"I Dissent": The Future of Rhetoric, Law, and American Democracy

An analysis of the rhetoric used in memorable Supreme Court Dissents and what we as rhetoricians can learn from it

by

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Certificate of Approval

This is to certify that the accompanying thesis by Devon Rose Mann has been accepted in partial fulfillment of the requirements for graduation with Honors in Rhetoric, Writing, and Public Discourse.

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Introduction

Lacking the bi-partisan bluster and election orientated showmanship of the legislative and electoral branches the Supreme Court is largely thought to be the head of most reserved and orderly branch of the United States Government. However, even this most upstanding and disciplined court has moments of unexpected disagreement and high passion, moments such as Justice Douglas' insistence that inanimate objects such as trees should have standing to sue, Justice Scalia's famous description of a majority's opinion in one case as "pure applesauce", or Justices Stevens' performative recitation of all ninety pages of his blistery dissent in *Citizens United v. FEC*. Funny or passionate, these upsets tend to have great social and political impacts—often etching legal decisions and moments into our public memory or even influencing social movements and legal amendments.

These moments of upset now have the potential or the need to generate public attention more than ever. With the death of Justice Ruth Bader Ginsberg and the appointment of three conservative justices to the Supreme Court since 2017 the court now operates with a six to three conservative majority. What this means is that for a lot of progressive issues like protections for undocumented immigrants, LGBT workers, women's contraceptive rights, and the need for corporate oversight in the coming decades, it is unclear but highly likely a conservative court will strip away potential and existing protections. The only way for progressive justices to attempt to counteract these measures will be through the dissents of the minority justices. These dissents allow judges to add a narrative to the official decision that might otherwise be overlooked and offers the potential for future Supreme Court decisions to overrule or change the current

decision while still maintaining the importance of stare decisis. Examples of this are Justice Oliver Holmes' dissent in *Abrams v. United States*, a case concerning the extent of freedom of speech protected by the first amendment during war time. Holmes' dissent was then used to further define the limits of free speech in a following Supreme Court Case *Schenck v. United States*. Or Justice Harlan's Dissent in *Plessy v. Ferguson* being used as inspiration for Thurgood Marshalls case in *Brown v. Board*. With that in mind this thesis was written with the intent of better understanding how dissents are written to achieve maximum impact.

By observing Supreme Court Dissents as forms of public deliberation and protest we can better understand how constitutive rhetoric functions in the public sphere of American Democracy, shaping our understanding of law as a form of rhetoric. Through the lens of constitutive rhetoric this thesis will look at three supreme court dissents*:* *Plessy v. Ferguson*, *Lawrence v. Texas*, and *Shelby County v. Holder*. These dissents, coming from different time periods, political issues, justices, and political sides of the aisle will hopefully allow some insight into what rhetorical tactics endure past all of these differences. By better understanding how law is shaped and operated rhetorically we can better understand the power structures that the laws represent and better emulate the power of dissents in the public and technical spheres to challenge these powers and motivate activism.

Law, Rhetoric, and Democracy

Why Rhetoric and Democracy?

You might be asking why use rhetoric as a lens to study law? After all, what does specific word choice in law matter as long as the overall enforcement of the law is unaffected? You could argue that it is its own technical sphere and the only useful critique of the legal sphere must come from a legal standpoint to have credibility. Perhaps you could extend a philosophic lens to examine law because that's where the root of so much law and public policy originates but why rhetoric? In his paper "Law as Rhetoric, Rhetoric as Law" James Boyd White points out that "the older (primarily Judaic and Christian) tradition saw the law… not as rhetoric but authority. The newer tradition is that of institutional sociology…from the point of view of 'value free' social science" (685). There are two reasons I would like to focus this thesis on the interlap of rhetoric and law. The first is to contradict the two prevalent ways of understanding law in our society: White points out the assumption that comes from understanding law as a neutral force because of its highly technical form and its position in expert and technical spheres. I think a rhetorical examination is a key tool for disproving this. The second reason is the realization that law is by its very nature is highly rhetorical. White argues this point as well: "law is most usefully seen not, as it usually is by academics and philosophers, as system of rules, but as a branch of rhetoric; and that kind of rhetoric of which law is a species is most usually seen… as the central art by which community and culture are established, maintained and transformed" (684). In their paper Regulating Disagreement, Constituting Participants: A Critique of Proceduralist Theories of Democracy Darrin Hicks and Lenore Langsdorf

point out that by “recognizing the constitutive presence of values” we can “reject claims of neutrality achieved through stripping away values embedded in social positions” (156). Because of this understanding that only by recognizing the values hidden behind apparent neutral laws we can address their implications it’s essential to view law and legal proceedings through a rhetorical lens. When a laws neutrality goes unquestioned it allows structural inequalities and prejudices to operate through the power of the state unchecked. It also prevents a deeper examination of how the power behind law (the state) is affected by these inequalities and prejudices. Laws like stop and frisk or literacy test laws are both examples of laws that are intended to seem neutral but actively target certain groups like people of color and add to structural inequality. By addressing these implications we can better understand how law is a public display of our societal values and norms, what that reveals about current power structures, and how they might be reenforced or resisted.

Constitutive Rhetoric and Law

When White refers to a form of rhetoric that establishes, maintains, and transforms “communities and culture” he’s referring to the term he coined: “constitutive rhetoric” which White defines as the identity one assumes for ”oneself, for one's audience, and for those one talks about” and “a relation among the characters one defines…a community of people, talking to and about each other”(690) when one engages in rhetoric. Scholars' understanding of constitutive rhetoric has changed and shifted since White’s original creation of the term. Influenced by Louis Althusser’s concept of interpellation and argument that subjects are constituted as subjects through almost all forms of interaction, Maurice Charland expands upon White’s definition of constitutive rhetoric in his essay “Constitutive Rhetoric: The Case of the Peuple Quebecois” and argues that individuals

are continuously subjected to forms of rhetoric and social, political, and economic relationships that constitute their identity in different ways. Because of this, Charland argues, the implication of constitutive rhetoric is that for the speaker to address a specific audience with the intent of persuading them of something, that audience must already have been created via interpellation (134). He argues that all audiences already exist and are made out of certain beliefs and community ties and values and social class are already forces in their identification and interaction with the piece of rhetoric being addressed to them. Basically Charland argues that certain rhetoric can shape these preexisting identifying factors into a specific unifying identity that can then be used for specific social or political movements. This understanding of constitutive rhetoric is key because law, as it should be, is an extension of Democracy and the will of the people. There are two implications of that: that law comes from certain groups within democracy and it is directed as a message (or form of power over) certain other groups within democracy. Law and Democracy come from the power of a collective identity. With that power in Democracy and Law there also comes the connotation of accountability. Accountability to listen to the publics that they have power over and to represent their views, with the realization that if they fail to do so laws or representatives in power will be changed or the public will lose faith in the state. To prevent this Democracy and Law must explain themselves and their decisions to the public. Because of this, whomever law addresses and fails to address is very telling of its intended audience and purpose and the power structures and failures of democracy. In my thesis I use this connection between law and constitutive rhetoric to examine what narratives dissenting justices use to appeal to

different audiences and what implications these appeals have to understanding the effect of the dissent and its potential future influence.

Law and Democracy

In this thesis so far, I have discussed American Democracy in relation to how it creates law and how law can function as an arm of the state, reflecting views of the citizens a democratic state represents and imposing the power of the state upon those same citizens. The courts often seems the least democratic element of our government as justices are rarely democratically appointed and court decisions and legal precedent are not beheld to public opinion, but this in many ways mirrors the same way that American Democracy works because its built on a specific set of values, rights, and structures that then create the system for democracy and democratic representation. So how would I define American democracy for the purpose of this essay? I would call it a system of governance built on a preordained system of values and rights that revolve around the protection of individual rights and liberties but is controlled by representatives of its citizens. American Democracy relies upon its judicial branch of government to help maintain this balance between the ever-shifting opinions of its citizens and the values and rights essential to its structure. Here we see the intersection of the public and technical sphere. The public sphere is concept created by Jurgen Habermas, an area he called "conceptually distinct from the state…a site for the production and circulation of discourses" (30). From Habermas' conception of the public sphere came other conceptions of how discourse circulate, such as the counter publics- publics whose opinions and narratives are excluded from the public sphere because of their marginalization, and the technical sphere- a sphere of discourse within but separated from

the public sphere by specific technical knowledge and language. The law and the court systems for example are a technical sphere whose events are then often circulated in the public sphere.

Dissent and Democracy

Another essential part of a health democracy is the space for protest. Otherwise we risk democracy only representing the majority's opinion and loosing safeguard's for the rise of authoritarianism. For the purpose of this thesis the form of protest I chose to examine rhetorically were Supreme court dissents in the form of three specific examples: Justice Harlan's dissent in *Plessy v. Ferguson*, Justice Scalia's dissent *in Lawrence v. Texas*, and Justice Ginsberg's dissent in *Shelby County v. Holder*. I chose dissents over forms of protest I believe dissents offer a unique form to observe legal rhetoric that usurps our usual understanding of law and protest. Dissents offer an interesting middle ground where something is not quite law not quite public discourse— it comes from the high technical authority of the supreme court, has the power to influence future court decisions and potential laws/amendments to laws in congress, but is also a form of protest and activism meant to appeal and stir public discourse. This is significant because one of the essential elements of democracy is public deliberation and debate. It allows people to question power, share their views, express disagreement and find compromises. Dissents can give voice to publics not yet represented through the slowly changing structure of law or counter publics minority's opinions. This representation adds an element of democracy to the branch of government that is more technical and less geared toward public deliberation. This intersection of technical and public rhetoric gives dissent a lot of influence as forms of public deliberation. In "Democracy and the Rhetorical Production

of Political Culture" Scott Welsh asserts that "public deliberation always begins with a challenge to those invested in maintaining existing social and political structures" (686). Protest forces public deliberation into the public eye and narratives. It helps suppressed issues become a topic of deliberation when they might otherwise not gain the same public interest either because of lack of public knowledge or because of active suppression. It can help force change in entrenched power structures and systemic discrimination.

Protest and Activism

Dissents as Protest

Before continuing to my analysis of the Supreme Court dissents it's important to justify my use of the term "protest" to categorize Supreme Court Dissents. One could reasonably argue that the nature of dissents: built into the structure of court proceedings and law does not meet the necessary requirements for a protest if the purpose of a protest is to generate awareness and discussion by being specifically disruptive by existing in spaces not meant for them and disrupting the flow of normal life. However in their study "How to Lose Cases and Influence People" Rachael Hinkle and Michael Nelson point out that the lack of specific legal power given to dissents "suggest that judges should only dissent when doing so is costless. But writing a dissenting opinion takes time and resources and may further hamper judges' attempts to achieve their collegiality goals by antagonizing colleagues with whom judges will work for years to come" (190). In a lecture on "The Role of Dissenting Opinions" Justice Ginsberg noted that the American practice of "revealing dissents" is "hardly universal" and that in "civil-law systems, the nameless, stylized judgment, and the disallowance of dissent are thought to foster the public's perception of the law as dependably stable and secure" (3). These discussions of dissents reveal that dissents are far from costless. They carry the risk of interpersonal or political backlash, the time and labor needed for a well-crafted argument, and their very existence might undermine the publics faith in the power and stability of the law. Dissents do not exist by accident --disruptive to the normal functioning of the law and process—they were created as a form of protest meant to draw public attention and debate. It's also

worth noting dissents are not unique as forms of protest that function in spaces designed by and protected by state forces such as protest protected by the first amendment or protests that utilize government permits to legally congregate and march.

What ACT UP Can Teach Us

One example of a group that used state processes to enhance their protest and activism is the ACT UP members participation in the 1982 House Congressional hearings on AIDS. In his paper on ACT Up's participation in these hearings—"ACT-ing UP in Congressional Hearings" Daniel Brouwer makes two essential observations that I think have great significance in the discussion of dissent as protests. Brouwer notes that "because the very nature of the forum guarantees dispersal of ACT UP discourses to wider audiences, and because the discourses that the members produce, however strident, still bear the mark of state tolerance, the benefits of oscillation are too compelling for activists to ignore" (101), and that "Two key factors contributed greatly to the unarguable success of the demonstration: first ACT UP members had reached a compelling level of competency with regard to medical knowledge and research protocol…second, the demonstration was meticulously plotted and campaigned" (91). The similarity between this form of protest and supreme court is apparent. Both protests' credibility stems from their technical ethos and association with trusted state process and power. By viewing this example of ACT UP activists and supreme court justices dissents as templates for effective activism I believe we can better hold law and democratic systems accountable for their systemic inequalities.

A Complication: Protest and Activism

I argue that dissents are protest because of the way that they disrupt normal functioning of the state with the intention of creating change and discourse. I also argue that they provide valuable routes for activists to use with both technical road mapping for new legal arguments and amendments and larger social arguments and rallying cries. However, there are a few thin lines to be discussed here. For instance, it could be risky to call the dissenting supreme court justices' activists. While their dissent might be useful to activists, the carefully cultivated neutral persona of the supreme court judge resists the label of activist. They are not members of activist organizations and their actions and dissents are not coordinated with activist groups for maximum effect. While it might be argued that anyone that contributes to activism is an activist, it's important to draw a line between a piece of activism and the organization and targeted planning that activists engage in. Both examples will have different strategies and overall priorities. For instance, in this case as government actors the first priority of a supreme court justice is the protection of the integrity of the law and the power of the state, not the protection of marginalized groups. Brouwer specifically notes the "benefits of oscillation" when discussing the benefits of working with state power--- the implication is that while there are times that working with the state gives an activist group power, voice, and credibility there are also times when a noticeable departure from the state is needed. When the power of the state is the first priority of an actor they lack this ability. With this in mind, this approach leads to an even larger question: Can true change ever be achieved by working within the system? Both the examples of activism discussed in this thesis, ACT UP and dissents, are examples of protests that work within the system and actually

benefit from the credibility that they gain from government association. It's reasonable to question whether activist efforts are really "wins" for activist groups if they also reinforce state power. As Audre Lorde once said "the master's tools will never dismantle the master's house." But it's hard to overlook the benefits that can come from working within the system in terms of preventing imminent harms and building the foundation for long-term change. The credibility that activist groups can gain from proximity to state power should not be overlooked. It's a rhetorical choice to be seen as cooperating with state power—it reaches a specific audience that would otherwise be critical of activist efforts. So working within the system can achieve palpable goals and good, especially if rhetoricians use their work within the system to give power and voice back to those overlooked by state power and larger public audiences.

The Dissents

Harlan's Dissent

The oldest and perhaps most unique of the dissents I will be discussing in this thesis belongs to one of the most famous supreme court cases in American history. The *Plessy v. Ferguson* case is infamous even now for the setbacks it gave to racial equality in America. In *Plessy v. Ferguson* where Homer Plessy, a man of mixed race, was convicted of sitting in a "whites only" train car, the majority of the Supreme Court ruled that the Louisiana law that required segregation based on race was constitutional under the "separate but equal" doctrine. Of the nine justices only Justice John Harlan dissented on this verdict, making him the only lone dissenter discussed in this thesis. Although this dissent went relatively unnoticed immediately after the case, fifty-eight years after *Plessy v. Ferguson* in the landmark case of *Brown v. Board of Education* Harland's dissent was proved right when the Supreme Court overturned the "separate but equal" doctrine. So, what gave Harlan's dissent the rhetorical power and foresight to remain so relevant more than half a century later? I would argue that Harlan's appeals to common sense over legal argument, strong emphasis of legal equality over personal equality, and discussion of the history of race in legal precedent are what gave his dissent such a long-lasting presence in the civil rights movement.

When I say that Justice Harlan appeals to common sense over legal argument don't mistake me to be saying that Justice Harlan doesn't have a legal argument in his dissent. Instead what I'm noting are Harlan's numerous appeals to his readers' common sense to see through the purposefully racially neutral language of the law and majority

ruling uses to justify the "separate but equal" doctrine. This is actually one of his main legal arguments, that the thirteenth and fourteenth amendments (the crux of Plessy's argument) "if enforced according to their true intent and meaning" would not just protect against slavery and general political rights but "protect all the civil rights that pertain to freedom and citizenship." So how does Harlan draw attention to the masked racism of the segregation laws of Louisiana? He plainly states it: "Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." Note Harlan's specific use of the term "everyone knows". By doing this he is establishing a common knowledge and speaking directly to his readers with a clear point: the majority court may deny it all they wish but Harlan, white America, and black America all know the purpose of these supposedly racially neutral laws. Harlan even goes so far as to say that "No one would be so wanting in candor as to assert the contrary". With this Harlan has established his main argument and fundamental truth: that any law rooted in the protection of white power, no matter how equally applied to the races, is discriminatory.

Harlan further appeals to his audiences' common sense and underlines how this law based on race is specifically discriminatory by his use of exaggeration and comparison. If this specific form of segregation is allowed, Harlan asks, why not "regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other?" or why not "the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?" The answer, Harlan points out, is that

"regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law". The implication of Harlan arguing about the nature of the law is important and I'll address it later, but for now I want to note the effect of the comparisons that Harlan provides. First, he provides an exaggerated vision of what segregation in America could look like with this ruling—showing it to be unpractical and unreasonable. And then he questions if the country is to be segregated by race, why not segregate by immigration status or religion—groups that members of his audience might be sympathetic to or be part of. These tactics appealing to his audience's common sense and sense of constitutive identity allow Harlan to disrupt ingrained prejudices and assumptions about race that might otherwise have excused this law. Instead Harlan has established two essential truths: this law is unreasonable, and its irrational reasoning lies in race relations.

However, Harlan's attempted disruption of racial prejudices is far from perfect. His legal argument hinges on the ideal of law as a "colorblind" institution while firmly establishing the belief that black and white people are not socially equal. There are two possible reasons for this. The first is that this is what Harlan actually believed, coming from a southern slave owning family, it is highly possible that Harlan was a racist whose view of the law prevented legal discrimination. The second explanation is that Harlan was attempting to convey a view of equality that would be more palatable to a larger audience—giving equality a foothold without triggering defensiveness of white supremacy. I'm not going to speculate about which explanation is correct, it's probably a combination of the two reasonings, however I will explain the effect that Harlan's presentation of racial equality has on his argument.

The very beginning of Harlan's dissent establishes his view of race, arguing that: "Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper" it is only when a "legislative body or judicial tribunal" attempts to perpetuate laws that regulate or violate the "personal liberty" of American citizens based off of race that such conduct becomes improper. In fact Harlan's "fundamental objection" to Louisiana's law is not its human effect or its racism, Harlan argues that he believes that the black man would not " object to separate coaches for his race if his rights under the law were recognized", but that the law as it is" interferes with the personal freedom of citizens". Harlan then goes on to establish two important points of view in his dissent: that the white race is superior—" 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" --- and that that superiority is not threatened by legal equality. In fact, Harlan argues that opposite is true—that white supremacy will remain only if it "remains true to its great heritage and holds fast to the principles of constitutional liberty" and that "the present decision, it may well be apprehended, will…only stimulate aggressions". Harlan continues to soothe fears by stating that "sixty million of whites are in no danger from the presence here of eight millions of blacks". The real danger, Harlan argues, is the deep unfairness and hypocrisy that this law conveys and how that weakens our constitution and our country as a whole.

So now that we've established how Harlan makes his legal argument more palatable to a white audience, it's time to examine what Harlan's legal argument actually is. The main area of contention between Harlan and the majority opinion of the supreme

court is the claim brought by Plessy's lawyers that the thirteenth and fourteenth amendments of the constitution would prohibit segregation on the bases of race. The Majority's opinion discards this claim, arguing that the thirteenth amendment pertains only to slavery and so is irrelevant to the case, and that while the fourteenth amendment is "undoubtedly to enforce the absolute equality of the two races before the law," that laws that require segregation don't necessarily imply inferiority as long as accommodations and the enforcement of the law is equal between the two races. The infamous separate but equal doctrine. Harlan disagrees with the majority opinion on both of these points. He argues that inherent in the thirteenth amendment is that it "does not permit the withholding or the deprivation of any right necessarily inhering in freedom." Because of this the thirteenth amendment not only prevents the institution of slavery but also "prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude." For the fourteenth amendment Harlan points out that:

"The words of the amendment… contain a necessary implication of a positive immunity or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race"

And he disagrees with the majority opinions' interpretation that segregation does not imply inferiority by arguing that while the law might be written to apply to both races it is common knowledge that its intent is to specifically apply to black people-- in clear violation of the intent of the fourteenth amendment . The law and the constitution, Harlan

argues, are colorblind institutions whose integrity are threatened by these obviously biased laws that unfairly regulate the personal freedom of American citizens white and black.

To truly understand these legal arguments, it's important to understand how Harlan uses racial history and past supreme court decisions to frame his understanding of the scope of the thirteenth and fourteenth amendments. While establishing his view of the thirteenth and fourteenth amendments Harlan quotes a previous supreme court decision--- *Strauder v. West Virginia*--- which argues that the purpose of the amendments was to secure "all the civil rights that the superior race enjoy" to "a race recently emancipated, a race that through many generations have been held in slavery". By doing this he acknowledges America's past with slavery and the civil war, a specter that looms large of Harlan's dissent—"State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights" and establishes a positive goal that the amendments require—not just prohibiting discrimination but reaching for equality, and legitimizes it with the power of legal precedent. Harlan also points out the historical white powers entrenched in state legislatures that create laws intended to disenfranchise black Americans, "we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race" and he refuses to take into account and legitimize legal decisions that come from these obviously biased courts: "I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them, are wholly inapplicable." Finally, Harlan extends his

historical narrative to look toward the future, noting “The destinies of the two races, in this country, are indissolubly linked together,” and laws aimed at racial discrimination can “have no other result than to render permanent peace impossible.” Harlan even speaks to the legitimacy of the majority’s ruling in *Plessy v. Ferguson* and, pointing to a case infamous for the prejudice displayed by its judges and its lasting consequences for civil rights and the nation writes “In my opinion, 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”. By comparing this case to *Dred Scott v. Sandford*-- a supreme court case infamous even then for its ruling that African Americans were not truly citizens of America and therefore not entitled to the “rights and privileges” of citizenship. Harlan effectively sums up his argument about the prejudiced nature of the majority's decision and leaves a dire warning about how future generations will interpret *Plessy v. Ferguson*.

Scalia’s Dissent

The case of *Lawrence v. Texas* is very different from *Plessy v. Ferguson* in both case circumstance and majority ruling. Argued before the Supreme Court in 2003, this case concerned the constitutionality of the Texas “Homosexual Conduct” law which criminalized homosexual sex acts and overturned the previous Supreme Court Decision *Bowers v. Hardwick*. Likewise the two dissents stemming from this case are very different, with different rhetorical tools and intentions. Unlike Harlan’s dissent where he approached his argument using rhetorical tactics to make his legal argument more palatable and less threatening to a larger hostile audience, we can see almost the opposite approach in Scalia’s dissent, with Scalia using neutral sounding legal language in his

argument to appear unbiased while promoting an emotional reaction from his audience with key tropes and buzzwords. A Supreme Court Justice famous for his conservative viewpoints and particularly fiery dissents, Antonin Scalia will be the only conservative (as we understand the political term today) opinion discussed in this thesis. In his dissent Scalia argues that the majority's opinion in *Lawrence v. Texas* violated Supreme Court legal precedent in a contradictory and irrational way that overstepped the court's power, and, if enforced, would call into question the legitimacy of several historic contraceptive rights cases. This powerful argument had specific rally points for both left and right leaning audience members that I worry will become increasingly relevant with our current Supreme Court.

So, what is Scalia's legal argument? For this case it's essential to understand the majority court's opinion and the earlier court cases referenced in both opinions to understand Scalia's dissent. The majority court argues that its ruling rests on three considerations: that the Texas "homosexual conduct" law violates the fourteenth amendment by being discriminatory toward same-sex couples, that the liberty and privacy guaranteed by the Due Process Clause in the fourteenth amendment extends to adults consensual sexual activity in the privacy of their home, and with these considerations in mind should the previous supreme court decision, *Bowers v. Hardwick*—a ruling that declared that consensual homosexual sex was not a right protected under the constitution, be overturned. Scalia disagrees with this. He argues that homosexuality doesn't qualify as a "fundamental right" under the strict lens that the court had previously mandated "deeply rooted in this Nation's history and tradition" and so is not owed "heighted scrutiny" or protection. He argues that this case is less a question of

liberty and privacy and more a question of if states have the right to impose "morality" laws, which he believes they do. Scalia questions the reasoning that goes into the courts overturning of Bowers and warns that while he can sometime justify the overturning of court legal precedent—called stare decisis—the court's reasoning for doing so is unreasonable and might lead to future reversals of such cases *as Roe v. Wade, Planned Parenthood of Southern Pennsylvania v. Casey*, and *Griswold v. Connecticut*. At first glance Scalia's dissent might seem like a straightforward legal argument. Although Scalia's tone simmers with anger and distaste throughout the dissent, he takes the majority court's lead and bases his dissent in a thorough point by point discussion of their argument. However, Scalia's legal argument over the course of its point by point discussion hits on many points that seem formulated to appeal directly to a conservative audience who might be fearful or angry about this newest court decision.

Let's begin with Scalia's discussion of the homosexual identity and its relationship to the court and the fourteenth amendment. There are three important elements to discuss here: Scalia's accusations against the majority court, the categorizing of homosexuality as a protected identity, and Scalia's discussion of homosexual activism. On its face Scalia's argument is fairly straightforward; Scalia argues that the court "have held repeatedly… that only fundamental rights qualify for…so-called 'heightened scrutiny' protection–that is, rights which are 'deeply rooted in this Nation's history and tradition'" and argues that "emerging awareness" --quoted directly from the majority opinion-- of the homosexual identity, "does not establish a fundamental right" as is not "deeply rooted in this Nation's history and tradition[s]", again quoting directly from the majority opinion. These direct quotes from the majority opinion in Scalia's opinion serve

to paint the majority opinion in a hypocritical light, implying that they are failing to fulfill their own self-imposed regulations. Scalia also points out that "nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right". Scalia seems to think that the majority is "so imbued with the law profession's anti-anti-homosexual culture" that it is now "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". Note Scalia's use of the double negative "anti-anti" to create the impression that it is the anti-homosexual groups who are being attacked instead of attacking homosexuals. Scalia even goes so far as to accuse the court of "impos[ing] foreign moods, fads, or fashions on Americans" because of the majority's discussion of how other nations have decriminalized homosexuality. Scalia does two rhetorically interesting things with his analysis of homosexuality how he uses it to accuse the majority court of illogical reasoning. He uses legal language and reasoning to create a neutral sounding argument to why homosexuality shouldn't be a federally protected right and why this issue is outside of the scope of the Supreme Court, and he has created a very specific persona for his conservative audience to identify against. This persona is hypocritical, out of touch with real Americans, and tyrannical with its imposition of foreign and elitist views. Specifically note how Scalia seems to be appealing to themes of the forgotten America--the political trope of the moderate conservative American whose needs are forgotten by liberal politicians--- and its fears and anger toward a phantom liberal elite.

Understanding this paves the way to understanding Scalia's framing of homosexual activism and its role in this decision. Remember, in his legal argument Scalia

has argued that he opposed the majority opinion not out of bias but because he believes the supreme court is the wrong place and avenue to seek protection for homosexual sex. Scalia even suggests alternative routes for activists to seek these protections: “Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means… every group has the right to persuade its fellow citizens that its view of such matters is the best” and notes that “homosexuals have achieved some success in that enterprise”. Even though this seems like a relatively neutral statement it’s worth noting here how Scalia has contextualized the homosexual identity and their rights and protections as a mere social issue without alluding to the possible life destroying forces as work in these social debates. This is reinforced by Scalia’s accusation that majority opinion’s fear that “that the criminalization of homosexual conduct is ‘an invitation to subject homosexual persons to discrimination both in the public and in the private spheres’” means that it has taken sides in a “culture war”. But even though Scalia has proclaimed his support for “democratic” activism his dissent repeatedly refers to the effects of gay activism with a warning tone. Scalia begins his dissent by alluding to a larger social movement that he thinks has influenced the majority court’s decision: “the widespread opposition to Bowers… is offered as a reason in favor of overruling [Bowers]”. The majority opinion’s decision, Scalia thinks “is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda”. As a side note of interest: The term homosexual or gay agenda was co-opted and popularized by religious critics back in the early 1990s, specifically in the propaganda movie “The Gay Agenda: The March on Washington” which included such claims as “75 percent of gay men regularly ingest

feces" and "70–78 percent have had a sexually transmitted disease". The effect of this argument is that Scalia reinforces his claim that the court is imposing radical elitist or minority views upon an undesiring American public. Scalia has carefully framed his "neutrality" on this issue in contrast to a court that is actually allied with whatever the current social order is.

Another key to Scalia's framing of the homosexual identity is his argument equating laws that criminalize homosexuality with "morality laws" that criminalize immoral behavior in response to the majority's opinion that the law against gay sex is "unreasonable". This is Scalia's attempt to once again make discrimination a neutral position. He uses laws like "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" and "prostitution, adult incest, adultery, obscenity, and child pornography" as reasons that states need to be able to outlaw what they deem "immoral" behavior, and gives the dire warning that with the overturning of *Bowers v. Hardwick* there will be nothing to prevent the overturning of these laws as well. By doing so Scalia allies himself with this imagined reasonable and general public who:

" do not want persons who openly engage in homosexual conduct as partners in their business, as 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".

While Scalia frames this as a simple difference of opinion in the "culture war" and the right of the American Public, his specific choice of examples where Americans might exercise their right to "protect" themselves is eye catching. They tend to be examples that would spur an audience to action: the protection of home and business, and especially with his use of "scoutmasters, school, and family", children. Scalia is painting a picture of a dangerous and abhorrent future. This also plays on the common trope of the predatory gay man as a pedophile. The implication is clear, despite his logical and neutral tone Scalia, is trying to provoke value-based fear and anger in his conservative audience.

Scalia's most elaborate legal argument in his dissent is less about constitutional protections and more about stare decisis, or legal precedent. This argument reinforces his accusations of hypocrisy against the majority opinion for his conservative audience and appeals directly to a more liberal audience that might otherwise disagree with his dissent. Scalia begins his dissent with the quote "Liberty finds no refuge in a jurisprudence of doubt" from the Supreme Court Case *Planned Parenthood of Southeastern Pa. v. Casey* to lay the groundwork for his argument that the majority opinion's decision to overturn *Bowers v. Hardwick* was a "manipulative" move based on political leanings rather than legitimate legal finding and that by justifying this move, the majority not only places their ruling on thin legal ground, but also places landmark contraceptive rights cases such as *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* in jeopardy of being overturned with the same legal precedent that the court has used to overturn *Bowers v. Hardwick*. For Scalia's conservative audience this reinforces his argument that the majority court's opinion is based in political bias rather than strong legal precedent and serves the dual purpose of criticizing widely reviled past cases, even potentially

setting up a political route that future cases might take to overturn these landmarks. For Scalia's liberal audience he is presenting them with a choice between the protection of homosexual couple's rights and the contraceptive rights established *by Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*.

Scalia also uses this as an opportunity to attack *Roe v. Wade* using the pretext of comparing the case to *Bowers v. Hardwick*, glibly arguing that "What a massive disruption of the current social order, therefore, the overruling of Bowers entails. Not so the overruling of Roe, which would simply have restored the regime that existed for centuries before 1973 [. . .] the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State,", and "it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of stare decisis set forth in Casey. It has thereby exposed Casey's extraordinary deference to precedent for the result-oriented expedient that it is.". What is Scalia really saying with these quotes? With the first quote he is establishes a norm and with it a value system: before the interference of the court with *Roe v. Wade* and the overturning of *Bowers v. Hardwick*, states had the power to outlaw abortion and homosexual sex, this was a normal and sustainable system that had "existed for centuries" and the court's interference marks disruption and threat to that sustainability. In the second quote Scalia's shocking overlook of the economic circumstance that might prevent low income women from accessing abortions out of their home state is echoed in his desire to let homosexuality be outlawed on a state by state basis and his complacent remark that homosexual activists have had "great success" in changing the laws in other states. Scalia's final quote about *Planned Parenthood of Southeastern Pa. v. Casey*. as

"result-oriented expedient" calls back to his accusations that in this case of *Lawrence v. Texas* the court has been influenced by "anti-anti- homosexual" activism. With this argument Scalia is able to link the three famous cases and bestow L*awrence v. Texas* with that same aura of controversy, resentment, and fear that conservative circles regard *Planned Parenthood of Southeastern Pa. v. Casey* and *Roe v. Wade* with.

Ginsberg's Dissent

Like Justice Scalia Justice Ginsberg is known as one of the most culturally impactful judges of the most recent half century. A Decade after Scalia's dissent of *Lawrence v. Texas* in 2013 Ruth Bader Ginsberg wrote a strongly worded dissent against the Supreme Court's majority decision in *Shelby County v. Holder,* a landmark case that in 2013 eliminated Section 5 of the Voting Rights Act, which required jurisdictions with histories of discrimination to submit proposed changes to voting procedures to the Federal Government for approval before they go into effect. Ginsberg's dissent, which was widely distributed and discussed, used appeals of both technical vocabulary and cultural allusions to bridge the technical sphere with the broader public sphere and dismantle the affirming court's argument and emphasize the importance of voting rights. Conscious of the public eye on *Shelby County v. Holder*, Ginsberg tailored her dissent as both a legal and ethical refutation of the majority court's decision. By observing Ginsberg's strategic mix of technical vocabulary and cultural allusions in her dissent we can question how expert opinion is used in argument in the public sphere, and what it means for Ginsberg to break from her use of it in her dissent.

Conscious that her voice will be heard in both the technical and public sphere, in her dissent of *Shelby County v. Holder*, Ruth Bader Ginsberg employs technical vocabulary to give her argument legal credibility. Her technical argument hinges on two main points: the constitutional precedent that gives Congress the jurisdiction to defend voting rights, and how data on an increase in discriminatory incidents was misinterpreted by the court. By confronting the first issue of congressional jurisdiction Ginsberg frames voting rights as central to American democracy and the Voting Rights Act as an extension of the Fifteenth Amendment. This reframes the debate of constitutionality around congressional methods rather than Federal vs State power, a reversal of Scalia's specific framing of *Lawrence v. Texas* around State rights. It also places greater weight on the affirming court's decision, by declaring Section 5 of the Voting Rights Act unconstitutional they have undermined the Fifteenth Amendment and the core of American Democracy. So, with constitutional precedence established, the question then becomes, as Ginsberg argues: "not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end" (10). Ginsberg answers this question with her examination of how the relevance of historical discrimination in voting rights brings institutional racism into conversation with the importance of the Voting Rights Act. By referencing how "voting discrimination had evolved into subtler second-generation barriers" and that "eliminating preclearance would risk loss of the gains that had been made" (18) Ginsberg established although the nature of discrimination has changed, racism is still present in America in a way that requires extreme protective measures from congress.

Ginsberg also relies upon historical examples to support her technical vocabulary and her ethos as a supreme court judge. The affirming court's main argument against Section 5 of the Voting Rights Act is that Section 4(b) of the act based its coverage formula, which determines which counties are covered by Section 5, is unconstitutional because it is based on an old formula. The majority court's ruling in *Shelby County v. Holder* focuses on these technical issues and so for her to have a credible argument Ginsberg must also use technical rhetoric to address the issues the majority raises. In response to the majority court's ruling, Ginsberg uses concrete examples of cases of discrimination prevented by this formula to prove that the decrease of discriminatory incidents is because of the Voting Rights Act rather than proof that protective measures are no longer needed. Ginsberg discusses a "few examples" (25-28) that detail a variety of different discriminatory acts by local governments – from canceling elections with black candidates to redistricting majority-black districts-- and effectively paints a sobering picture of how voting discrimination is enacted in America in the 21st century. Ginsberg's main argument, with her framing of congressional jurisdiction and her use of historical evidence, is a technical one. While her dissent is observed in the public sphere is was created in the technical sphere and is addressed to other legal experts. Thus, the inherent values of her argument and its parameters are based in the law and the constitution.

While Ginsberg relies upon expert knowledge to frame the Voting Rights Act in the terms of congress defending minorities' constitutional freedoms against ongoing but historically rooted racism, her use of cultural allusions establishes a narrative of historical progress as something that needs to be continuously defended. Ginsberg argues the gains

of the Civil Rights Movement can be lost, and thus need to be actively protected. She does this using legal examples and precedent, but in rejoinder to the majority court's argument that "history did not end in 1965," Ginsberg also uses quotes from literature such as The Tempest's "what's past is prologue" and The Life of Reasons quote "[t]hose who cannot remember the past are condemned to repeat it" (19). Ginsberg's use of popular cultural artifacts and sayings suggest that her statement of dissent in *Shelby County v. Holder* isn't just a legal opinion but a larger moral proclamation. Ginsberg also employs the rhetoric of Martin Luther King Jr. to further frame *Shelby County v. Holder* as a civil rights issue. When discussing Shelby County, and Alabama's history of racial discrimination in general, Ginsberg recalls King's demonstrations on "Bloody Sunday" and his march from Selma to Montgomery with the passage of the original Voting Rights Act. Similar to her argument that the new Voting Rights Act must be protected to stop backsliding, Ginsberg states that King believed "progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion" and quotes King that "the arc of the moral universe is long, but it bends toward justice" (24). By employing the ethos that King holds as a civil rights leader Ginsberg once again deviates from a traditional legal argument. This demonstrates how Ginsberg uses her dissent to speak to both the technical sphere of the court and the larger public sphere of the American people. The use of King as a historical figure, one of the most recognizable faces from the American civil rights movement, is very strategic. King not only conveys credibility to a large audience but also invokes imagery that every American is taught from an early age—the horrors of the Jim Crow south and the hard fought battle of the 1960s. Ginsberg is reminding her audience beyond the legal sphere

what is at risk with this court decision. The point is clear, by ruling Section 5 of the Voting Rights Act unconstitutional the majority court has discounted a history of discrimination and actively obstructed King's dream of equality. They are thoroughly on the wrong side of history.

Having established her argument in the technical legal sphere, Ginsberg uses cultural allusions and "common sense" to enhance her argument. By relying on these artifacts, Ginsberg taps into a larger cultural wisdom meant to resonate with a larger audience. This implies that the court's decision as not just legally incorrect, but generally illogical. It is, "just as buildings in California have a greater need to be earthquake proofed" (21) common sense that areas of historical discrimination need greater oversite to prevent racism. Having established the Voting Rights Act as common sense, Ginsberg has strong words for her co-judges, critiquing their observation of "increases in voter registration and turnout as if that were the whole story" and scolding them for lacking the "great care and seriousness" (23) the matter deserves. She goes on to blame the court's "hubris" (30) for its blindness to the issues she's highlighted in her dissent and the larger implications of its decision. In simple terms, the court's decision is "like throwing away your umbrella in a rainstorm because you are not getting wet" (33). With this Ginsberg deviates from a traditional legal argument and purely technical language to show the depth of the court's mistake. In her dissent, the affirming justices are illogical and inconsiderate of the case's larger implications. The implication of her argument is that on this issue the court holds an accountability not just to the technical legal sphere, but a larger public history of injustice and discrimination. By not engaging with this public

history the majority court decision has missed key parts of the issue and made an incorrect decision, Ginsberg argues.

Having observed how Ginsberg's argument uses both technical vocabulary and cultural allusions to create an argument we must now ask what audiences Justice Ginsberg is appealing to. Once known as a reserved and generally politically moderate judge, as the Supreme Court continues to tilt increasingly to the right, Ginsberg has come to represent a decidedly liberal voice on the court. In recent years she's become an unlikely pop culture icon for her fiery dissents of cases similar to *Shelby County v. Holder*, which deal with similar hot button issues of women and minorities civil rights, corporate power, and even presidential elections. Because of this and the nature of the case, it's not surprising that Ginsberg's dissent of *Shelby County v. Holder* was widely distributed and discussed, and it's highly likely that she wrote it with the intention of creating a response from the public sphere, or at least drawing public attention to the injustice that her dissent outlines. For the liberal audience that she has become a celebrity to her voice conveys the sense of anger and betrayal that the audience might have felt upon reading the court's decision. Ginsberg's quotes from Martin Luther King Junior, a civil rights figure famous (sometimes controversially) for his appeal to both black and moderate white audiences are key because they mirror the emotional and cultural history of the audience Justice Ginsberg is trying to reach in her dissent. Ginsberg is also prompting a mobilization from her liberal audience with her dire framing of civil rights as a resource needing active protection and at real risk of being lost, an almost literal step backward in history.

Although Ginsberg's ethos as a famous liberal figurehead prevents her from appealing to a conservative audience directly, there are two ways that her dissent addresses more conservative concerns. The first is with the same common sense that Ginsberg uses to stoke her liberal audiences' anger. While Ginsberg's common-sense conclusions might seem obvious to an audience that already agrees with her, her common sense explanations of racism and the potentially catastrophic repercussions for not having protective measures in place help address systemic racism in a way that is palatable to a hostile or unfamiliar audience. Ginsberg's second strategy goes hand in hand with her refutation of the majority court's argument that the federal government doesn't have the right to unprompted oversight of the states in this issue. She attempts to resolve conservative fears of the federal government overstepping its power with a clear explanation of how historical events have necessitated this oversight and how racism, rather than being a historical event with a clear ending, has become a systemic force that continues and must be actively guarded against.

Conclusion

So far, this thesis has discussed how law is a form of constitutive rhetoric and how if we view law as a constitutive rhetoric then we can understand how law represents larger power structures and inequality in society and we will be better able to confront these issues. Dissents are an interesting mix of upholding current power structures, such as the law and the government, and protesting against them and providing avenues for changing them. Their specific appeals to both public and technical audiences make them a unique and powerful lens to understand the interaction of constitutive rhetoric and law. So what have we learned from these dissents? What do they all have in common? They all discuss the role of the court in their decisions—specifically justifying why or why not the court (and by extension the federal government) has jurisdiction over this issue and justifying its power over the states. They also all discuss how the legacy of the court will be impacted by the majority's decision—with the implications that legacy is linked both with stare decisis (legal precedent), which will affect future legal structure, and the court's credibility and power (and maybe by extension the power of law and the state in general). What does this teach us? That a priority of the court is the preservation of the court and the state. But also that to successfully work within the system, activist movements will have to justify how activist goals affect the power of the state. If activists want the state to aid them, they have to appear to be aiding the state. This phenomenon can be seen in Harlan's' justification for integration of the races because it will prevent future racial conflict and strengthen justification for rule of law and Ginsberg's argument that protections for voting rights are essential for the protection of democracy. On the other

side of this argument is Scalia's fear of overstepping federal power for the protection of homosexual rights.

In their dissents, all three justices make sure to appeal to both sympathetic and hostile audiences. They lack the binding legal power that a majority opinion holds and so find power by creating discourse in the public sphere. Part of that is justifying use of power to both audiences. Another part is using arguments that both audiences will connect with, which are a mix of three elements: technical, social, and historic. The technical side in this case is a mix of the judges' ethos as supreme court justices and the supposed knowledge and expertise that comes with that position and their use of legal arguments and quotations from past cases that also carry that ethos. This technical power is hard for hostile audiences to argue with and makes it hard for them to discredit an argument on purely emotional grounds. Then there's the social argument which uses cultural knowledge and allusions to connect with both sympathetic and hostile audiences, finding common ground and appealing to emotions either with their sympathy or fear or anger-constituting an audience off of these similarities. Then that can motivate audiences into action. There's the historical contextualizing of the agreement and the situation which presents a narrative and framing of the argument, constitutes the current reality and the audience, and makes the argument easier to understand and connect with emotionally. The mix of these three elements of an argument constitute both sympathetic and hostile audiences so that they'll see themselves in the author's argument and be motivated to act in reaction to it. With the calculated mix of technical, social, and historic argumentation, the dissents discussed in this thesis have achieved highly effective constitutive rhetoric. By emulating this tactic I believe activists could create their own pieces of constitutive

rhetoric to achieve maximum audience identification and engagement while minimizing negative blow back from hostile audiences and the state. Through dissents we can see how the technical and public spheres interact in Democracy. There is an issue that applies to the larger public sphere of the citizens of the state, but it is debated in and constrained by the technical language and regulations of the technical sphere of the law. A dissent takes this technical debate and reframes it to reappeal to already existing discourses and audiences in the public sphere.

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