

## Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices\*

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*Oral dissents identify some of the U.S. Supreme Court Justices' most deeply held minority opinions. While print dissents are published routinely, oral dissents are not systematically tracked. This article presents the results of an AALL grant-funded project to locate oral dissents issued from October 1969 through today, discusses the methodology used in compiling our list, and describes various aspects of oral dissents that may make some more difficult to find.*

I exercise the privilege we have—though rarely used—to dissent orally. This is a uniquely important case . . . .<sup>1</sup>

¶1 In the United States Supreme Court's early years, Justices only issued their opinions orally and individually, or "in seriatim, [with] the most junior justice speaking first." Written opinions were not issued. By Chief Justice John Marshall's tenure (1801–1835) that practice had ended and Justices delivered opinions for the Court as a whole.<sup>2</sup> Prior to 1940, there was a norm by which Justices did not issue dissents, but since the 1940s, dissents have become increasingly common.<sup>3</sup>

¶2 In modern times, when the Supreme Court hands down a decision, the Chief Justice announces that a result has been reached, and the author of the majority speaks briefly about the case. There is no advance notice to the public that an opinion will be announced. An oral dissent or "dissenting statement" is a decla-

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\* © Jill Duffy & Elizabeth Lambert, 2009. We would like to thank the extraordinary staff at the Supreme Court for providing context and suggesting avenues for our research and the fantastic staff at the Harvard Law School Library for the invaluable resource and publishing support. We especially thank Steve Young and Jade Vinson for their constant support and for going above and beyond the call of duty in tracking down leads, compiling our Excel table, and enduring a steady stream of opinion announcement listening (in the car, on vacations, etc.). We also gratefully thank the AALL Research Fund: An Endowment Established by LexisNexis for its research assistance. Among other things, the AALL Research Fund allowed us to travel to various sites housing Supreme Court Justices' papers, and supplied us with the audio equipment necessary to compile our list of oral dissents.

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1. Lewis F. Powell, Jr., *Dissent from the Bench* (June 4, 1979) (Lewis F. Powell, Jr. Papers, on file at the Washington and Lee University School of Law) (dissenting orally from *Davis v. Passman*, 442 U.S. 228 (1979)).

2. Jeff Bleich et al., *Dissenting from the Bench*, S.F. ATTORNEY, Spring 2008, at 30, 31.

3. Thomas Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 361–362, 363 fig.1 (1988).

ration that a Justice makes aloud in open court, immediately following the majority's announcement of the Courts opinion. Oral dissents are rare, occurring at most only a few times each year. They are an added gesture Justices make when they wish to underscore that, in their view, the majority opinion is flawed or fundamentally wrong.<sup>4</sup> While written dissenting opinions are common and routinely published, the dissenting statements Justices make in open court have not been systematically tracked or transcribed.<sup>5</sup> Except for the occasional reading of an entire opinion, such as Justice Stewart's reading of his entire dissenting opinion in *Fullilove v. Klutznick* (1980), Justices' dissenting statements may be worded differently from their published dissenting opinions.<sup>6</sup> Despite the potential value to Supreme Court researchers, few, if any, lists exist identifying the cases in which Justices have dissented orally.<sup>7</sup>

¶3 Our goal in writing this article was to compile as complete a list as possible of Supreme Court cases, from the Burger, Rehnquist, and Roberts Courts (October Term 1969–date<sup>8</sup>), in which an oral dissent was issued, along with citable support for each included case. The list appears in the accompanying appendix. As detailed in the methodology section, we used sources such as Supreme Court opinion announcement audio via The Oyez Project (Oyez) and the National Archives Records Administration (NARA), secondary sources, and the Justices' papers to

4. Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1. For a brief historical account of oral and written dissents, see Bleich et al., *supra* note 3, and Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001).

5. The *Journal of the Supreme Court of the United States* noted oral dissents sporadically in the 1990s and does so more comprehensively today. The Oyez Project has made great strides in increasing accessibility to the opinion announcement audio housed at the National Archives in College Park, Maryland. "The Oyez Project is a multimedia archive devoted to the Supreme Court of the United States and its work. It aims to be a complete and authoritative source for all audio recorded in the Court since the installation of a recording system in October 1955." The Oyez Project, About, <http://www.oyez.org/about> (last visited Oct. 30, 2009).

6. Listen, for example, to Justice Ginsburg's oral dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, which starts "Justice Alito announced four members of this Court . . . dissent from this decision . . ." and compare it with her written dissent, which starts "Lilly Ledbetter was a supervisor at Goodyear Tire and Rubber's plant in Gadsden, Alabama . . ." *Compare* The Oyez Project, *Ledbetter v. Goodyear Tire and Rubber Company*, [http://oyez.org/cases/2000-2009/2006/2006\\_05\\_1074](http://oyez.org/cases/2000-2009/2006/2006_05_1074) (last visited Nov. 12, 2009) (Opinion Announcement, Ginsburg, J., at 3:48), *with* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting). *See also* *Blackmun, in Unusual Action, Denounces 5-to-4 Ruling*, N.Y. TIMES, Nov. 3, 1976, at 83 [hereinafter *Blackmun Denounces Ruling*] ("Justice Blackmun's written dissent today, however, was not as critical as his oral opinion. Presumably, this was because in his written dissent he spoke for three other Justices as well.").

7. When we first began this project in early 2008, we were aware of the need for a list of Supreme Court cases receiving an oral dissent. While writing, that need was underscored by the request for and inclusion of our interim work in Lani Guinier, *The Supreme Court 2007 Term Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15 nn.44–45, 23 n.94, 24 n.98, 45 n.200, 46 n.207, 47 n.212, 119 n.545 (2008). Today, multiple groups seek to create oral dissent datasets. *See, e.g.*, Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560 (2009); William D. Blake & Hans J. Hacker, *The Brooding Spirit of the Law: Supreme Court Justices Reading Dissents from the Bench* (Jan. 15, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1328496>.

8. Each term of the U.S. Supreme Court encompasses the period from the first Monday occurring in October of a particular year through the day preceding the first Monday in October of the next year. SUP. CT. R. 3.

compile our list. In the final section of the article, we detail aspects of oral dissents that may make some of them more difficult to find.

¶4 Inevitably, as the Supreme Court moves forward with its caseload and as additional research tools become available, cases will be added to this list. We view this work as only a first step toward filling a bibliographic hole in Supreme Court research. In doing so, we hope to add to the historical record and to preserve the tradition of oral dissents.<sup>9</sup>

### Project History

¶5 We began this project at the height of oral dissent “season.”<sup>10</sup> What started out framed as one in-depth research question—in which Supreme Court cases since October Term 1969 was there an oral dissent?—became a myriad of individual questions: What is the condition of the opinion announcement audio at NARA? Where are the personal papers of the Justices serving on the Court since October Term 1969? What are the restrictions on those papers? What efforts to digitize opinion announcement audio exist? How do reporters refer to “oral dissents” in the news? All of these had to be answered before we could even begin to compile our list.

¶6 Despite our geographic distance from each other, we were able to work together to answer these questions and compile our results. While this project had technological and geographic challenges, unbeknownst to us we were approaching both a wave of interest in this topic and increased resources available for its completion.

### Methodology

¶7 At the outset, we compiled an Excel spreadsheet of Supreme Court cases using the Case Citation Finder from the Supreme Court’s web site.<sup>11</sup> The “master list,” as we dubbed it, listed the official citation for each Supreme Court case, from the Burger Court (October Term 1969) to the present.<sup>12</sup> We used the master list to keep track of which opinion announcements we listened to and note the oral dissents we found.

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9. See John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 272 (2005) (“Potter [Stewart] also is the Justice who told me that John Harlan asked him to make sure to preserve the tradition of making at least one oral announcement of a dissenting opinion each Term. It was shortly after Byron White and I advised Justice Scalia of that tradition that he delivered his first, and probably most notable, oral dissent in the independent counsel case.”).

10. Because the Supreme Court hands down many opinions late in the term, May, June, and July are popular, though not exclusive, months for oral dissents. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (decided Jan. 17, 1984) (Blackmun, J., dissenting orally).

11. U.S. Supreme Court, Case Citation Finder, <http://www.supremecourtus.gov/opinions/casfinder.html> (last visited Sept. 22, 2009).

12. We investigated using the ALLCOURT database compiled by Harold J. Spaeth and housed at the Judicial Research Initiative, <http://www.cas.sc.edu/poli/juri/sctdata.htm>, but did not have ready access to statistical software on our home computers and felt that a straightforward list with the names of the cases would be most useful to us in our compiling and annotating.

¶8 With the list in place, we determined that we needed to work on it collaboratively. We also began gathering copious amounts of supporting documentation, particularly news articles from ProQuest Historical Newspapers, and realized that we were in need of a central repository. After evaluating several vendors, including Google Docs, and receiving advice from a fellow law librarian, we began using Huddle to share our work with one another.<sup>13</sup>

### Supreme Court Resources

¶9 While we knew that oral dissents are not currently published in the *U.S. Reports*, we searched to see if they had been included earlier in the Court's history. We found only one instance of an oral dissent published in the *U.S. Reports*: a dissent by Justice Bradley in 1886.<sup>14</sup>

¶10 The *Journal of the Supreme Court of the United States*,<sup>15</sup> which contains the official minutes of the Court, did not begin consistently listing announcements of oral dissenting opinions until October Term 2002, using the language "Dissenting opinion announced by" in its opinion summaries. Prior to this time, the *Journal* noted some dissenting opinion announcements in its index or text, but not with reliable consistency. For example, the index from October Term 1998<sup>16</sup> contains Justice Scalia's oral dissent in *Chicago v. Morales*<sup>17</sup> but omits the fact that Justice Ginsburg read her dissent a week later in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*<sup>18</sup> In complex cases, it can be difficult to ferret out an oral dissent in the *Journal*. The language in the *Journal* entry for *Demore v. Kim*<sup>19</sup> illustrates how the summary of the holding does not allow for an easy search on "dissenting opinion announced."<sup>20</sup>

13. We are grateful to Kumar Jayasuriya for suggesting Huddle ([www.huddle.net](http://www.huddle.net)). Huddle allowed us to set up various folders in a password-protected environment and to store the changing versions of our master list and our supporting documentation in one workspace. Wikis, such as PBWorks, also offer an easy way to navigate through large amounts of material.

14. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 118 U.S. 210 (1886) ("An imperfect copy of [Justice Bradley's oral dissent] having found its way into print, he prepared and filed the following: . . ."). The majority opinion was published at 117 U.S. 312 (1886).

15. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, available at <http://www.supremecourtus.gov/orders/journal.html> (last visited Sept. 22, 2009).

16. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 1998, at III (1999), available at <http://www.supremecourtus.gov/orders/journal/jnl98.pdf> [hereinafter J. SUP. CT. OT 1998].

17. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

18. 527 U.S. 308 (1999).

19. 538 U.S. 510 (2003).

20. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2002, at 901 (2003), available at <http://www.supremecourtus.gov/orders/journal/jnl02.pdf> [hereinafter J. SUP. CT. OT 2002] ("Opinion announced by Justice Souter, with whom Justice Stevens and Justice Ginsburg join, concurring in part and dissenting in part. Opinion by Justice Breyer, concurring in part and dissenting in part."). Also, searching the PDFs themselves is not entirely reliable, as shown by the page break that appears in the entry for *Bell v. Thompson*, 545 U.S. 794 (2005). See JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2004, at 1071-72 (2005) available at <http://www.supremecourtus.gov/orders/journal/jnl04.pdf> [hereinafter J. SUP. CT. OT 2004] ("Dissenting opinion announced by Justice Breyer.").

¶11 The Justices' personal papers provided original, firsthand accounts of some oral dissents,<sup>21</sup> and valuable information about the Supreme Court audio recordings, but in other ways were not ideal sources of information for this project. As of this writing, only certain papers are open to researchers.<sup>22</sup> Due to copyright restrictions and the sheer volume of materials,<sup>23</sup> the papers are not online and, therefore, searching through them requires a researcher to be on site.<sup>24</sup> Moreover, oral dissent materials are not always where one may expect to find them. In the William O. Douglas Papers, for example, we discovered a memorandum verifying that Justice Douglas announced his dissents in *Younger v. Harris*<sup>25</sup> and *Boyle v. Landry*,<sup>26</sup> but the memorandum was contained in the *Perez v. Ledesma*<sup>27</sup> folder, another case that was announced on the same day.<sup>28</sup>

### Articles and Books

¶12 Most of our leads came from secondary sources, including newspapers in LexisNexis, Newspaper Archive, ProQuest, and Westlaw; journals and law reviews in HeinOnline, JSTOR, LexisNexis, Westlaw, and Google Scholar; and books in Google Books and HeinOnline. We quickly learned that the phrase “oral dissent” is not common terminology, so searching for phrases like “read aloud” or “from the

21. For a nonexhaustive list of oral dissent texts available in manuscript collections, see *infra* ¶¶ 29 and 30, and accompanying footnotes.

22. Of the Justices who served on the Court from October Term 1969–present, the papers of Justices Blackmun, Douglas, and Marshall (Library of Congress) and Justice Harlan II (Princeton) are open without restrictions. The papers of Justices Black and Brennan (Library of Congress), Powell (Washington and Lee) and Chief Justice Rehnquist (Stanford University) require permission or have restrictions imposed upon researchers. Portions of Chief Justice Rehnquist's papers, for example, are marked “closed during the lifetime of any member of the Supreme Court who served with William H. Rehnquist.” Online Archive of Calif., Register of the William H. Rehnquist Papers, <http://www.oac.cdlib.org/data/13030/tn/kt4z09r7tn/files/kt4z09r7tn.pdf> (last visited Nov. 24, 2009). Other arrangements, like the exclusive biographer agreement between Justice Brennan and biographer Stephen Wermiel, may provide additional challenges for researchers trying to access a Justice's papers. See Kate Coscarelli, *Adjournment Over, Brennan Biography Now Back on Track*, STAR-LEDGER (Newark, N.J.), Jan. 6, 2008, at 15. The papers of other Justices who served on the Court during this time period are currently closed. See, e.g., Warren E. Burger Collection, <http://swem.wm.edu/src/Burger.cfm> (last visited Nov. 12, 2009) (“In accordance with the donor agreement, the Warren E. Burger Papers will be closed to researchers until 2026.”); Tony Mauro, *Souter Seals Papers for a Half-Century*, NAT'L L.J., Aug. 31, 2009, at 17.

23. By way of reference, the Harry A. Blackmun Papers at the Library of Congress contain hundreds of case files, and materials can be requested four boxes at a time. See CONNIE L. CARTLEDGE ET AL., HARRY A. BLACKMUN: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS (2003), <http://hdl.loc.gov/loc.mss/eadmss.ms003030>.

24. We did, however, receive extraordinary long-distance assistance from archivists John Jacobs at Washington and Lee University School of Law and Sarah Wilson at Stanford Law School. We are indebted to them for their assistance with the Powell and Rehnquist Papers, respectively.

25. 401 U.S. 37 (1971).

26. 401 U.S. 77 (1971).

27. 401 U.S. 82 (1971).

28. Memorandum from William O. Douglas to Hugo L. Black (Feb. 20, 1971) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Box 1506, *Perez v. Ledesma* folder) [hereinafter Douglas Memorandum] (“In No. 2—*Younger v. Harris* and in No. 4—*Boyle v. Landry*, I will say a few words in dissent.”).

bench” in conjunction with “Supreme Court,” and other variations, proved useful.<sup>29</sup> Future researchers may find additional articles using variations of “high court” or “read aloud” or other language capturing a dissent from the bench, especially given the number of articles such searches yield; however, our searches generally produced the same articles and cases, reassuring us that we had exhausted the sources available to us.

¶13 Because authors do not always use the term “oral dissent” to describe a dissenting statement, the term is rarely indexed and, given the number of books about the Supreme Court and its Justices, we considered it most productive to stick with electronic searching for books.<sup>30</sup> Even when searching, we sometimes discovered problems with citations in books to the oral dissents such as citations only to the written opinion<sup>31</sup> or no citation for the proposition at all.<sup>32</sup>

¶14 We faced similar hurdles with respect to the results from our news searching. We discovered that many news articles used words like “said” or “delivered” with respect to dissenting opinions, but this language did not necessarily mean that the Justice spoke from the bench. Instead, it could simply refer to an opinion that was filed with the clerk of the Court. When news articles referenced oral dissents, it was sometimes necessary to perform a second search to determine the name of the case discussed. We found it most helpful if the news article gave identifying information, such as the case name or docket number,<sup>33</sup> but this was not always the case.<sup>34</sup> While cross-referencing was time consuming and detail oriented, electronic resources such as ProQuest Historical Newspapers and Google Books made this project significantly easier than it would have been just a few years ago. We expect that additional oral dissents will be revealed as advances in technology continue.

29. See *infra* Appendix for annotations quoting the variety of language that was found denoting oral dissents.

30. See, e.g., JOAN BISKUPIC, SANDRA DAY O’CONNOR 251 (2005) (“So it was a telling moment on March 4, 1991, when O’Connor for the first time in her tenure offered a dissent from the bench.”). This oral dissent was located through a Google Books search of the book. The index does not reference this material under “dissent,” “oral dissent,” “opinion,” or even “O’Connor,” and it would be difficult to locate manually without reading the book in its entirety. Nevertheless, we did read some books in their entirety, such as Linda Greenhouse’s *Becoming Justice Blackmun*, which contains copious references to the Blackmun papers. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2006).

31. See, e.g., HENRY J. ABRAHAM, *THE JUDICIARY* 229–30 (10th ed. 1996) (citing the written opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as authority that Justices Stewart and Stevens orally dissented).

32. See, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 401 (1994) (stating, without footnote, that Chief Justice Burger “took the unusual step of delivering his opinion orally, glaring down the bench at Powell as he read excerpts from his dissent” in *Brewer v. Williams*); J. Harvie Wilkinson III, *Goss v. Lopez: The Supreme Court as Superintendent*, 1975 SUP. CT. REV. 25, 45 (stating, without footnote, “[t]he decision provoked Mr. Justice Powell to his first verbal dissent from the bench”). Both authors clerked for Justice Powell, so it may be that their knowledge comes firsthand.

33. See, e.g., Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. TIMES, Apr. 27, 1995, at A1 (“The decision, *United States v. Lopez*, No. 93-1260.”); Charles Lane, *High Court Backs Vice President*, WASH. POST, June 25, 2004, at A1 (“The case is *Cheney v. the United States District Court for the District of Columbia*, No. 03-475.”).

34. See, e.g., *Justices, 5-4, Back Adult-Film Zoning*, N.Y. TIMES, June 25, 1976, at A1 (discussing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976)); John P. MacKenzie, *‘Fine-or-Jail’ Is Held Unfair*, WASH. POST, Mar. 3, 1971, at A1 (discussing *Boddie v. Connecticut*, 401 U.S. 371 (1971)). Neither article mentions the case name or docket number.

## Audio Recordings

¶15 Supreme Court opinion announcement audio is not comprehensive for this time frame. There are two sources for audio of opinion announcements—tapes available from the NARA and digital recordings available from the Oyez Project web site.

¶16 However, according to Oyez, not all opinion announcements were transmitted from the Supreme Court to NARA in the first place:

Though the Court recorded all public sessions, it did not always deliver all recorded sessions to the Archives. For a period in the 1980s, Court officials archived recordings from days of oral argument, withholding opinion announcements from its archival responsibility. The National Archives did not routinely accession opinion announcements, however. Thus, with access to the original master tapes submitted to the Archives, it is now possible to make public the announcement of opinions whenever possible. We do so whenever possible at The Oyez Project.<sup>35</sup>

¶17 Correspondence in the Justices' papers on this point is particularly illuminating. A 1991 memorandum to Justice White from Alfred Wong, then Marshal of the Supreme Court, reviewed the taping procedures with respect to oral arguments and opinion announcements. In the memo, Wong stated:

Over the years, all proceedings in the Courtroom were recorded, including opinions from the Bench. A period of a number of years followed where opinions were deliberately omitted. Then later all proceedings again were recorded. At the present time an attempt is being made to record opinions on a single tape. This is possible only on non-argument days. On argument days, the opinions are included just prior to beginning of oral argument. Needless to say, the recording of opinions over the years has been hodge-podge and guidance is necessary.<sup>36</sup>

Wong elaborated that the agreement between the Court and NARA with respect to the tapes did not expressly mention the opinion announcements and was primarily focused on the taping of oral arguments. As such, the Marshal's office sought counsel from the Conference as to whether recording of the opinion announcements could be discontinued.<sup>37</sup> A document entitled "Taping in the Courtroom," attached to the memo, detailed the procedures used by the Marshal's Office for making the recordings in the courtroom.<sup>38</sup>

¶18 Almost three weeks later, Justice Kennedy circulated a memorandum to the Conference summarizing the Justices' conclusion that they "agreed at [their] last meeting that [the Court] should tape the announcement of opinions from the bench."<sup>39</sup> Clarifying the release of the tapes at NARA, Justice Kennedy recommended "treating the tapes of oral announcements and tapes of arguments in the

35. The Oyez Project, *supra* note 5.

36. Memorandum from Alfred Wong, Marshal, to Justice White (May 10, 1991) (on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers, Box 512, folder 8) [hereinafter Wong Memorandum]; see also Tony Mauro, *Marshall Nugget*, LEGAL TIMES, Aug. 21, 1995, at 8 (summarizing correspondence in the Marshall Papers with respect to audio recordings).

37. The "Conference" here refers to the sitting Justices as a group.

38. Wong Memorandum, *supra* note 36.

39. Memorandum from Justice Anthony M. Kennedy to the Conference (May 29, 1991) (on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers, Box 512, folder 8).

same way.<sup>40</sup> The Court's response to the opinion announcement audio may have signaled a shift in views amongst Court members from just twenty years earlier. In January 1973, Justice Blackmun circulated a memorandum to the Conference<sup>41</sup> seeking review of his eight-page opinion announcement that he planned to release to the press for two upcoming abortion cases, *Roe v. Wade*<sup>42</sup> and *Doe v. Bolton*.<sup>43</sup> Justice Brennan wrote back to him, advising that "Our practice in the past has always been not to record oral announcements of opinions in order to avoid the possibility that the announcement will be relied upon as the opinion or as interpreting the filed opinion."<sup>44</sup> In this instance, Justice Brennan appeared to be referring to "recording" as the documentation of the opinion announcements, but it is still a strong message that opinion announcements are not legal authority and thus treated as subordinate to other proceedings before the Court.

¶19 The Supreme Court audio recordings at NARA vary in format, from reel-to-reel tapes to audio cassettes to compact discs.<sup>45</sup> Because the Court's agreement with NARA was to provide the oral arguments, transmittal of opinion announcement audio was not a primary goal. As such, opinion announcement audio is not in the collection for some cases, and NARA arranges the audio by oral argument date. In other words, to find an opinion announcement recording at NARA, one needs to cross-reference the recording containing the oral argument released on the same day as the opinion announcement. Because the Court often releases opinions on non-argument days, particularly at the end of the term, when most of the controversial cases are handed down, some audio simply does not exist in the collection. That said, the Court has started transmitting audio for non-argument day opinions, allowing for preservation of these announcements going forward.<sup>46</sup>

¶20 Originally, we planned to use Oyez's opinion announcement audio as a secondary check on our research.<sup>47</sup> When we started our project, there was significant audio content for only a handful of relevant terms on Oyez. During the course

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40. *Id.*

41. Memorandum from Harry A. Blackmun to the Conference (Jan. 16, 1973) (on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers, Box 98, folder 10 (70-18, *Roe v. Wade* case file)).

42. 410 U.S. 113 (1973).

43. 410 U.S. 179 (1973).

44. Memorandum from Justice William J. Brennan, Jr. to Justice Harry A. Blackmun (Jan. 17, 1973) (on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers, Box 98, folder 10 (70-18, *Roe v. Wade* case file)); see also TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 225–26 (2008) (summarizing the exchange between Blackmun and members of the Conference with respect to his planned opinion announcement in the abortion cases).

45. These materials are indexed in two loose-leaf binders for Record Group 267 and housed at the Motion Picture, Sound, and Video Research Room, National Archives and Records Administration, College Park, Maryland.

46. See, e.g., Audio tapes: 267.1031 (six tapes of opinion announcements, labeled with dates ranging from May 27, 1997 to June 27, 1997) (on file with Motion Picture, Sound, and Video Research Room, National Archives and Records Administration, College Park, Maryland). Holdings for the recordings are not consistent, and consultation with the staff at NARA is recommended.

47. The Oyez Project offers digital audio of selected Supreme Court oral arguments and, most recently, select opinion announcements. The Oyez Project, *supra* note 5. The term "Oyez" comes from the call "Oyez Oyez Oyez" (meaning "Hear Ye") announced at the start of each Supreme Court session. The Oyez Project, FAQ, <http://www.oyez.org/faq> (last visited Dec. 24, 2009).

of our research, however, Oyez released copious amounts of opinion announcement audio (and transcribed audio) making the site a primary source for information. As of this writing, Oyez has released over 2100 opinion announcements out of the more than 4500 opinion announcements for this time frame. Together, we listened to more than 2200 opinion announcements via Oyez's automatic RSS/Podcast/iTunes feed<sup>48</sup> and the NARA audio cassettes, logging our progress and any unusual occurrences, such as incomplete or incomprehensible recordings.<sup>49</sup> We were able to identify the Justice delivering the oral dissent by either a signal from one of the other Justices during the proceedings<sup>50</sup> or by the Justice's voice, corroborated by news accounts and the written dissenting opinion.

¶21 While greatly aiding our research and producing several "finds," not all opinion announcement audio for this time period is currently available via the Oyez web site, and some audio may simply not exist. Oyez is currently undertaking a project to load all the opinion announcement audio available at NARA to the Internet.<sup>51</sup>

¶22 Table 1 illustrates the extent of our audio examination. Given the breadth of this project, it was necessary to use the audio available at Oyez rather than consult the NARA audio as a matter of course.<sup>52</sup> We expect that the completeness of the audio listening portion will increase as additional opinion announcement audio is loaded to Oyez or, alternatively, if more time is devoted to listening the NARA recordings in the future.

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48. The feed enabled us to set up our computers to automatically track any new opinion announcements that were added to the site. Each case was checked off our master list after we listened to it on Oyez and confirmed whether it did or did not have a dissent.

49. See, e.g., The Oyez Project, *Kelly v. Robinson*, [http://www.oyez.org/cases/1980-1989/1986/1986\\_85\\_1033](http://www.oyez.org/cases/1980-1989/1986/1986_85_1033) (last visited Nov. 12, 2009) (cuts off at 0:08 after the Chief states that Justice Powell will deliver the opinion); The Oyez Project, *Rizzo v. Goode*, [http://www.oyez.org/cases/1970-1979/1975/1975\\_74\\_942](http://www.oyez.org/cases/1970-1979/1975/1975_74_942) (last visited Nov. 12, 2009) (audio speeds up and slows down during playback).

50. See, e.g., The Oyez Project, *Parker v. Levy*, [http://www.oyez.org/cases/1970-1979/1973/1973\\_73\\_206](http://www.oyez.org/cases/1970-1979/1973/1973_73_206) (last visited Nov. 24, 2009) (Justice Rehnquist stating, "Mr. Justice Stewart has filed a dissenting opinion which he will announce.").

51. The Oyez Project, *supra* note 5. In making these audio recordings accessible via the Internet, the Oyez Project has made significant contributions to studies such as this one. In the past, the only method available for studying the opinion announcements would have been to visit NARA in person.

52. Even NARA generally refers users to the Oyez web site for its ease of use over the archival audio collections. Telephone interview with Les Waffin, Chief, Motion Picture, Sound & Video Branch, NARA (June 11, 2009). Oyez will become an even more valuable resource once they have completed their project to add earlier opinion announcement audio.

Table 1

## Completeness of Audio Examination

Terms	Audio Checked <sup>53</sup>	Total Opinions Announced <sup>54</sup>	Percentage
1969–1971	0	391	0%
1972–1974	152	449	34%
1975–1977	418	436	96%
1978–1980	71	409	17%
1981–1983	153	462	33%
1984–1986	50	459	11%
1987–1989	138	425	32%
1990–1992	268	337	80%
1993–1995	208	252	83%
1996–1998	96	254	38%
1999–2001	223	236	94%
2002–2004	225	227	99%
2005–2007	212	214	99%
TOTAL	2214	4551	49%

Case Study: *Roe v. Wade*

¶23 An interesting, and somewhat overwhelming, aspect to this project was that any time we discovered a lead but could not confirm it, pursuing the lead became its own research question. For example, if an author claimed a Justice issued an oral dissent in a particular case, but only offered the written opinion as the source of authority, we would search news, journal, audio, book, and manuscript sources, among others, to try to substantiate the lead.

¶24 *Roe v. Wade*<sup>55</sup> provides a good example. Sources claimed that both Justice White and Justice Rehnquist read oral dissents in *Roe*. One book cited the written opinions in the case,<sup>56</sup> while another cited to a Bill Moyers interview of Justice

53. Includes logged cases from our master list for those listened to via Oyez (2154) and at NARA (sixty total: five from October Term 1979, thirteen from October Term 1992, twenty-seven from October Term 1995, and fifteen from October Term 1996). At the outset, we intended to exclude unanimous opinions from review, but decided to include them to catch any anomalies that may have occurred.

54. Compiled by adding the “Number of written opinions of the Court” and the “Per curiam opinions in argued cases” figures from the Statistics tables in the *Journal of the Supreme Court of the United States*. These numbers were selected because they reflected the same numbers used by Chief Justice Burger in a July 2, 1984, memorandum to the Conference about the status of opinions announced during October Term 1981–1983 (on file with the Library of Congress, Manuscript Division, William J. Brennan Jr. Papers, Box I:632, Opinion Announcements folder). We did not eliminate unanimous opinions from this total; thus the results could be even more complete than shown in the table, albeit only slightly.

55. 410 U.S. 113 (1973).

56. LAURIE COLLIER HILLSTROM, *DEFINING MOMENTS: ROE V. WADE* 59 (2008).

Blackmun in 1987.<sup>57</sup> Fortunately, we were able to track down the interview, now on the somewhat outdated technology of VHS, and watch it. In the interview, Justice Blackmun confirms at least one dissenting statement in *Roe*, but does not state who issued the oral dissent(s).<sup>58</sup>

¶25 Oyez provides the oral argument and the oral re-argument audio for *Roe v. Wade*, but not the opinion announcement audio. The index to the recordings at NARA shows no tape from the date of the decision, January 22, 1973. It was a Monday nonargument day and, at that time in the Court's history, the Court focused on recording oral arguments, not opinion announcements.

¶26 Although *Roe v. Wade* received widespread media attention, and still garners considerable commentary today, the focus tends to be on the decision itself, not the opinion announcement. Even Justice Blackmun commented that the case did not receive as much media attention as expected when first issued.<sup>59</sup> A check of several major newspapers, both on ProQuest and on microfilm at the Library of Congress, yielded nothing further regarding possible oral dissents.

¶27 The Blackmun Papers are similarly silent on the issue of oral dissents in this case, although Justice Blackmun, the author of the majority opinion, was known to keep meticulous files. Justice Blackmun's oral history interviews, however, did reveal that Justice White issued an oral dissent.<sup>60</sup> Yet, this still did not confirm whether Justice Rehnquist delivered his dissent from the bench. The Rehnquist papers for the 1972–1974 October Terms, the time period that includes the *Roe v. Wade* case file, were opened in late 2008.<sup>61</sup> Unfortunately, further research in these papers revealed nothing more. As of this writing, there is no authoritative evidence that Justice Rehnquist orally dissented in *Roe v. Wade*.<sup>62</sup>

¶28 In sum, our methodology allowed us to handle the various resource changes we experienced, such as the sudden increase in opinion announcement audio via

57. MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK DECISION THAT MADE ABORTION LEGAL* 300, 351 (1998) (citing “Blackmun, television interview with Bill Moyers, PBS, 1987”).

58. *In Search of the Constitution with Bill Moyers: Justice Harry A. Blackmun* (PBS television broadcast, 1987) (At approximately 33:00, discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986), Bill Moyers asks, “Why did you disagree so strongly in that case that you took the unusual tack of reading your dissent from the bench?” Justice Blackmun replies, “Well, about once a year, a dissent is announced from the bench. I’ve had it done against me. I had it done against me in *Roe* against *Wade*.”).

59. The Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, conducted by Professor Harold Hongju Koh, Yale Law School, July 6, 1994 to Dec. 13, 1995, at 492, available at <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09> [hereinafter Interviews with Justice Blackmun] (“On that very day, however, January 22, 1973, Lyndon B. Johnson died, and news of the abortion cases was distinctly secondary.”).

60. *Id.* (“It proved to be one of those rare instances when the dissent was announced separately from the bench. We do this perhaps once or twice a year to maintain what Stewart used to call ‘this art form.’ Byron White was rather emotional in delivering the dissent, and stressed the ‘raw judicial power’ business. Why was Byron White so strongly on that side of those cases? It surprised me a little, and I’ve never asked him.”).

61. Adam Liptak & Jonathan D. Glater, *Papers Offer A Close-Up of Rehnquist and the Court*, N.Y. TIMES, Nov. 18, 2008, at A12.

62. Several sources imply that Rehnquist also orally dissented, but offer no conclusive proof. See HILLSTROM, *supra* note 56, at 59; FAUX, *supra* note 57, at 300.

Oyez, and gave us the ability to follow many leads. As our case list filled in and we began to compile our results, we noticed some aspects of oral dissents that may be of particular interest to Supreme Court researchers, including the manner in which they are delivered and the types of opinions in which they occur.

## Characteristics of Oral Dissents

### Delivery of Oral Dissents

¶29 The way a Justice delivers a dissent from the bench may bear upon the likelihood of finding the text. Several of Justice Black's oral dissents have been described as "ad-libbed," such as his oral dissents in *Goldberg v. Kelly*<sup>63</sup> and *Whiteley v. Warden*,<sup>64</sup> suggesting that a prepared text may not exist (and may never have existed). Justice Blackmun, however, who recommended ending the tradition of announcing opinions from the bench, prepared dissenting statement *drafts*, many of which are available in his personal papers at the Library of Congress.<sup>65</sup> Justice Powell also prepared dissenting statement drafts, the texts of which are available in his personal papers at the Washington and Lee University School of Law.<sup>66</sup> The text of Justice Brennan's statement in *Regents of the University of California v. Bakke*<sup>67</sup> can be found amongst the twenty-four folders of material he kept for that case.<sup>68</sup> The files of other Justices are less complete. Justice Marshall's dissenting statement in *Milliken v. Bradley*<sup>69</sup> appears in his papers at the Library of Congress,<sup>70</sup> although

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63. 397 U.S. 254 (1970). John P. MacKenzie, *Relief Cutoff Without Hearing Barred*, WASH. POST, Mar. 24, 1970, at A1 ("Ad-libbing from the bench, Black said with fervor . . .").

64. 401 U.S. 560 (1971). John P. MacKenzie, *2 Justices Accuse Court of Bad Faith*, WASH. POST, Mar. 30, 1971, at A1 (describing Justice Black as providing a "15-minute ad lib discussion," while "the targets of the dissent—John M. Harlan, William O. Douglas, William J. Brennan Jr., Potter Stewart, Byron R. White and Thurgood Marshall—listened impassively . . .").

65. GREENHOUSE, *supra* note 30, at 43 (noting Justice Blackmun's distaste for opinion announcement). Oral dissent texts in the Harry A. Blackmun Papers at the Library of Congress, in the respective case files, include those prepared for: *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18 (1981); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); and *Herrera v. Collins*, 506 U.S. 390 (1993). The dissenting statement for *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), is a copy of the slip opinion with marked portions of text to be read.

66. The dissenting statement texts available include those prepared for: *Goss v. Lopez*, 419 U.S. 565 (1975) (noting "as delivered from bench the day this case was handed down"); *Castaneda v. Partida*, 430 U.S. 482 (1977) (noting "text of oral delivery of my dissent on 3/23"); *Agosto v. INS*, 436 U.S. 748 (1978) (including the line "what prompts me to speak at this length in dissent"); *TVA v. Hill*, 437 U.S. 153 (1978) (starting "I dissent orally"); and *Davis v. Passman*, 442 U.S. 228 (1979) (noting "dissent from the bench").

67. 438 U.S. 265 (1978).

68. See William J. Brennan, Statement on *Regents of the Univ. of Cal. v. Bakke*, Library of Congress, Manuscript Division, William J. Brennan Jr. Papers, box I:441, folder 3 (76-811, *Regents of the Univ. of Cal. v. Bakke*, file 5 of 24) (includes handwritten notations on typed manuscript that correspond with the audio on Oyez, as well as a note from Justice White stating "you were great" and requesting a copy of the statement).

69. 418 U.S. 717 (1974).

70. Thurgood Marshall, Statement on *Milliken v. Bradley*, Library of Congress, Manuscript Division, Thurgood Marshall Papers, box 131, folder 4 (73-434, *Milliken v. Bradley* case files) (marked "Read in Court by Justice Marshall").

other oral dissent texts, such as those from *Regents of the University of California v. Bakke* and *United States v. Ross*,<sup>71</sup> are not found there. Justice Douglas's and Justice Black's files offered occasional proof that they issued oral dissents, either through memoranda or news clippings, respectively, but their files did not contain any oral dissent texts.

¶30 Sometimes a Justice will read a dissenting statement on behalf of another Justice, as was the case in Justice Douglas's oral dissent in *Milliken v. Bradley*. Like Justice Marshall, Justice Douglas issued an oral dissent in *Milliken* but Justice Brennan delivered the statement on Justice Douglas's behalf. When one Justice announces a dissent on behalf of another, researchers may have trouble correctly identifying the person actually holding the dissenting view—especially researchers listening to audio—but may have the benefit of additional manuscript collection choices for retrieving the text.

### Type of Opinion

¶31 The type of opinion the Court issues can impact the finding process as well. Plurality opinions, in which there is no opinion supported by the majority of the Court, may be lengthy and intricate. The opinion announcement in *Regents of the University of California v. Bakke*,<sup>72</sup> for example, lasted over one hour—well over four times the length of most opinion announcements during this time period.<sup>73</sup> Justice Powell stated the judgment of the Court, followed by Justices Stevens, Brennan, Blackmun, and Marshall, who each announced their dissenting and concurring views. The announcement of plurality opinions may also sound unusual due to the number of speakers. For example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>74</sup> was authored and announced by three Justices—O'Connor, Kennedy, and Souter. Each read the majority opinion while Chief Justice Rehnquist announced his dissent.<sup>75</sup> Our list includes dissenting statements from plurality opinions.

¶32 Split majority rulings may also pose challenges to those listening to opinion announcement audio. Justice Stevens' dissenting statement in *United States v. Booker*<sup>76</sup> occurs in the middle of the opinion announcement, unlike most others, which occur at the end.<sup>77</sup> In *Booker*, Justice Stevens announced the opinion of the

71. 456 U.S. 798 (1982).

72. 438 U.S. 265 (1978).

73. The Oyez Project, *Regents of the University of California v. Bakke*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_811](http://oyez.org/cases/1970-1979/1977/1977_76_811) (last visited Nov. 13, 2009).

74. 505 U.S. 833 (1992).

75. The Oyez Project, *Planned Parenthood v. Casey*, [http://oyez.org/cases/1990-1999/1991/1991\\_91\\_744](http://oyez.org/cases/1990-1999/1991/1991_91_744) (last visited Nov. 12, 2009); *All Things Considered: SCOTUS Upholds Roe v. Wade with Restrictions* (NPR radio broadcast, June 29, 1992) (“Rehnquist also spoke from the bench, and in his written opinion, said that *Roe* should be reversed and that today's ruling leaves it only barely intact.”).

76. 543 U.S. 220 (2005).

77. *Arizona v. Fulminante*, 499 U.S. 279 (1991), is another example of this type of fractured opinion. Described by the Court as “another kettle of fish,” Justice White delivered the majority as to part of the opinion; Chief Justice Rehnquist then announced his three-part opinion, part of which is a dissent, part of which is the majority; and finally Justice White announced his oral dissent. The Oyez Project, *Arizona v. Fulminante*, [http://oyez.org/cases/1990-1999/1990/1990\\_89\\_839](http://oyez.org/cases/1990-1999/1990/1990_89_839) (last visited Nov. 13, 2009).

Court that the sentencing guidelines were unconstitutional as applied; then Justice Breyer announced the opinion of the Court with respect to the remedy. Before switching speakers, Justice Stevens stated: “Before Justice Breyer begins his announcement, I shall briefly state that the four Justices who do not join the Court’s remedial conclusion believe that it is not necessary to invalidate any part of the guidelines or the sentencing statute” and then explained the dissenters’ reasoning for these views.<sup>78</sup>

¶33 Similarly, concurring statements can be deceptive, as they sound like oral dissents but on closer examination prove to be otherwise. Concurring announcements occur when a Justice agrees with the majority’s holding but disagrees with its reasoning. By definition, concurring statements do not proclaim the minority view. We chose not to include them in our list of cases and did not search for them separately because they are not oral dissents, though we made note of oral concurring opinions when we encountered them along the way.<sup>79</sup> However, we did include oral statements when a Justice concurred in part and dissented in part, as we found them to be more akin to dissents than concurrences.<sup>80</sup>

¶34 As expected, many blockbuster cases had oral dissents, including cases on abortion, the death penalty, private sexual conduct, school busing, flag burning, and school desegregation.<sup>81</sup> But fairly technical cases garner dissenting statements too, such as Justice Blackmun’s oral dissent in *United States v. Foster Lumber Co.*,<sup>82</sup> a complicated tax case, described as “not one of general interest.”<sup>83</sup>

¶35 Adding to their unpredictable nature, we found that oral dissents occurred in close cases as well as in those in which only one Justice wrote in dissent. For example, under the Rehnquist Court (1986–2005) many 5-4, or otherwise close

78. The Oyez Project, *United States v. Booker*, [http://oyez.org/cases/2000-2009/2004/2004\\_04\\_104](http://oyez.org/cases/2000-2009/2004/2004_04_104) (last visited Nov. 12, 2009) (Opinion Announcement, Stevens, J., at 7:02). We declined to include Chief Justice Rehnquist’s one-sentence summary of the dissenting part of his opinion in *Arizona v. Fulminante* (1991) as an oral dissent because it appeared to be only a cursory mention in order to give context to the majority part of his opinion. See The Oyez Project, *Arizona v. Fulminante*, *supra* note 77 (Opinion Announcement, Rehnquist, C.J., at 1:21).

79. A non-exhaustive list of concurring opinion announcement cases for this time frame includes: *Gregg v. Georgia*, 428 U.S. 153 (1976) (White, J., concurring orally); *Proffitt v. Florida*, 428 U.S. 242 (1976) (White, J., concurring orally); *Jurek v. Texas*, 428 U.S. 262 (1976) (White, J., concurring orally); *California v. Texas*, 437 U.S. 601 (1978) (per curiam) (White, J., concurring orally); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (Stewart, J., concurring orally); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (Kennedy, J., concurring orally); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Scalia, J., reading Justice Kennedy’s concurrence from the bench); *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J., concurring orally); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring orally).

80. See, e.g., The Oyez Project, *Hamdi v. Rumsfeld*, [http://oyez.org/cases/2000-2009/2003/2003\\_03\\_6696](http://oyez.org/cases/2000-2009/2003/2003_03_6696) (last visited Nov. 12, 2009) (Opinion Announcement, Souter, J., at 8:36) (Justice Souter used most of his statement from the bench to summarize why he and Justice Ginsburg dissented from the plurality opinion.).

81. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Milliken v. Bradley*, 418 U.S. 717 (1974) (school busing); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (private sexual conduct); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Herrera v. Collins*, 506 U.S. 390 (1993) (death penalty); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school desegregation).

82. 29 U.S. 32 (1976).

83. *Blackmun Denounces Ruling*, *supra* note 6.

decisions received oral dissents,<sup>84</sup> such as Justice Stevens' oral dissent in *Texas v. Johnson*,<sup>85</sup> Justice Kennedy's oral dissent in *Alexander v. United States*,<sup>86</sup> and Justice Souter's oral dissent in *Alden v. Maine*.<sup>87</sup> In *Pacific Mutual Life Insurance v. Haslip*,<sup>88</sup> however, Justice O'Connor read her full, lone dissenting opinion—the first oral dissent of her tenure.<sup>89</sup>

¶36 Surprisingly, oral dissents even occurred in some per curiam opinions, such as Justice Douglas's oral dissents in *Jones v. State Board of Education*<sup>90</sup> and *United States v. Armour & Co.*<sup>91</sup> and Justice Stewart's oral dissent in *Kentucky v. Whorton*.<sup>92</sup> Because per curiam opinions are not signed by a particular Justice but rather are issued by the Court as a whole, they were unsuspected case candidates for oral dissents, yet provided unexpected finds.

¶37 Whatever can be said about searching for oral dissents, one thing is clear: Justices issue them when they feel strongly about the case at hand. Regarding his dissent in *Herrera v. Collins*,<sup>93</sup> Justice Blackmun stated "I suspect I felt rather strongly about that one, and thus, wrote and announced a dissent."<sup>94</sup> Justice Stevens once said he read a dissent from the bench because he "didn't want his views to get lost in the shuffle of the day's news."<sup>95</sup> Regarding his oral dissent in *Chicago v. Morales*,<sup>96</sup> Justice Scalia simply stated, "I think this is a very important case, and so . . . would like to state briefly, some of the reasons for my dissent."<sup>97</sup> If a search engine allowed researchers to search by the field "importance of issue to the Justice," our list would likely be complete.

## Conclusion

¶38 Our goal was to present as complete a list as possible of Supreme Court cases from the Burger, Rehnquist, and Roberts Courts (October Term 1969–cur-

84. This is true of the Burger and Roberts Courts as well. In the Burger Court, compare *Sierra Club v. Morton*, 405 U.S. 727 (1972) (4-3) (Douglas, J., and Blackmun, J., dissenting orally), with *Younger v. Harris*, 401 U.S. 37 (1971) (8-1) (Douglas, J., dissenting orally). In the Roberts Court, compare *Rapanos v. United States*, 547 U.S. 715 (2006) (5-4) (Stevens, J., dissenting orally), with *Scott v. Harris*, 550 U.S. 372 (2007) (8-1) (Stevens, J., dissenting orally).

85. 491 U.S. 397 (1989).

86. 509 U.S. 544 (1993).

87. 527 U.S. 706 (1999).

88. 499 U.S. 1 (1991).

89. Letter from Justice O'Connor to Justice Powell (Mar. 6, 1991) (on file with the Lewis F. Powell, Jr. Papers, Washington and Lee University School of Law); Ruth Marcus, *Justices Reject Limit on Punitive Damages*, WASH. POST, Mar. 5, 1991, at A1.

90. 397 U.S. 31 (1970).

91. 402 U.S. 673 (1971).

92. 441 U.S. 786 (1979).

93. 506 U.S. 390 (1993).

94. Letter from Justice Blackmun to Ms. Holt (Feb. 4, 1993) (on file with the Personal Papers of Harry A. Blackmun, Library of Congress, Box 620) (regarding *Herrera v. Collins*).

95. Joan Biskupic, *Voicing Supreme Dissent: Rare, Loud and Clear*, WASH. POST, July 5, 1999, at A19.

96. 527 U.S. 41 (1999).

97. The Oyez Project, *Chicago v. Morales*, [http://oyez.org/cases/1990-1999/1998/1998\\_97\\_1121](http://oyez.org/cases/1990-1999/1998/1998_97_1121) (last visited Nov. 12, 2009) (Opinion Announcement, Scalia, J., at 4:51).

rent) in which an oral dissent was issued, along with citable support for each included case. Ultimately, we would like to share our results with organizations that are compiling freely accessible versions of Supreme Court data, such as the Oyez Project or the Supreme Court Database.<sup>98</sup> In the future, we hope to begin adding oral dissents prior to October Term 1969, and we welcome leads and comments regarding our work.

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98. The Supreme Court Database is housed at <http://scdb.wustl.edu> (last visited Nov. 20, 2009) It seeks to make the Spaeth ALLCOURT database materials more user-friendly by providing a front-end web interface.

## Appendix

### Oral Dissents, October Term 1969–Present

¶39 This list contains 119 oral dissents, grouped by the term in which they were decided, in ascending order by *United States Reports* citation. In cases with multiple dissents, each Justice’s dissent is listed separately, in ascending order of seniority. We have not included cases in this list unless we could verify the oral dissent through a contemporaneous authority, such as the audio recording, a news article from the time period, or the Justices’ papers. Additionally, the list is not exhaustive in terms of sources. For brevity, we included only two or three sources per dissent.

¶40 Because concurring statements do not proclaim the minority view, they are not included in this list. We did include statements for opinions that were concurring in part and dissenting in part. If an oral dissent was issued in addition to an oral concurrence or a fractured majority opinion, such as a plurality or a split majority, it is included in this list.<sup>99</sup>

#### October Term 1969

Douglas: *Jones v. State Board of Education*, 397 U.S. 31 (1970) (per curiam)<sup>100</sup>

Black: *Goldberg v. Kelly*, 397 U.S. 254 (1970)<sup>101</sup>

Douglas: *Walz v. Tax Commission*, 397 U.S. 664 (1970)<sup>102</sup>

Douglas: *United States v. Armour & Co.*, 398 U.S. 268 (1970) (per curiam)<sup>103</sup>

#### October Term 1970

Douglas: *Younger v. Harris*, 401 U.S. 37 (1971)<sup>104</sup>

Douglas: *Boyle v. Landry*, 401 U.S. 77 (1971)<sup>105</sup>

Black: *Boddie v. Connecticut*, 401 U.S. 371 (1971)<sup>106</sup>

Black: *Whiteley v. Warden*, 401 U.S. 560 (1971)<sup>107</sup>

99. See, e.g., The Oyez Project, *Rapanos v. United States*, [http://www.oyez.org/cases/2000-2009/2005/2005\\_04\\_1034](http://www.oyez.org/cases/2000-2009/2005/2005_04_1034) (last visited Nov. 12, 2009) (Kennedy, J., concurring orally, and Stevens, J., dissenting orally); The Oyez Project, *Planned Parenthood v. Casey*, [http://www.oyez.org/cases/1990-1999/1991/1991\\_91\\_744](http://www.oyez.org/cases/1990-1999/1991/1991_91_744) (last visited Nov. 12, 2009) (majority opinion read by O’Connor, Kennedy, and Souter, JJ.; dissenting opinion read by Rehnquist, C.J.).

100. John P. MacKenzie, *Supreme Court Dismisses Campus Free-Speech Plea*, WASH. POST, Feb. 25, 1970, at A9 (“In announcing his dissent from the bench, Douglas departed from his text to note . . .”).

101. John P. MacKenzie, *supra* note 63 (“Ad-libbing from the bench, Black said with fervor . . .”).

102. John P. MacKenzie, *Court Backs Church Tax Exemption*, WASH. POST, May 5, 1970, at A1 (“Only Justice William O. Douglas, declaring from the bench that he took the ‘strict constructionist’ view of the Bill of Rights . . .”).

103. John P. MacKenzie, *Armour Antitrust Action Dismissed*, WASH. POST, June 2, 1970, at D7 (“Douglas asked from the bench in announcing his dissent.”).

104. Fred P. Graham, *Justices Curtail U.S. Courts’ Role in State Trials*, N.Y. TIMES, Feb. 24, 1971, at 1 (“In a dissent from the bench, Justice Douglas called the day’s decisions an ‘inquest upon the famous case of Dombrowski.’”); Douglas Memorandum, *supra* note 28 (“In No. 2—*Younger v. Harris* and in No. 4—*Boyle v. Landry*, I will say a few words in dissent.”).

105. Douglas Memorandum, *supra* note 28.

106. MacKenzie, *supra* note 34 (“It prompted a long oral dissent from the bench by Black.”).

107. MacKenzie, *supra* note 64, at A1 (“All the targets of the Black and Burger dissent—John

**October Term 1971**

Blackmun: *Sierra Club v. Morton*, 405 U.S. 727 (1972)<sup>108</sup>

Douglas: *Sierra Club v. Morton*, 405 U.S. 727 (1972)<sup>109</sup>

**October Term 1972**

White: *Roe v. Wade*, 410 U.S. 113 (1973)<sup>110</sup>

Douglas: *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973)<sup>111</sup>

**October Term 1973**

Stewart: *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974)<sup>112</sup>

Stewart: *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)<sup>113</sup>

Stewart: *Cardwell v. Lewis*, 417 U.S. 583 (1974)<sup>114</sup>

Stewart: *Parker v. Levy*, 417 U.S. 733 (1974)<sup>115</sup>

Marshall: *Milliken v. Bradley*, 418 U.S. 717 (1974)<sup>116</sup>

Douglas (read by Brennan): *Milliken v. Bradley*, 418 U.S. 717 (1974)<sup>117</sup>

M. Harlan, William O. Douglas, William J. Brennan Jr., Potter Stewart, Byron R. White and Thurgood Marshall—listened impassively as Black delivered his dissent from Harlan’s majority opinion [and] [t]hen, before launching a 15-minute ad lib discussion, Black read that the decision . . .”).

108. Memorandum from KRR [Kenneth R. Reed], Law Clerk, to William O. Douglas (Apr. 19, 1972) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Box 1545, *Sierra Club v. Morton* folder) [hereinafter Reed Memorandum] (“Mr. Justice Blackmun desires to deliver his dissent orally from the bench but . . . he will not do so unless you also deliver your dissent orally. He therefore requests that you dissent orally today.”); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 197 (1979) (quoting memorandum to Douglas, without footnotes); Sam Kalen, *Standing on Its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 16 n.89 (1997) (stating that “Justices Douglas and Blackmun ‘felt so strongly about their dissents’ that they read ‘them from the bench when the decision was announced’” (quoting ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 723 (2d ed. 1996)).

109. See Reed Memorandum, *supra* note 108; WOODWARD & ARMSTRONG, *supra* note 108, at 197 (“Douglas read his dissent aloud.”).

110. Interviews with Justice Blackmun, *supra* note 59, at 492 (“It proved to be one of those rare instances when the dissent was announced separately from the bench.”).

111. Glen Elsasser, *Aviation Fuel Tax Is Upheld*, CHI. TRIB., Mar. 6, 1973, at A4 (“The 6 to 3 decision provoked the first oral dissent of the court’s current term when Justice William O. Douglas charged from the bench that the court, for the first time, was approving a state’s meddling in interstate commerce.”).

112. The Oyez Project, *Super Tire Engineering Co. v. McCorkle*, [http://oyez.org/cases/1970-1979/1973/1973\\_72\\_1554](http://oyez.org/cases/1970-1979/1973/1973_72_1554) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 2:43).

113. The Oyez Project, *Mitchell v. W.T. Grant Co.*, [http://oyez.org/cases/1970-1979/1973/1973\\_72\\_6160](http://oyez.org/cases/1970-1979/1973/1973_72_6160) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 1:25).

114. The Oyez Project, *Cardwell v. Lewis*, [http://oyez.org/cases/1970-1979/1973/1973\\_72\\_1603](http://oyez.org/cases/1970-1979/1973/1973_72_1603) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 3:59).

115. John P. MacKenzie, *Military Code Is Upheld*, WASH. POST, June 20, 1974, at A1 (“Stewart’s dissenting opinion, which he read slowly from the bench . . .”); The Oyez Project, *Parker v. Levy*, [http://oyez.org/cases/1970-1979/1973/1973\\_73\\_206](http://oyez.org/cases/1970-1979/1973/1973_73_206) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 4:18).

116. The Oyez Project, *Milliken v. Bradley*, [http://oyez.org/cases/1970-1979/1973/1973\\_73\\_434](http://oyez.org/cases/1970-1979/1973/1973_73_434) (last visited Nov. 13, 2009) (Opinion Announcement, Marshall, J., at 24:39).

117. *Id.* (Opinion Announcement, Brennan, J., reading for Douglas, J., at 18:25).

**October Term 1974**

Powell: *Goss v. Lopez*, 419 U.S. 565 (1975)<sup>118</sup>

**October Term 1975**

Stewart: *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)<sup>119</sup>

Stewart: *North v. Russell*, 427 U.S. 328 (1976)<sup>120</sup>

Marshall: *Gregg v. Georgia*, 428 U.S. 153 (1976)<sup>121</sup>

White: *Woodson v. North Carolina*, 428 U.S. 280 (1976)<sup>122</sup>

White: *Roberts v. Louisiana*, 428 U.S. 325 (1976)<sup>123</sup>

Blackmun: *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976)<sup>124</sup>

**October Term 1976**

Burger: *Brewer v. Williams*, 430 U.S. 387 (1977)<sup>125</sup>

Powell: *Castaneda v. Partida*, 430 U.S. 482 (1977)<sup>126</sup>

Brennan: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)<sup>127</sup>

Marshall: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)<sup>128</sup>

118. John P. MacKenzie, *Court Extends Pupils' Rights on Suspension*, WASH. POST, Jan. 23, 1975, at A1 ("Justice Powell, who like most of the court's members ordinarily does not discuss his dissents from the bench, made an exception and delivered key excerpts from the dissenting opinion in open court.").

119. *Justices, 5-4, Back Adult-Film Zoning*, *supra* note 34 ("[Justice Stewart] gave his dissent added emphasis by reading aloud from it in court this morning after Justice Stevens announced the decision."); The Oyez Project, *Young v. American Mini Theatres*, [http://oyez.org/cases/1970-1979/1975/1975\\_75\\_312](http://oyez.org/cases/1970-1979/1975/1975_75_312) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 3:07).

120. The Oyez Project, *North v. Russell*, [http://oyez.org/cases/1970-1979/1975/1975\\_74\\_1409](http://oyez.org/cases/1970-1979/1975/1975_74_1409) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 0:24).

121. The Oyez Project, *Gregg v. Georgia*, [http://oyez.org/cases/1970-1979/1975/1975\\_74\\_6257](http://oyez.org/cases/1970-1979/1975/1975_74_6257) (last visited Nov. 13, 2009) (Opinion Announcement, Marshall, J., at 14:35).

122. The Oyez Project, *Woodson v. North Carolina*, [http://oyez.org/cases/1970-1979/1975/1975\\_75\\_5491](http://oyez.org/cases/1970-1979/1975/1975_75_5491) (last visited Nov. 13, 2009) (Opinion Announcement, White, J., at 13:18).

123. The Oyez Project, *Roberts v. Louisiana*, [http://oyez.org/cases/1970-1979/1975/1975\\_75\\_5844](http://oyez.org/cases/1970-1979/1975/1975_75_5844) (last visited Nov. 13, 2009) (Opinion Announcement, White, J., at 3:05).

124. *Blackmun Denounces Ruling*, *supra* note 6 ("In an unusual statement from the bench, Supreme Court Justice Harry A. Blackmun angrily denounced today a decision in favor of the Government . . ."); The Oyez Project, *United States v. Foster Lumber Co.*, [http://oyez.org/cases/1970-1979/1975/1975\\_74\\_799](http://oyez.org/cases/1970-1979/1975/1975_74_799) (last visited Nov. 13, 2009) (Opinion Announcement, Blackmun, J., at 2:42).

125. Morton Mintz, *High Court, 5-4, Rejects Dilution Of Miranda Rule*, WASH. POST, Mar. 24, 1977, at A1 ("Moreover, Chief Justice Warren E. Burger, in a rare action, read aloud a 15-page dissent attacking the decision . . ."); Lesley Oelsner, *Justices Spurn States' Plea to Void Miranda Ruling*, N.Y. TIMES, Mar. 24, 1977, at A1 ("[W]ith Chief Justice Warren E. Burger taking the unusual step of expressing an emotional dissent from the bench in open court."); The Oyez Project, *Brewer v. Williams*, [http://oyez.org/cases/1970-1979/1976/1976\\_74\\_1263](http://oyez.org/cases/1970-1979/1976/1976_74_1263) (last visited Nov. 13, 2009) (Opinion Announcement, Burger, C.J., at 3:13).

126. *Court Finds Jury Can Be Biased Even Against a "Governing Majority"*, N.Y. TIMES, Mar. 24, 1977, at A19 ("The ruling drew several sharp dissents, . . . including one spoken from the bench in open court, by Lewis F. Powell Jr."); The Oyez Project, *Castaneda v. Partida*, [http://oyez.org/cases/1970-1979/1976/1976\\_75\\_1552](http://oyez.org/cases/1970-1979/1976/1976_75_1552) (last visited Nov. 13, 2009) (Opinion Announcement, Powell, J., at 4:26).

127. The Oyez Project, *Regents of the University of California v. Bakke*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_811](http://oyez.org/cases/1970-1979/1977/1977_76_811) (last visited Nov. 13, 2009) (Opinion Announcement, Brennan, J., at 21:45).

128. *Id.* (Opinion Announcement, Marshall, J., at 50:35).

Blackmun: *Regents of the University of California v. Bakke*, 438 U. S. 265 (1978)<sup>129</sup>  
 Stevens: *Regents of the University of California v. Bakke*, 438 U. S. 265 (1978)<sup>130</sup>

### October Term 1977

Stewart: *Stump v. Sparkman*, 435 U.S. 349 (1978)<sup>131</sup>  
 Stewart: *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)<sup>132</sup>  
 Powell: *Agosto v. INS*, 436 U.S. 748 (1978)<sup>133</sup>  
 Powell: *TVA v. Hill*, 437 U.S. 153 (1978)<sup>134</sup>  
 Stewart: *Parker v. Flook*, 437 U.S. 584 (1978)<sup>135</sup>  
 Stevens: *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)<sup>136</sup>

### October Term 1978

Stewart: *Kentucky v. Whorton*, 441 U.S. 786 (1979) (per curiam)<sup>137</sup>  
 Powell: *Davis v. Passman*, 442 U.S. 228 (1979)<sup>138</sup>  
 Blackmun: *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979)<sup>139</sup>

129. *Id.* (Opinion Announcement, Blackmun, J., at 39:55).

130. *Id.* (Opinion Announcement, Stevens, J., at 13:19).

131. Morton Mintz, *High Court Rules Judge Isn't Liable*, WASH. POST, Mar. 29, 1978, at A1 (“In recent years, dissenters only infrequently have given opinions from the bench. Yesterday, however, Justice Potter Stewart read aloud most of his five-page dissent . . . Chief Justice Warren E. Burger, one of the majority, was at Stewart’s right as the dissenter spoke in a strong, controlled voice. As one cutting phrase tumbled on another, Burger’s face reddened. Other justices also appeared to be uncomfortable. The tension struck observers as almost palpable.”); The Oyez Project, *Stump v. Sparkman*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_1750](http://oyez.org/cases/1970-1979/1977/1977_76_1750) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 2:35).

132. The Oyez Project, *Lafayette v. Louisiana Power & Light Co.*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_864](http://oyez.org/cases/1970-1979/1977/1977_76_864) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 2:25).

133. The Oyez Project, *Agosto v. INS*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_1410](http://oyez.org/cases/1970-1979/1977/1977_76_1410) (last visited Nov. 13, 2009) (Opinion Announcement, Powell, J., at 2:28).

134. Glen Elsasser & Jack Fuller, *Supreme Court Rejects TVA Dam to Save Tiny Fish*, CHI. TRIB., June 16, 1978, at 2 (“Justice Lewis Powell delivered a biting oral dissent.”); Warren Weaver Jr., *High Court Bars Dam, Reprising Rare Fish*, N.Y. TIMES, June 16, 1978, at A1 (“Presenting a summary of his dissent from the bench this morning, Justice Powell predicted . . .”); The Oyez Project, *TVA v. Hill*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_1701](http://oyez.org/cases/1970-1979/1977/1977_76_1701) (last visited Nov. 13, 2009) (Opinion Announcement, Powell, J., at 4:38).

135. The Oyez Project, *Parker v. Flook*, [http://oyez.org/cases/1970-1979/1977/1977\\_77\\_642](http://oyez.org/cases/1970-1979/1977/1977_77_642) (last visited Nov. 13, 2009) (Opinion Announcement, Stewart, J., at 7:46).

136. The Oyez Project, *Houchins v. KQED Inc.*, [http://oyez.org/cases/1970-1979/1977/1977\\_76\\_1310](http://oyez.org/cases/1970-1979/1977/1977_76_1310) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 11:05).

137. Morton Mintz, *‘Innocence’ Instruction to Jury Not Always Needed, Court Says*, WASH. POST, May 22, 1979, at A2 (“The ruling drew a sharp dissent, underscored by Justice Potter Stewart when he read it aloud from the bench.”).

138. Morton Mintz, *Hill Not Exempt from Bias Suits, Court Rules, 5 to 4*, WASH. POST, June 6, 1979, at A1 (“In addition, exercising the right to dissent orally, Powell contended that the rationale of the ruling cannot be limited to Capitol Hill.”).

139. Linda Greenhouse, *Justices, 5-4, Limit Courtroom Access by Press and Public*, N.Y. TIMES, July 3, 1979, at A1 (“Associate Justice Harry A. Blackmun wrote a dissenting opinion and took the unusual step of reading excerpts from the bench this morning.”).

**October Term 1979**

Stevens: *Harris v. McRae*, 448 U.S. 297 (1980)<sup>140</sup>

Stevens: *Fullilove v. Klutznick*, 448 U.S. 448 (1980)<sup>141</sup>

Stewart: *Fullilove v. Klutznick*, 448 U.S. 448 (1980)<sup>142</sup>

**October Term 1980**

Blackmun: *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981)<sup>143</sup>

Stewart: *Michigan v. Summers*, 452 U.S. 692 (1981)<sup>144</sup>

**October Term 1981**

Blackmun: *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982)<sup>145</sup>

Marshall: *United States v. Ross*, 456 U.S. 798 (1982)<sup>146</sup>

**October Term 1982**

White: *INS v. Chadha*, 462 U.S. 919 (1983)<sup>147</sup>

140. Glen Elsasser, *Uphold Welfare Abortion Curbs*, CHI. TRIB., July 1, 1980, at 1 (“Justice John Paul Stevens, a former federal judge in Chicago, read from his dissenting opinion . . .”).

141. Audio tape: 267.322 (tape 6 of 6) (on file with Motion Picture, Sound, and Video Research Room, National Archives and Records Administration, College Park, Maryland).

142. *Id.* Memorandum from Potter Stewart to Warren E. Burger (June 30, 1980) (on file with the Library of Congress, Manuscript Division, Justice Harry A. Blackmun Papers, Box 303, *Fullilove v. Klutznick* folder) (“In my annual effort to preserve the art form, I plan to announce my dissenting opinion in this case on Wednesday.”).

143. Fred Barbash, *Courts Can Take Child from Parents Without Providing Lawyer*, JUSTICES SAY, WASH. POST, June 2, 1981, at A1 (“Blackmun [took] the unusual step of announcing his dissent from the bench.”); *Supreme Court Roundup: Right to Aid in Custody Cases Is Upset*, N.Y. TIMES, June 2, 1981, at B9 (“In one of the most emotionally charged dissents of the judicial term, Associate Justice Harry A. Blackmun, who took the unusual step this morning of announcing his dissenting views from the bench, said that the majority’s conclusion was ‘virtually incredible.’”).

144. Fred Barbash, *Court Deadlocks on Wiretap Suit Against Nixon*, WASH. POST, June 23, 1981, at A1 (“Justice Potter Stewart, joined by Brennan and Marshall, read a strongly worded dissent from the bench yesterday.”); *Supreme Court Widens Police Power on Warrants*, N.Y. TIMES, June 23, 1981, at A15 (“The decision provoked a strong dissent from Associate Justice Potter Stewart who, in his first appearance on the bench since he announced that he would retire next month, took the relatively unusual step of announcing his dissenting views in the courtroom.”).

145. Fred Barbash, *Dissent Sees ‘Hostility’ Toward Foreign-Born*, WASH. POST, Jan. 13, 1982, at A1 (“The decision produced an unusually strong dissent, read in full from the bench by Justice Harry A. Blackmun.”); The Oyez Project, *Cabell v. Chavez-Salido*, [http://oyez.org/cases/1980-1989/1981/1981\\_80\\_990](http://oyez.org/cases/1980-1989/1981/1981_80_990) (last visited Nov. 13, 2009) (Opinion Announcement, Blackmun, J., at 1:14).

146. Jim Mann, *Court Broadens Police Power to Search Cars*, L.A. TIMES, June 2, 1982, at B1 (“Marshall took the unusual step of reading most of his dissent in open court, apparently to show his displeasure with the ruling.”).

147. Fred Barbash, *Decision Alters Balance of Power in Government*, WASH. POST, June 24, 1983, at A1 (“‘I have not spoken orally in dissent in many years,’ White said from the bench yesterday. ‘But this is no ordinary case. It is probably the most important case the court has handed down in many years.’”); Linda Greenhouse, *Supreme Court, 7-2, Restricts Congress’s Right to Overrule Actions by Executive Branch*, N.Y. TIMES, June 24, 1983, at A1 (“[Chief Justice Burger] then said that Justice White would read a dissenting opinion. Justice White said it had been many years since he had read an oral dissent aloud. ‘But this is probably the most important case the Court has handed down in many years,’ he said, calling the decision a ‘destructive action’ that was ‘clearly wrong and unnecessarily broad.’”).

**October Term 1983**

Blackmun: *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)<sup>148</sup>

Stevens: *Hudson v. Palmer*, 468 U.S. 517 (1984)<sup>149</sup>

**October Term 1984**

None found

**October Term 1985**

Blackmun: *Bowers v. Hardwick*, 478 U.S. 186 (1986)<sup>150</sup>

**October Term 1986**

Stevens: *McNally v. United States*, 483 U.S. 350 (1987)<sup>151</sup>

**October Term 1987**

Scalia: *Morrison v. Olson*, 487 U.S. 654 (1988)<sup>152</sup>

**October Term 1988**

Stevens: *Texas v. Johnson*, 491 U.S. 397 (1989)<sup>153</sup>

Blackmun: *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)<sup>154</sup>

148. Fred Barbash, *Viewer Videotaping of TV Programs Upheld*, WASH. POST, Jan. 18, 1984, at A1 (“Dissenting Justice Harry A. Blackmun . . . [read] from the bench for added emphasis . . .”).

149. Al Kamen, *Stricter Limits Set on Inmates’ Rights*, WASH. POST, July 4, 1984, at A1 (“The prison-search ruling prompted Justice John Paul Stevens to take the rare step of reading a dissent from the bench. Stevens said he is concerned that what the court had done might get lost in the rush of other ‘newsworthy’ opinions handed down yesterday.”); *Prisoners Forfeit Rights to Privacy, Justices Say*, N.Y. TIMES, July 4, 1984, at B5 (“Associate Justice John Paul Stevens wrote a dissenting opinion that he took the unusual step of reading from the bench this morning.”).

150. Al Kamen, *Court Upholds State Law Prohibiting Sodomy, 5-4*, WASH. POST, July 1, 1986, at A1 (“Justice Harry A. Blackmun [took] the unusual step of reading major portions of a harsh dissent from the bench . . .”); Stuart Taylor, Jr., *High Court, 5-4, Says States Have the Right to Outlaw Private Homosexual Acts*, N.Y. TIMES, July 1, 1986, at A1 (“The announcement of the decision was unusually dramatic, with Associate Justices Byron R. White, author of the majority opinion, and Harry A. Blackmun, author of an impassioned dissent, both reading detailed passages from the bench.”).

151. Stuart Taylor, Jr., *Justices Narrow Mail Fraud Scope*, N.Y. TIMES, June 25, 1987, at A1 (“Justice Stevens was so upset by the decision that he read portions of his opinion aloud from the bench today. No member of the Court has done that for almost a year.”).

152. Al Kamen, *Court Upholds Independent Counsel Law*, WASH. POST, June 30, 1988, at A1 (“The lone dissenter, Justice Antonin Scalia, read an unusual and impassioned dissent from the bench, accusing the court majority of ignoring constitutional principles and saying the decision ‘departs from the text of the Constitution and gives no reason.’ Scalia said he was reading his dissent because the decision ‘is one of the most important opinions this court has issued in many years.’”).

153. Al Kamen, *Court Nullifies Flag-Desecration Laws*, WASH. POST, June 22, 1989, at A1 (“Justice John Paul Stevens, a member of the minority, took the unusual step of reading his opinion from the bench.”); Ruth Marcus, *Justices Overturn Federal Flag Law*, WASH. POST, June 12, 1990, at A1 (“[U]nlike last year, [Justice Stevens] did not read his dissent from the bench.”).

154. Linda Greenhouse, *Supreme Court, 5-4, Narrowing Roe v. Wade, Upholds Sharp State Limits on Abortions*, N.Y. TIMES, July 4, 1989, at A1 (“Then Justice Harry A. Blackmun, the author of the *Roe v. Wade* opinion, read his dissent in a weary and sorrowful tone.”); Al Kamen, *5-4 Ruling Stops Short of Overturning ‘Roe,’* WASH. POST, July 4, 1989, at A1 (“Blackmun, who wrote the majority opinion in *Roe*, read his dissent from the bench to a hushed courtroom.”).

**October Term 1989**

Scalia: *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)<sup>155</sup>

**October Term 1990**

O'Connor: *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)<sup>156</sup>

White: *Arizona v. Fulminante*, 499 U.S. 279 (1991)<sup>157</sup>

Stevens: *Payne v. Tennessee*, 501 U.S. 808 (1991)<sup>158</sup>

**October Term 1991**

Scalia: *Lee v. Weisman*, 505 U.S. 577 (1992)<sup>159</sup>

Rehnquist: *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)<sup>160</sup>

155. Michael Gartner, *If Corporations Are Silenced in Political Debate, Who's Next?*, WALL ST. J., Apr. 5, 1990, at A19 ("Justice Scalia said in a dissent that he actually read from the bench because he felt so strongly about the issue."); Ruth Marcus, *Court Says States Can Restrict Corporate Political Spending*, WASH. POST, Mar. 28, 1990, at A2 ("The ruling drew a stinging dissent from Justice Antonin Scalia, who took the unusual step of reading his dissent from the bench."); The Oyez Project, *Austin v. Michigan Chamber of Commerce*, [http://oyez.org/cases/1980-1989/1989\\_88\\_1569](http://oyez.org/cases/1980-1989/1989/1989_88_1569) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 1:19).

156. Ruth Marcus, *Justices Reject Limit on Punitive Damages*, WASH. POST, Mar. 5, 1991, at A1 ("The sole dissenter, Justice Sandra Day O'Connor, who took the unusual step of reading her dissent from the bench despite a cold that left her voice hoarse, said that Alabama procedures were the 'antithesis of due process.'").

157. Linda Greenhouse, *High Court, 5 to 4, Softens Stand Against Confession by Coercion*, N.Y. TIMES, Mar. 27, 1991, at A1 ("In a bitter dissenting opinion, which he took the highly unusual step of reading from the bench, Justice Byron R. White . . ."); Ruth Marcus, *Court Splits on Coerced Confessions*, WASH. POST, Mar. 27, 1991, at A1 ("White, who ordinarily does not announce his reasoning in cases from the bench and who tends to rule against criminal defendants, took the rare step of reading his dissent. It was the first time he has done so since 1983."); The Oyez Project, *Arizona v. Fulminante*, [http://oyez.org/cases/1990-1999/1990/1990\\_89\\_839](http://oyez.org/cases/1990-1999/1990/1990_89_839) (last visited Nov. 13, 2009) (Opinion Announcement, White, J., at 3:11).

158. The Oyez Project, *Payne v. Tennessee*, [http://oyez.org/cases/1990-1999/1990/1990\\_90\\_5721](http://oyez.org/cases/1990-1999/1990/1990_90_5721) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 5:04).

159. Ruth Marcus, *High Court Bans Graduation Prayer at Public Schools*, WASH. POST, June 25, 1992, at A1 ("A somber-sounding Scalia underscored his unhappiness by announcing his dissent from the bench, a tool the justices reserve to signal extreme disagreement."); The Oyez Project, *Lee v. Weisman*, [http://oyez.org/cases/1990-1999/1991/1991\\_90\\_1014](http://oyez.org/cases/1990-1999/1991/1991_90_1014) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 6:45).

160. *All Things Considered: SCOTUS Upholds Roe v. Wade with Restrictions* (NPR radio broadcast, June 29, 1992) ("Rehnquist also spoke from the bench, and in his written opinion, said that Roe should be reversed and that today's ruling leaves it only barely intact."); The Oyez Project, *Planned Parenthood v. Casey*, [http://oyez.org/cases/1990-1999/1991/1991\\_91\\_744](http://oyez.org/cases/1990-1999/1991/1991_91_744) (last visited Nov. 13, 2009) (Opinion Announcement, Rehnquist, C.J., at 14:20).

**October Term 1992**

Blackmun: *Herrera v. Collins*, 506 U.S. 390 (1993)<sup>161</sup>

Stevens: *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)<sup>162</sup>

Kennedy: *Alexander v. United States*, 509 U.S. 544 (1993)<sup>163</sup>

**October Term 1993**

Stevens: *Dolan v. City of Tigard*, 512 U.S. 374 (1994)<sup>164</sup>

Scalia: *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)<sup>165</sup>

**October Term 1994**

Breyer: *United States v. Lopez*, 514 U.S. 549 (1995)<sup>166</sup>

Ginsburg: *Miller v. Johnson*, 515 U.S. 900 (1995)<sup>167</sup>

161. Linda Greenhouse, *Court Discourages Late Claims of Innocence from Death Row*, N.Y. TIMES, Jan. 26, 1993, at A1 (“The decision drew an angry dissent from Justice Harry A. Blackmun, who took the unusual step of reading his opinion from the bench.”).

162. Audio tape: 267.853 (tape 3 of 4) (on file with Motion Picture, Sound, and Video Research Room, National Archives and Records Administration, College Park, Maryland).

163. *All Things Considered: Supreme Court Decides Three Cases Before Ending Term* (NPR radio broadcast, June 29, 1993) (“In an unusual oral dissent from the Supreme Court bench yesterday, Justice Anthony Kennedy said . . .”); Audio tape: 267.853 (tape 4 of 4) (on file with Motion Picture, Sound, and Video Research Room, National Archives and Records Administration, College Park, Maryland).

164. The Oyez Project, *Dolan v. City of Tigard*, [http://oyez.org/cases/1990-1999/1993/1993\\_93\\_518](http://oyez.org/cases/1990-1999/1993/1993_93_518) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 2:08).

165. Joan Biskupic, *Court Allows Abortion Clinic Buffer Zones*, WASH. POST, July 1, 1994, at A1 (“Justice Antonin Scalia, who read an impassioned dissent from the bench, said the court ‘has left a powerful loaded weapon lying about today’ that could be used to squelch the speech of objectors of all sentiments.”); Linda Greenhouse, *High Court Backs Limits on Protest at Abortion Clinic*, N.Y. TIMES, July 1, 1994, at A1 (“Then Justice Scalia began an angry rendition of his dissenting opinion, at one point referring to ‘abortion mills,’ a phrase that did not appear in his printed opinion.”); Interviews with Justice Blackmun, *supra* note 59, at 35 (“Justice Scalia orally announced his dissent in the *Madsen* case. So that was a little unusual ending the term with a voice raised in dissent on the last case announced. I had the feeling, I may be completely wrong in this, that the chief justice was rather annoyed about having the dissent read, annoyed about the timing of it. We all have a right to read a dissent, of course, if we want to.”).

166. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 1994, at III (1995), available at <http://www.supremecourtus.gov/orders/journal/jnl94.pdf> [hereinafter J. SUP. CT. OT 1994] (“Breyer, J. . . . reads dissenting opinion (93-1260)”); Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. TIMES, Apr. 27, 1995, at A1 (“Justice Breyer took the unusual step of reading from the bench this morning a portion of the dissenting opinion he wrote for himself and the three others.”); The Oyez Project, *United States v. Lopez*, [http://oyez.org/cases/1990-1999/1994/1994\\_93\\_1260](http://oyez.org/cases/1990-1999/1994/1994_93_1260) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 2:02).

167. J. SUP. CT. OT 1994, *supra* note 166, at III (“Ginsburg, J. reads dissenting opinion (94-631, et al.)”); The Oyez Project, *Miller v. Johnson*, [http://oyez.org/cases/1990-1999/1994/1994\\_94\\_631](http://oyez.org/cases/1990-1999/1994/1994_94_631) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 6:00).

**October Term 1995**

Souter: *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)<sup>168</sup>

Scalia: *Romer v. Evans*, 517 U.S. 620 (1996)<sup>169</sup>

**October Term 1996**

O'Connor: *City of Boerne v. Flores*, 521 U.S. 507 (1997)<sup>170</sup>

Stevens: *Printz v. United States*, 521 U.S. 898 (1997)<sup>171</sup>

**October Term 1997**

Breyer: *Miller v. Albright*, 523 U.S. 420 (1998)<sup>172</sup>

Scalia: *Clinton v. City of New York*, 524 U.S. 417 (1998)<sup>173</sup>

168. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 1995, at III (1996), available at <http://www.supremecourtus.gov/orders/journal/jnl95.pdf> (“Souter, J. Reads first dissenting opinion (94-12)”); *Lawsuits by Indian Tribes Against States Ruled Out*, N.Y.L.J., Mar. 28, 1996, at 1 (“After [Chief] Justice Rehnquist announced the ruling from the bench, Justice Souter took the rare step of reading, for seven minutes, from his dissenting opinion.”); *All Things Considered: High Court Ruling Viewed as States’ Rights Victory* (NPR radio broadcast, Mar. 27, 1996) (“In a rare oral dissent from the bench, Justice David Souter, appointed to the Court by President Bush, called the majority opinion ‘fundamentally mistaken.’”).

169. Joan Biskupic, *Court Declares Gays Not Legally Different; Ruling Rejects Distinctions Based on Prejudice*, WASH. POST, May 22, 1996, at A1 (“Justice Antonin Scalia, who wrote the statement of the three dissenting justices and took the unusual step of reading portions of it from the bench, angrily observed that the majority was putting ‘the prestige of this institution’ behind equal rights for homosexuals.”); The Oyez Project, *Romer v. Evans*, [http://oyez.org/cases/1990-1999/1995/1995\\_94\\_1039](http://oyez.org/cases/1990-1999/1995/1995_94_1039) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 5:43).

170. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 1996, at III (1997), available at <http://www.supremecourtus.gov/orders/journal/jnl96.pdf> (“O’Connor, J. Reads dissenting opinion (95-2074)”); The Oyez Project, *City of Boerne v. Flores*, [http://oyez.org/cases/1990-1999/1996/1996\\_95\\_2074](http://oyez.org/cases/1990-1999/1996/1996_95_2074) (last visited Nov. 13, 2009) (Opinion Announcement, O’Connor, J., at 4:39).

171. Joan Biskupic, *Court Voids Background Check of Gun Buyer Under Brady Law*, WASH. POST, June 28, 1997, at A1 (“In dissent, Justice John Paul Stevens read aloud for nearly 20 minutes his statement protesting the majority.”); Linda Greenhouse, *Justices Limit Brady Gun Law as Intrusion on States’ Rights*, N.Y. TIMES, June 28, 1997, at A1 (“Justice Scalia summarized his opinion and Justice Stevens responded . . . Justice Stevens at times read from a memorandum that contained excerpts from his dissenting opinion. But often he spoke off the cuff, looking directly at the small audience as he explained his disagreement. He made some sly points that his written opinion omitted.”).

172. Joan Biskupic, *Sexual Stereotypes Split High Court*, WASH. POST, Apr. 23, 1998, at A1 (“Taking the unusual step of reading part of his dissent aloud, Breyer said . . .”).

173. *Few Lawmakers Grieve as Supreme Court Justices Give Line-Item Veto the Ax*, in 54 CONGRESSIONAL QUARTERLY ALMANAC 6-17, 6-22 (1998) (“Scalia [read] his dissent from the bench . . .”); *All Things Considered: Supreme Court Rulings* (NPR radio broadcast, June 26, 1998) (“And in a rare oral dissent from the bench, Scalia contended . . .”).

**October Term 1998**

Kennedy: *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)<sup>174</sup>

Scalia: *City of Chicago v. Morales*, 527 U.S. 41 (1999)<sup>175</sup>

Ginsburg: *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)<sup>176</sup>

Stevens: *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)<sup>177</sup>

Breyer: *College Savings Bank v. Fla. Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)<sup>178</sup>

Souter: *Alden v. Maine*, 527 U.S. 706 (1999)<sup>179</sup>

**October Term 1999**

Breyer: *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)<sup>180</sup>

Kennedy: *Hill v. Colorado*, 530 U.S. 703 (2000)<sup>181</sup>

174. Linda Greenhouse, *From the High Court, a Voice Quite Distinctly a Woman's*, N.Y. TIMES, May 26, 1999, at A1 (“There was a memorable scene, lasting no more than 10 minutes, as Justice O’Connor and Justice Anthony M. Kennedy summarized their respective majority and dissenting opinions for a courtroom audience of lawyers and tourists.”); The Oyez Project, *Davis v. Monroe County Board of Education*, [http://oyez.org/cases/1990-1999/1998/1998\\_97\\_843](http://oyez.org/cases/1990-1999/1998/1998_97_843) (last visited Nov. 13, 2009) (Opinion Announcement, Kennedy, J., at 4:50).

175. J. SUP. CT. OT 1998, *supra* note 16, at III (“Scalia, J. Reads dissent from bench (97-1121)”); The Oyez Project, *supra* note 97.

176. Lyle Denniston, *5-4 Ruling a Major Blow to Creditors*, BALT. SUN, June 18, 1999, at 1C (“Two former law professors on the court—Justices Ruth Bader Ginsburg and Antonin Scalia—disagreed animatedly over a legal fine point, with Ginsburg reading from her dissent after Scalia had finished speaking for the majority.”); The Oyez Project, *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, [http://oyez.org/cases/1990-1999/1998/1998\\_98\\_231](http://oyez.org/cases/1990-1999/1998/1998_98_231) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 5:29).

177. J. SUP. CT. OT 1998, *supra* note 16, at III (“Stevens, J. Reads dissent from bench (98-531)”); The Oyez Project, *Florida Prepaid v. College Savings Bank*, [http://oyez.org/cases/1990-1999/1998/1998\\_98\\_531](http://oyez.org/cases/1990-1999/1998/1998_98_531) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 3:10).

178. J. SUP. CT. OT 1998, *supra* note 16, at III (“Breyer, J. Reads dissent from bench (98-149)”); The Oyez Project, *College Savings Bank v. Florida Prepaid*, [http://oyez.org/cases/1990-1999/1998/1998\\_98\\_149](http://oyez.org/cases/1990-1999/1998/1998_98_149) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 11:20).

179. J. SUP. CT. OT 1998, *supra* note 16, at III (“Souter, J. Reads dissent from bench (98-436)”); The Oyez Project, *Alden v. Maine*, [http://oyez.org/cases/1990-1999/1998/1998\\_98\\_436](http://oyez.org/cases/1990-1999/1998/1998_98_436) (last visited Nov. 13, 2009) (Opinion Announcement, Souter, J., at 6:43).

180. The Oyez Project, *FDA v. Brown & Williamson Tobacco Corp.*, [http://oyez.org/cases/1990-1999/1999/1999\\_98\\_1152](http://oyez.org/cases/1990-1999/1999/1999_98_1152) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 6:36).

181. Joan Biskupic, *Abortion Debate Will Continue to Rage*, USA TODAY, June 29, 2000, at 9A (“Antonin Scalia, Anthony Kennedy and Clarence Thomas were moved to read portions of their angry dissents in the Nebraska and Colorado cases from the mahogany bench.”); Linda Greenhouse, *Court Rules that Governments Can’t Outlaw Type of Abortion*, N.Y. TIMES, June 29, 2000, at A1 (“Justice Scalia and Justice Kennedy read their impassioned dissenting opinions in the courtroom this morning for more than half an hour, making clear that this First Amendment debate was in many respects a proxy for the court’s ongoing abortion debate.”); The Oyez Project, *Hill v. Colorado*, [http://oyez.org/cases/1990-1999/1999/1999\\_98\\_1856](http://oyez.org/cases/1990-1999/1999/1999_98_1856) (last visited Nov. 13, 2009) (Opinion Announcement, Kennedy, J., at 20:42).

Scalia: *Hill v. Colorado*, 530 U.S. 703 (2000)<sup>182</sup>

Thomas: *Stenberg v. Carhart*, 530 U.S. 914 (2000)<sup>183</sup>

### October Term 2000

Stevens: *Alexander v. Sandoval*, 532 U.S. 275 (2001)<sup>184</sup>

Ginsburg: *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001)<sup>185</sup>

### October Term 2001

Breyer: *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002)<sup>186</sup>

Scalia: *Atkins v. Virginia*, 536 U.S. 304 (2002)<sup>187</sup>

182. Biskupic, *supra* note 181; Greenhouse, *supra* note 181; The Oyez Project, *Hill v. Colorado*, *supra* note 181 (Opinion Announcement, Scalia, J., at 7:14).

183. Matt Kelley & Jake Thompson, *Fractured Court Mirrors Society*, OMAHA WORLD HERALD (Neb.), June 29, 2000, at 1 (“Thomas, usually silent on the bench, surprised court observers Wednesday by reading his dissent from the court chamber.”); Tony Mauro, *Final Day: In Dissent, Speaking Out*, LEGAL TIMES, July 3, 2000, at 10 (“Justice Clarence Thomas grimly described the ‘horrifying’ ‘partial-birth’ abortion procedure that the majority had just permitted in *Stenberg v. Carhart*.”); The Oyez Project, *Stenberg v. Carhart*, [http://oyez.org/cases/1990-1999/1999/1999\\_99\\_830](http://oyez.org/cases/1990-1999/1999/1999_99_830) (last visited Nov. 13, 2009) (Opinion Announcement, Thomas, J., at 7:45).

184. Linda Greenhouse, *Supreme Court Limits Scope of a Main Civil Rights Law*, N.Y. TIMES, Apr. 25, 2001, at A14 (“Justice Stevens read portions of his dissent from the bench, a step justices take only rarely to call attention to developments they regard as particularly wrongheaded.”); The Oyez Project, *Alexander v. Sandoval*, [http://oyez.org/cases/2000-2009/2000/2000\\_99\\_1908](http://oyez.org/cases/2000-2009/2000/2000_99_1908) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 6:40).

185. Linda Greenhouse, *Ruling Limits Awarding of Legal Fees for Plaintiffs*, N.Y. TIMES, May 30, 2001, at A20 (“In a dissenting opinion that she took the unusual step of reading from the bench, Justice Ruth Bader Ginsburg . . .”); Charles Lane, *Disabled Pro Golfer Wins Right to Use Cart*, WASH. POST, May 30, 2001, at A1 (“Ginsburg, calling the court’s ruling ‘stunningly harsh,’ read a summary of her views from the bench, a gesture usually reserved by justices for cases they feel particularly strongly about.”); The Oyez Project, *Buckhannon Board & Care Home v. West Virginia*, [http://oyez.org/cases/2000-2009/2000/2000\\_99\\_1848](http://oyez.org/cases/2000-2009/2000/2000_99_1848) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 3:17).

186. Linda Greenhouse, *Justices Expand States’ Immunity in Federalism Case*, N.Y. TIMES, May 29, 2002, at A1 (“The three other dissenters signed Justice Breyer’s opinion, which he took the unusual step of reading from the bench this morning.”); Charles Lane, *Court Backs States in Case Testing Reach of U.S. Agencies*, WASH. POST, May 29, 2002, at A4 (“[W]ith Justice Stephen G. Breyer taking the unusual step of reading his dissenting opinion from the bench after Thomas finished announcing the majority opinion.”); The Oyez Project, *Federal Maritime Commission v. South Carolina Ports Authority*, [http://oyez.org/cases/2000-2009/2001/2001\\_01\\_46](http://oyez.org/cases/2000-2009/2001/2001_01_46) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 3:15).

187. Charles Lane, *Court Bars Execution of Mentally Retarded*, WASH. POST, June 21, 2002, at A1 (“Scalia read a summary of his opinion from the bench after Stevens finished reading the opinion for the court, a gesture usually reserved only for those cases in which a justice disagrees especially strongly with the majority.”); The Oyez Project, *Atkins v. Virginia*, [http://oyez.org/cases/2000-2009/2001/2001\\_00\\_8452](http://oyez.org/cases/2000-2009/2001/2001_00_8452) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 6:53).

Souter: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)<sup>188</sup>

Ginsburg: *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)<sup>189</sup>

### October Term 2002

Breyer: *Ewing v. California*, 538 U.S. 11 (2003)<sup>190</sup>

Souter: *Demore v. Kim*, 538 U.S. 510 (2003)<sup>191</sup>

Ginsburg: *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003)<sup>192</sup>

Scalia: *Lawrence v. Texas*, 539 U.S. 558 (2003)<sup>193</sup>

### October Term 2003

Stevens: *Vieth v. Jubelirer*, 541 U.S. 267 (2004)<sup>194</sup>

O'Connor: *Blakely v. Washington*, 542 U.S. 296 (2004)<sup>195</sup>

Ginsburg: *Cheney v. United States District Court*, 542 U.S. 367 (2004)<sup>196</sup>

Stevens: *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)<sup>197</sup>

188. Charles Lane, *Court Upholds Ohio School Vouchers*, WASH. POST, June 28, 2002, at A1 (“Reading from the bench a joint statement from the four dissenting justices as a demonstration of their strong disagreement with the majority, Souter . . .”); The Oyez Project, *Zelman v. Simmons-Harris*, [http://oyez.org/cases/2000-2009/2001/2001\\_00\\_1751](http://oyez.org/cases/2000-2009/2001/2001_00_1751) (last visited Nov. 13, 2009) (Opinion Announcement, Souter, J., at 8:05).

189. Edward Walsh, *Curbs on Judicial Hopefuls Lifted*, WASH. POST, June 28, 2002, at A10 (“Ginsburg read part of her dissent aloud, usually a sign of a justice’s strong feelings on an issue.”); The Oyez Project, *Republican Party of Minnesota v. White*, [http://oyez.org/cases/2000-2009/2001/2001\\_01\\_521](http://oyez.org/cases/2000-2009/2001/2001_01_521) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 9:18).

190. J. SUP. CT. OT 2002, *supra* note 20, at 707 (“Dissenting opinion announced by Justice Breyer”); The Oyez Project, *Ewing v. California*, [http://oyez.org/cases/2000-2009/2002/2002\\_01\\_6978](http://oyez.org/cases/2000-2009/2002/2002_01_6978) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 4:12).

191. J. SUP. CT. OT 2002, *supra* note 20, at 901 (“Opinion announced by Justice Souter, with whom Justice Stevens and Justice Ginsburg join, concurring in part and dissenting in part.”); The Oyez Project, *Demore v. Kim*, [http://oyez.org/cases/2000-2009/2002/2002\\_01\\_1491](http://oyez.org/cases/2000-2009/2002/2002_01_1491) (last visited Nov. 13, 2009) (Opinion Announcement, Souter, J., at 3:46).

192. J. SUP. CT. OT 2002, *supra* note 20, at 1100 (“Dissenting opinion announced by Justice Ginsburg”); The Oyez Project, *American Insurance Association v. Garamendi*, [http://oyez.org/cases/2000-2009/2002/2002\\_02\\_722](http://oyez.org/cases/2000-2009/2002/2002_02_722) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 5:15).

193. J. SUP. CT. OT 2002, *supra* note 20, at 1103 (“Dissenting opinion announced by Justice Scalia”); The Oyez Project, *Lawrence and Garner v. Texas*, [http://oyez.org/cases/2000-2009/2002/2002\\_02\\_102](http://oyez.org/cases/2000-2009/2002/2002_02_102) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 9:20).

194. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2003, at 839 (2004), available at <http://www.supremecourtus.gov/orders/journal/jnl03.pdf> [hereinafter J. SUP. CT. OT 2003] (“Dissenting opinion announced by Justice Stevens”); The Oyez Project, *Vieth v. Jubelirer*, [http://oyez.org/cases/2000-2009/2003/2003\\_02\\_1580](http://oyez.org/cases/2000-2009/2003/2003_02_1580) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 10:30).

195. J. SUP. CT. OT 2003, *supra* note 194, at 1017 (“Dissenting opinion announced by Justice O’Connor”); The Oyez Project, *Blakely v. Washington*, [http://oyez.org/cases/2000-2009/2003/2003\\_02\\_1632](http://oyez.org/cases/2000-2009/2003/2003_02_1632) (last visited Nov. 13, 2009) (Opinion Announcement, O’Connor, J., at 6:09).

196. J. SUP. CT. OT 2003, *supra* note 194, at 1017 (“Dissenting opinion announced by Justice Ginsburg”); Charles Lane, *High Court Backs Vice President*, WASH. POST, June 25, 2004, at A1 (“Reading a summary of her opinion from the bench, a sign of especially strong disagreement with the majority, Ginsburg said . . .”).

197. J. SUP. CT. OT 2003, *supra* note 194, at 1036 (“Dissenting opinion announced by Justice

Souter: *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)<sup>198</sup>

Scalia: *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)<sup>199</sup>

### October Term 2004

Stevens: *United States v. Booker*, 543 U.S. 220 (2005)<sup>200</sup>

Scalia: *Roper v. Simmons*, 543 U.S. 551 (2005)<sup>201</sup>

Breyer: *Bell v. Thompson*, 545 U.S. 794 (2005)<sup>202</sup>

Scalia: *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005)<sup>203</sup>

### October Term 2005

Stevens: *Rapanos v. United States*, 547 U.S. 715 (2006)<sup>204</sup>

Thomas: *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)<sup>205</sup>

Scalia: *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)<sup>206</sup>

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Stevens”); The Oyez Project, *Rumsfeld v. Padilla*, [http://oyez.org/cases/2000-2009/2003/2003\\_03\\_1027](http://oyez.org/cases/2000-2009/2003/2003_03_1027) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 4:44).

198. J. SUP. CT. OT 2003, *supra* note 194, at 1036 (“Opinion announced by Justice Souter, with whom Justice Ginsburg joins, concurring in part, dissenting in part, and concurring in the judgment.”); The Oyez Project, *Hamdi v. Rumsfeld*, [http://oyez.org/cases/2000-2009/2003/2003\\_03\\_6696](http://oyez.org/cases/2000-2009/2003/2003_03_6696) (last visited Nov. 13, 2009) (Opinion Announcement, Souter, J., at 8:36).

199. J. SUP. CT. OT 2003, *supra* note 194, at 1036 (“Dissenting opinion announced by Justice Scalia”); The Oyez Project, *Hamdi v. Rumsfeld*, *supra* note 198 (Opinion Announcement, Scalia, J., at 12:15).

200. The Oyez Project, *United States v. Booker*, [http://oyez.org/cases/2000-2009/2004/2004\\_04\\_104](http://oyez.org/cases/2000-2009/2004/2004_04_104) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 7:02).

201. J. SUP. CT. OT 2004, *supra* note 20, at 657 (“Dissenting opinion announced by Justice Scalia”); The Oyez Project, *Roper v. Simmons*, [http://oyez.org/cases/2000-2009/2004/2004\\_03\\_633](http://oyez.org/cases/2000-2009/2004/2004_03_633) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 9:40).

202. J. SUP. CT. OT 2004, *supra* note 20, at 1071–72 (“Dissenting opinion announced by Justice Breyer”); The Oyez Project, *Bell v. Thompson*, [http://oyez.org/cases/2000-2009/2004/2004\\_04\\_514](http://oyez.org/cases/2000-2009/2004/2004_04_514) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 6:32).

203. J. SUP. CT. OT 2004, *supra* note 20, at 1071 (“Dissenting opinion announced by Justice Scalia”); The Oyez Project, *McCreary County v. ACLU*, [http://oyez.org/cases/2000-2009/2004/2004\\_03\\_1693](http://oyez.org/cases/2000-2009/2004/2004_03_1693) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 9:21).

204. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2005, at 1108 (2006), available at <http://www.supremecourtus.gov/orders/journal/jnl05.pdf> [hereinafter J. SUP. CT. OT 2005] (“Dissenting opinion announced by Justice Stevens”); The Oyez Project, *Rapanos v. United States*, [http://oyez.org/cases/2000-2009/2005/2005\\_04\\_1034](http://oyez.org/cases/2000-2009/2005/2005_04_1034) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 16:25).

205. J. SUP. CT. OT 2005, *supra* note 204, at 1161 (“Dissenting opinion announced by Justice Thomas”); The Oyez Project, *Hamdan v. Rumsfeld*, [http://oyez.org/cases/2000-2009/2005/2005\\_05\\_184](http://oyez.org/cases/2000-2009/2005/2005_05_184) (last visited Nov. 13, 2009) (Opinion Announcement, Thomas, J., at 24:18).

206. J. SUP. CT. OT 2005, *supra* note 204, at 1161 (“Dissenting opinion announced by Justice Scalia”); The Oyez Project, *Hamdan v. Rumsfeld*, *supra* note 205 (Opinion Announcement, Scalia, J., at 14:34).

**October Term 2006**

Ginsburg: *Gonzales v. Carhart*, 550 U.S. 124 (2007)<sup>207</sup>

Stevens: *Scott v. Harris*, 550 U.S. 372 (2007)<sup>208</sup>

Ginsburg: *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)<sup>209</sup>

Stevens: *Uttecht v. Brown*, 551 U.S. 1 (2007)<sup>210</sup>

Souter: *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)<sup>211</sup>

Breyer: *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)<sup>212</sup>

Breyer: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)<sup>213</sup>

**October Term 2007**

Scalia: *Boumediene v. Bush*, 553 U.S. \_\_\_ (2008)<sup>214</sup>

Stevens: *District of Columbia v. Heller*, 554 U.S. \_\_\_ (2008)<sup>215</sup>

207. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2006, at 861 (2007), available at <http://www.supremecourtus.gov/orders/journal/jnl06.pdf> [hereinafter J. SUP. CT. OT 2006] (“Dissenting opinion announced by Justice Ginsburg”); The Oyez Project, *Gonzales v. Carhart*, [http://oyez.org/cases/2000-2009/2006/2006\\_05\\_380](http://oyez.org/cases/2000-2009/2006/2006_05_380) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 7:26).

208. J. SUP. CT. OT 2006, *supra* note 207, at 907 (“Dissenting opinion announced by Justice Stevens”); The Oyez Project, *Scott v. Harris*, [http://oyez.org/cases/2000-2009/2006/2006\\_05\\_1631](http://oyez.org/cases/2000-2009/2006/2006_05_1631) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 5:17).

209. J. SUP. CT. OT 2006, *supra* note 207, at 991 (“Dissenting opinion announced by Justice Ginsburg”); The Oyez Project, *Ledbetter v. Goodyear Tire and Rubber Company*, [http://oyez.org/cases/2000-2009/2006/2006\\_05\\_1074](http://oyez.org/cases/2000-2009/2006/2006_05_1074) (last visited Nov. 13, 2009) (Opinion Announcement, Ginsburg, J., at 3:48).

210. J. SUP. CT. OT 2006, *supra* note 207, at 1009 (“Dissenting opinion announced by Justice Stevens”); The Oyez Project, *Uttecht v. Brown*, [http://oyez.org/cases/2000-2009/2006/2006\\_06\\_413](http://oyez.org/cases/2000-2009/2006/2006_06_413) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 5:18).

211. J. SUP. CT. OT 2006, *supra* note 207, at 1095 (“Dissenting opinion announced by Justice Souter”); The Oyez Project, *Federal Election Commission v. Wisconsin Right to Life*, [http://oyez.org/cases/2000-2009/2006/2006\\_06\\_969](http://oyez.org/cases/2000-2009/2006/2006_06_969) (last visited Nov. 13, 2009) (Opinion Announcement, Souter, J., at 9:43).

212. J. SUP. CT. OT 2006, *supra* note 207, at 1099 (“Dissenting opinion announced by Justice Breyer”); The Oyez Project, *Parents Involved in Community Schools v. Seattle School District No. 1*, [http://oyez.org/cases/2000-2009/2006/2006\\_05\\_908](http://oyez.org/cases/2000-2009/2006/2006_05_908) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 19:02).

213. J. SUP. CT. OT 2006, *supra* note 207, at 1099 (“Dissenting opinion announced by Justice Breyer”); The Oyez Project, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, [http://oyez.org/cases/2000-2009/2006/2006\\_06\\_480](http://oyez.org/cases/2000-2009/2006/2006_06_480) (last visited Nov. 13, 2009) (Opinion Announcement, Breyer, J., at 6:18).

214. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2007, at 985 (2008), available at <http://www.supremecourtus.gov/orders/journal/jnl07.pdf> [hereinafter J. SUP. CT. OT 2007] (“Dissenting opinion announced by Justice Scalia”); The Oyez Project, *Boumediene v. Bush*, [http://oyez.org/cases/2000-2009/2007/2007\\_06\\_1195](http://oyez.org/cases/2000-2009/2007/2007_06_1195) (last visited Nov. 13, 2009) (Opinion Announcement, Scalia, J., at 9:08).

215. J. SUP. CT. OT 2007, *supra* note 214, at 1037 (“Dissenting opinion announced by Justice Stevens”); The Oyez Project, *District of Columbia v. Heller*, [http://oyez.org/cases/2000-2009/2007/2007\\_07\\_290](http://oyez.org/cases/2000-2009/2007/2007_07_290) (last visited Nov. 13, 2009) (Opinion Announcement, Stevens, J., at 16:20).

**October Term 2008**

Stevens: *Montejo v. Louisiana*, 556 U.S. \_\_ (2009)<sup>216</sup>

Breyer: *Horne v. Flores*, 557 U.S. \_\_ (2009)<sup>217</sup>

Ginsburg: *Ricci v. DeStefano*, 557 U.S. \_\_ (2009)<sup>218</sup>

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216. Jesse J. Holland, *Justices Reverse a Rule on Police Questioning*, WASH. POST, May 27, 2009, at A4 (“Stevens read his dissent aloud from the bench. It was the first time this term that a justice had read a dissent aloud.”); David Stout, *Court Eases Restrictions on Questioning Suspects*, N.Y. TIMES, May 27, 2009, at A15 (“Tuesday’s opinion in *Montejo v. Louisiana*, No. 07-1529, inspired considerable emotion, as displayed by Justice Stevens’s reading of his dissent . . .”); The Oyez Project, *Montejo v. Louisiana*, [http://www.oyez.org/cases/2000-2009/2008/2008\\_07\\_1529](http://www.oyez.org/cases/2000-2009/2008/2008_07_1529) (last visited Dec. 24, 2009) (Opinion Announcement, Stevens, J., at 7:12).

217. *All Things Considered: High Court Eases Oversight of English Program* (NPR radio broadcast, June 25, 2009) (“That may be one reason Justice Stephen Breyer took the unusual step of reading his dissent from the bench.”); Posting of Tony Mauro to The BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2009/06/supreme-court-rules-student-strip-search-unconstitutional.html> (June 25, 2009, 12:03 P.M.) (“The Court also ruled in three other cases, including *Horne v. Flores*, a dispute over the adequacy of programs for English language learners in an Arizona school district. The 5-4 decision prompted Justice Stephen Breyer to read from his dissent from the bench.”); The Oyez Project, *Horne v. Flores*, [http://www.oyez.org/cases/2000-2009/2008/2008\\_08\\_289](http://www.oyez.org/cases/2000-2009/2008/2008_08_289) (last visited Dec. 24, 2009) (Opinion Announcement, Breyer, J., at 7:14).

218. Robert Barnes, *Justices Rule for White Firemen in Bias Lawsuit*, WASH. POST, June 30, 2009, at A1 (“Justice Ruth Bader Ginsburg, reading her dissent from the bench for emphasis . . .”); Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, June 30, 2009, at A1 (“Justice Ruth Bader Ginsburg, reading a dissenting statement from the bench . . .”); The Oyez Project, *Ricci v. DeStefano*, [http://www.oyez.org/cases/2000-2009/2008/2008\\_07\\_1428](http://www.oyez.org/cases/2000-2009/2008/2008_07_1428) (last visited Dec. 24, 2009) (Opinion Announcement, Ginsburg, J., at 9:47).