perform the job of instructor.

The majority painted with too broad of a brush, leading to a situation in which certain methadone users lost access to jobs they could perform normally. Plus, considering the Court's refusal to accept the disparate impact argument, "one senses a manifest unwillingness to believe that the law should require employers to treat ex-addicts as they would other potential employees."[51] On the other hand, White's dissent proposed a more egalitarian and meritocratic workplace

> White's dissent recognizes the unfairness of calculations of risk based only on past illicit conduct. White implies that in making its statistical assessments, the majority also reflected its assumptions about the "rational" nature of excluding ex-addicts from employment opportunities. The *Beazer* decision thus validates … the automatic elimination of an application for employment based on the applicant's past conduct and without considering her other qualifications.[52]

The dissent would better reduce discrimination towards recovering ex-users and in turn diminish the disparate impact on excluded Black or Latino job applicants. This constitutional dialogue establishes to future jurists how not to further weaken disparate impact claims at the cost of Black and Brown employment.

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[50] Furnish, Hannah A. 1983. "A Path through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine." *Boston College Law Review* 23 (2): 421.
[51] Simonson, Jocelyn. 2006. "Rethinking Rational Discrimination against Ex-Offenders." *Georgetown Journal on Poverty Law & Policy* XIII (2): 292.
[52] Simonson. "Rethinking Rational Discrimination." p. 293.

Although not on the same magnitude as *Plessy* and *Korematsu*, White's dissent in *Beazer* shared an understanding of the Supreme Court as a guardian and representative for the legal interests of politically marginalized groups:

> I have difficulty also with the Court's easy conclusion that the challenged rule was "[q]uite plainly" not motivated "by any special animus against a specific group of persons." Heroin addiction is a special problem of the poor, and the addict population is composed largely of racial minorities that the Court has previously recognized as politically powerless and historical subjects of majoritarian neglect. Persons on methadone maintenance have few interests in common with members of the majority, and thus are unlikely to have their interests protected, or even considered, in governmental decisionmaking. … It is hard for me to reconcile that stipulation of animus against former addicts with our past holdings that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

I found it surprising that in 1979, eight years before the American Medical Association began to classify addiction as a medical disease[53] and eight years after the start of the war on drugs,[54] a Supreme Court justice extended such empathy and legal protection to the political outgroup of those struggling with and/or recovering from addiction. To not just address disparate impact along racial and socioeconomic lines but to also observe and combat political animus against former addicts specifically seems remarkably modern. If a strong dissent is as Brennan describes—attentive to the needs of the community and its vulnerable populations, as well as obligated to correct disparities in Constitutional protections—then I would argue that White's dissent in *Beazer* certainly qualifies.

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[53] Indiana University Health. 2022. "Is Addiction Really a Disease?" Indiana University Health. https://iuhealth.org/thrive/is-addiction-really-a-disease#:~:text=Most%20medical%20professionals%20agree.,as%20a%20disease%20in%201987.

[54] NPR. 2007. "Timeline: America's War on Drugs." NPR. https://www.npr.org/templates/story/story.php?storyId=9252490.

VI. Conclusion

Although Supreme Court dissents have the potential to be polarizing and vitriolic, the dissents in *Plessy*, *Korematsu*, and *Beazer* function as strong evidence for the value of a well-reasoned and dynamic dissenting opinion. The strongest dissents contribute substantial legal reasoning to the constantly-shifting constitutional dialogue and/or have the potential to take advantage of shifting societal norms, all the while avoiding the disunity and rancor of traditional American politics. Harlan in *Plessy*, Murphy in *Korematsu*, and White in *Beazer* each penned a dissenting opinion that met those requirements with judicial rigor and sensibility, eventually landing on the right side of both history and the law.

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