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Dissent
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A dissent from the prevailing point of view challenges us that the way things are is *not* the way things have to be. As we explored last week through "A Brief History of Tomorrow," **we Unitarian Universalists have often been a *future*-oriented people**, seeking to help build the better world that we dream about. And many of our Unitarian and Universalist forebears were on the leading edge of creating social change.

Along those lines, it is significant to recall that this past Wednesday was the **200th anniversary of the birthday of our Unitarian ancestor Henry David Thoreau**, who was born on July 12, 1817. Among many examples of dissent in Thoreau's life, the most famous is that at age twenty-nine, during his time living in a cabin he built at Walden Pond, Thoreau spent the night in jail for nonpayment of a poll tax to protest the use of tax dollars to support slavery and unjust wars (Richardson 175). His shared reflections on his experience in the essay "**Civil Disobedience**" have been an inspiration ever since for people of conscience seeking to resist pressures to conform to unjust aspects of society (178).

And as one way of reflecting on how and why we might be called to dissent now or in the future, I would like to invite us to consider the tradition of dissent in the U.S. Supreme Court. One of my longtime areas of interest has been Constitutional interpretation, and the study of how and why various individuals and groups make interpretations may well be the focus on my second book if I ever first carve out the time to publish my dissertation. I'm particularly interested in comparing how and why interpretations have been made over time about the

meaning and significance of the legal documents (like the U.S. Constitution), sacred scriptures (like the Bible), various pieces of art (historic and contemporary), and the shifting set of experiences we call the "Self." I've spoken about my views on this in previous sermons, but for me the upshot is that, **if your interpretation increases hate, fear, inequality, and violence instead of love, joy, justice, and peace, you're doing it wrong.** And the problem might be more with *you* (or the interpretive communities that you are a part of) than with the "text" you are reading.

In the meantime, one among many great books from this perspective is The Case Against the Supreme Court. It was published a few years ago by the brilliant legal scholar Erwin Chemerinsky, who has argued cases before the Supreme Court, and is the author of the leading law school textbook about constitutional law (5). (If you want to dive into the history of Supreme Court dissents that came to be vindicated over time, a good next step is Melvin Urofsky's Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue.) To share with you just one early passage from Chemerinsky's book, he writes:

> Each year, as I teach first-year law students, I have the strong sense that many, maybe even most, **come to law school believing that the law exists external to what the courts say and that the role of the Justices is to find it and mechanically apply it…. But that is an illusion that has no relationship to reality.** Let's admit that this emperor has no clothes. (342)

He is challenging us to be honest that Supreme Court justices are *human*. And the evidence is clear that we humans rarely weigh all sides without bias. Rather, **we have preexisting "values, views, and prejudices" that warp our perceptions** (10).

We are most open to arguments that support our current line of thinking, and we are most defensive against arguments that might undermine our self-interest. By and large, all Supreme Court justices—liberal, moderate, or conservative—are extremely well-qualified. **They disagree "not because one of them is smarter or knows the Constitution better. They diverge because of their ideologies**" (14). That fact, of course, is why it is so significant that Neil Gorsuch, not Merrick Garland, is the latest Associate Justice to the highest court in our land.

To be clear, Chemerinsky is not intending to be unduly cynical. He was drawn to becoming a lawyer in the first place because of the power of the law at its best to create social change. But after more than three decades of teaching, writing, and litigating about the law at some of the highest levels, he has come to believe that—despite the many significant times when the U.S. Supreme Court has sided with justice and equality—we need to be honest that:

> **the Supreme Court usually sides with big business and government power and fails to protect people's rights,** Now, and throughout American history, the court has been far more likely to rule in favor of corporations than workers or consumers; it has been **far more likely to uphold government abuses of power than to stop them.** (6)

By becoming more conscious of the real record of the Supreme Court, we can better discern when and why we might be called to dissent.

To begin with an even larger perspective, it is sometimes helpful to remember that our system of governance is not the only way: **"Great Britain, for example, has no written constitution. In the Netherlands, no court has the power to declare any law unconstitutional**; in fact, its judiciary is prohibited from doing so" (7). Even in U.S. history, the co-equal power the Supreme Court enjoys today was far from clear in Article III, Section 1 of the Constitution. We could have ended up with a system more like the Netherlands if not for the leadership of John Marshall (1755-1835), the fourth Chief Justice, whose majority opinion in the 1803 case *Marbury v. Madison* established the precedent of judicial review, the authority of our high court to declare a law unconstitutional (Urofsky 45-46).

Moreover, **the Supreme Court did not start becoming the full-fledged "Constitutional tribunal" that we know today until around 1925**—less than a hundred years ago—under the leadership of chief justice William Howard Taft, a Unitarian (212-216). Before 1925, the court was much more of a "forum that corrected errors in ordinary private litigation" (211). My point is that the system has changed and it can and will change again. The question is whether it will change to be further in support of powerful, monied interests *or* whether it will change in the direction of due process and equal protection under the law.

And as we begin to reflect more directly on the promises and perils of dissent, it is important to remember that not all dissents are either righteous or vindicated. Indeed, most dissents end up in the "dustbin of history." So why bother? Because, in the words of Charles Hughes (1862-1948), the 11th Chief Justice (1930–1941), **"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day…"** (Urofsky 112).

Or as the recently retired Justice John Paul Stevens (1920-) said when asked "If you could fix one thing about the American judicial system, what would it be?" He replied, **"I would make all my dissents into majority opinions"** (339). Another American Judge, William Hirt, said it this way: "Dissents, like homicides, fall into three categories—excusable, justifiable, and reprehensible." So when considering a dissent, we should ask ourselves whether what we are doing is *excusable* (people will understand why we dissented even if we're wrong), *justifiable* (our dissent will likely be vindicated by history), or *reprehensible* (dissenting on the wrong side of history) (3).

In that spirit, when we consider the ongoing struggle in this country to genuinely achieve "peace, liberty, and justice for all," it is vital to remember that in the beginning, the **deep injustice of slavery was inked into our Constitution**. Article I, Section 2 calculates membership in the U.S. House of Representatives based on counting enslaved human beings as "three-fifths" of a person. And Article I, Section 9 explicitly says that slavery could not be ended prior to 1808 (Chemerinsky 21). We now know in retrospect that slavery did not end in the U.S. until the mid-1860s, and only after so many lives were lost in the Civil War.

As a point of comparison, "England, by act of Parliament, abolished slavery throughout its empire in 1833" (Chemerinsky 27). The United States Congress (and large parts of our populace) made that impossible in our country because of too many people dissenting on the wrong side of history. (Along those lines, if you haven't already, be sure to read Mayor Mitch Landrieu's speech on removing New Orleans' Confederate monuments.)

In the lead-up to the Civil War, the 1857 case of *Dred Scott v. Sanford* ruled against the rights of people whose ancestors had been enslaved. This decision is **almost universally regarded as the single most reprehensible decision ever made by the U.S. Supreme Court.** It

was decided 7-2, and the majority opinion was written by Frederick's own Roger Taney (1777-1864), the fifth Chief Justice of the Supreme Court. (He is literally buried on the same block where I live.) Many of you likely followed the saga of removing the bust of Taney from in front of Frederick City Hall, which finally happened in March.

From the perspective of dissent, I invite you to consider that it is perhaps equally significant not only to know why Taney—and the six other justices who voted with him—were wrong, but also to know why the two dissenters to the *Dred Scott* decision were right. Writing in opposition to the majority opinion in *Dred Scott*, Associate justices John McLean and Benjamin Curtis wrote what most scholars consider "the most important dissents handed down in the Supreme Court up to that time" (69). **President Lincoln famously refused to comment on Taney's opinion because he could not "improve on McLean and Curtis"** (Urofsky 76). And here is why dissent can be vital: McLean and Curtis's view lost the day, but they planted seeds that came to fruition years later when the tide of history finally turned against the heinous *Dred Scott* decision.

Likewise, we could fruitfully trace how the many dissents favoring racial justice written by Justice John Harlan (1833-1911) were largely ignored *for decades,* until his more progressive views finally gained traction during the mid-twentieth century Civil Rights Movement. Harlan died in 1911 at the age of 78, so he did not live to enjoy the full fruits of his labors.

There are multiple other ironies as well. Prior to the Civil War, Harlan himself had been a slave holder (106). And there were many other ways in which he was far from the perfect ally in the struggle for racial justice. But in 1896, **he was the sole dissenting voice in *Plessy v. Ferguson,*** in which the eight other justices ruled in favor of racial segregation laws on the basis of "separate but equal" (Urofsky 117-119). Here's another irony: Harlan's famous dissent that "our Constitution is color-blind" began to be vindicated with the 1954 Supreme Court decision of *Brown v. Board of Education.* But **that same logic, that "our Constitution is color-blind," has, in recent decades, been turned *against* racial justice** programs like Affirmative Action—as if there were no difference between using race to discriminate against people of color and using race as a factor in advancing racial equality (120-125).

There is so much more I would like to say about the history of dissent in general, and at the Supreme Court in particular, but for now I will begin moving toward my conclusion by inviting you to consider the following two dissents as being particularly worthy of keeping track of. Earlier, I quoted the recently-retired Justice Stevens. He wrote a powerful dissent against the 2010 case of *Citizens United v. Federal Election Commission,* a ruling which argued that since "corporations are people" their campaign contributions are protected as "freedom of speech." Justice Stevens' dissent may one day help overturn that 5-4 ruling, which was along partisan lines. I'll limit myself to quoting one crucial line:

> **the Court's opinion is…a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding**, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt… (Chemerinsky 254-256)

Hopefully Justice Stevens' dissent can lead the common sense of the American people to again become the law of the land.

A second crucial dissent that may come to be vindicated is William Brennan's 1987 dissent in *McCleskey vs. Kemp*. I know that many of you have read—or have read about—Michele Alexander's important book, The New Jim Crow: Mass Incarceration in an Age of Colorblindness. Alexander shows how racial bias in our country's criminal justice system has led to there being "more African-American adults under correctional control—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began." This raises the question: did we end enslavement in the mid-nineteenth century, or did White Supremacists merely reinvent a more insidious version of slavery through a racially-biased criminal justice system—invoking an urgent need for a "Third Reconstruction" in our country. (A powerful film along these lines is the powerful documentary 13th by Ava DuVernay.) Tragically:

> Since McCleskey, the Court has refused to accept statistical evidence of discrimination against *groups*, and insist…that proof of *individual* impact must be shown. **If, and when, changes on the Court lead to accepting the [growing**

> **number of studies about *systemic* bias], then Justice Brennan's dissent will guide them in how they use these materials.** (Urofsky 416-418)

Relatedly, it was moving and meaningful last term to see Justice Sonia Sotomayor's including in her dissents quotes from W. E. B. Du Bois's *The Souls of Black Folk*, James Baldwin's *The Fire Next Time*, Michelle Alexander's *The New Jim Crow*, and Ta-Nehisi Coates's *Between the World and Me*. It matters who our Supreme Court justices read and quote. In many cases, whether we end up advancing the cause of peace, liberty, and justice for *all*—or whether we end up merely protecting the peace, liberty, and justice of a *select few*—turns on whether we are experiencing the world mostly from the perspective of the powerful or whether we are a part of and in solidarity with groups who have been historically oppressed.

At our recent annual meeting, we voted to approve for at least the next year, the banner that is displayed in our atrium:

- Love is love
- Black Lives Matter
- Women's Rights are Human Rights
- Climate Change is Real
- Workers Deserve a Living Wage
- Immigrants Make America Great
- Support Indigenous People's Right

There are, of course, many other worthy causes. **For such a time as this, in what emerging moral arena do you feel called to *dissent*?** Where do you feel called to say that the way things are is not the way things have to be?

In that spirit of dissent, I will conclude for now with a quote from James Baldwin:

> For nothing is fixed, forever and forever and forever, it is not fixed; the earth is always shifting, the light is always changing, the sea does not cease to grind down rock. Generations do not cease to be born, and we are responsible to them because we are the only witnesses they have. The sea rises, the light fails, lovers cling to each other, and children cling to us. The moment we cease to hold each other, the moment we break faith with one another, the sea engulfs us and the light goes out.

May our choices in the days to come lead us to be ones about whom it will be said, “They kept the faith. They kept the candles burning when the light threatened to go out.