

DISSECTING DISSENT IN THE FACE OF THE ROBERTS COURT'S INDEFINITE REIGN

Julie M. Mathews, Blog Editor, Vol. 31¹

PREFACE: A few days preceding the submission of this writing, I received a notification on my phone informing me of the death of Justice Sandra Day O'Connor, the first woman to be appointed to the Supreme Court² For centuries, it was unconscionable that a woman could be an attorney, let alone serve on our nation's highest bench; now, six women have made history doing so.³ It is undoubtedly because of the ceiling-shattering sacrifices of Justice O'Connor, and the five female justices who followed her in her footsteps, that I can compose a piece such as this. As a fellow woman in the legal profession, it is my honor to be able to honor the women who have served or currently serve on this Honorable Court. May these justices, past and present, continue to inspire women everywhere that they, too, will achieve their dreams, no matter who may want to silence their voices or what detractors may stand in their way. As Justice Ruth Bader Ginsburg—the second woman appointed to the Court—famously said, there will be enough women on the Court “when there are nine.”⁴

The voice of opposition is often not the loudest or most flagrant—sometimes, it comes from the minority, and frequently, it is from the perspective of a minority individual.⁵ Our judicial system is no stranger to this phenomenon, and the nation's highest court will experience it for decades to come.⁶ When Justice Ketanji Brown Jackson assumed her role as Associate Justice of

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² See Linda Greenhouse, *Sandra Day O'Connor, First Woman on the Supreme Court, Is Dead at 93*, NY TIMES (Dec. 1, 2023), <https://www.nytimes.com/2023/12/01/us/sandra-day-oconnor-dead.html>.

³ See SUPREME COURT OF THE UNITED STATES, *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/Default.aspx>.

⁴ PBS Newshour, *When Will There be Enough Women on the Supreme Court? Justice Ginsburg Answers That Question*, PBS (Feb. 5, 2015, 7:48 PM), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court>.

⁵ See Christine Ro, *Why Do We Still Distrust Women Leaders?*, BBC (Feb. 25, 2022), <https://www.bbc.com/worklife/article/20210108-why-do-we-still-distrust-women-leaders>. (“‘The stereotype is that women aren’t agentic’ – or decisive and authoritative – ‘and their voices aren’t as loud and they’re kind of small.’ Because those are the types of traits traditionally associated with men and with leaders, notions of leadership have become bound up with perceptions of masculinity.”).

⁶ See Ron Elving, *How the Supreme Court's Conservative Majority Came to Be*, NPR (July 1, 2023), <https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush> (discussing the right-wing progression of the Supreme Court).

the Supreme Court of the United States on June 30, 2022, she shattered glass ceilings as the first Black woman to serve on the nation’s highest bench.⁷ She is the sixth woman to serve on the Court in its 234 years of operation.⁸ The Court now consists of the most women justices presiding over the Court at once: (1) Justice Amy Coney Barrett; (2) Justice Ketanji Brown Jackson; (3) Justice Elena Kagan; and (4) Justice Sonia Sotomayor.⁹ With Justice Jackson’s appointment to the bench, the Court’s dissenting opinions on hot-button issues will likely be authored or joined by three liberal women.¹⁰ This was the trend when the late Justice Ruth Bader Ginsburg¹¹ sat on the bench, as she was often joined in dissent by Justice Kagan and Justice Sotomayor.¹² This writing will dissect what this means for the foreseeable future of the nation’s judicial system by analyzing powerful dissents of the left-leaning female justices during the last two Court terms.¹³ It will also

⁷ See Ximena Bustillo, *Ketanji Brown Jackson sworn in as first Black woman on the Supreme Court*, NPR (June 30, 2022), <https://www.npr.org/2022/06/30/1108714345/ketanji-brown-jackson-supreme-court-oath-swearing-in> (reporting on the historic nature of Justice Jackson’s swearing in as a Supreme Court justice).

⁸ CENTER FOR AMERICAN WOMEN AND POLITICS, *U.S. Supreme Court*, <https://cawp.rutgers.edu/facts/levels-office/us-supreme-court>; https://www.supremecourt.gov/about/members_text.aspx [hereinafter “CAWP”].

⁹ *Id.*

¹⁰ Elving, *supra* note 6.

¹¹ “Notorious RBG” served on the Supreme Court of the United States from August 10, 1993, until her demise on September 18, 2020. Justice Ginsburg was a trailblazing attorney and champion for women’s rights issues; she filed over twenty Supreme Court briefs related to women’s rights and successfully argued five of six cases before the Court during her time as a practitioner. During a recent ceremony honoring the late Justice, Attorney General Merrick Garland, who served as a Supreme Court law clerk when Justice Ginsburg was practicing, remarked that “[i]t was a time when there were few women lawyers, and even fewer women arguing before the highest court,” and that the justices at the time told their law clerks that she was “the best advocate we would hear all year.” SUPREME COURT OF THE UNITED STATES, *Biography of Associate Justice Ruth Bader Ginsburg*, <https://www.supremecourt.gov/about/biographyginsburg.aspx>; Jessica Gresko, *Supreme Court honors the legacy of Justice Ruth Bader Ginsburg*, ASSOCIATED PRESS (Mar. 17, 2023), <https://apnews.com/article/ruth-bader-ginsburg-supreme-court-memorial-b4451f29e27f663dfa499dd80e5e2a4f>.

¹² In 2011, when the Court was back in session with three female justices for the first time, Justice Ginsburg said, “When the schoolchildren file in and out of the court and they look up and they see three women, then that will seem natural and proper — just how it is.” Justice Sotomayor and Justice Kagan are the third and fourth women to serve on the Supreme Court. Robert Barnes & Michael A. Fletcher, *Ruth Bader Ginsburg dies: Supreme Court justice dead at age 87*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html.

¹³ See Dahlia Lithwick on the Supreme Court’s Legitimacy Crisis, THE GALLUP PODCAST, 18:05 (Aug. 2022) (downloaded using Spotify) (remarking on the optics of what it’s going to look like to have three women dissenting with [Justice] Amy Coney Barrett and the men in the majority”) [hereinafter “THE GALLUP PODCAST”].

reflect on notable dissents of Justice Ginsburg and the late Justice Sandra Day O'Connor¹⁴, as well as developments in our society which paved the way for the indefinite reign of the 2022-2023 Roberts Court.

When President Joseph R. Biden, Jr., announced Justice Jackson's nomination, he stated that "[f]or too long, our government, our courts haven't looked like America."¹⁵ While the composition of the bench may more accurately resemble the likeness of our nation's populace, Americans do not necessarily agree that this translates to a reflection of what direction they would like the Court to take.¹⁶ Pew Research Center reports that 54% of Americans express an unfavorable view of the Court.¹⁷ Favorability of the Court experienced a decline in recent years with a difference of 26% since 2020.¹⁸ The Associated Press' NORC Center for Public Affairs Research surveyed adults from May to December 2022 and found that 18% had a great deal of confidence in the Court, while 36% possessed hardly any.¹⁹ This recent spike in distrust in the

¹⁴ Justice Sandra Day O'Connor passed away on December 1, 2023, at age 93. She was the very first woman to serve on the Supreme Court, breaking a 192-year tradition of only male justices on the bench. In reflection on her appointment, Justice O'Connor said, "As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more women out there doing things, and we'll all be better off for it." Her ground-breaking tenure on the Court—often called "The O'Connor Court" despite Justice William H. Rehnquist having served as Chief Justice—paved the way for the next five female justices (and jurists that will follow them) to make their voices heard, whether in agreement or dissent. Greenhouse, *supra* note 2; SUPREME COURT OF THE UNITED STATES, *supra* note 2.

¹⁵ THE WHITE HOUSE, *Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/>.

¹⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2348 (2022) (Kagan, J., dissenting) ("[W]e know that citizens will continue to contest the Court's decision, because '[m]en and women of good conscience' deeply disagree about abortion."); see generally THE GALLUP PODCAST, *supra* note 13 (discussing public opinion of the Supreme Court in the wake of *Dobbs*).

¹⁷ Kaity Lin & Carroll Doherty, *Favorable views of Supreme Court falls to historic low*, PEW RESEARCH CENTER (July 21, 2023), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/#:~:text=Half%20of%20Americans%20now%20view,much%20in%20the%20past%20year.>

¹⁸ Lin & Doherty, *supra* note 17.

¹⁹ *Public Confidence in the U.S. Supreme Court is at its Lowest Since 1973*, THE ASSOCIATED PRESS, <https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973/>.

operation of the Court is largely influenced by the monumental precedents that were set, and overturned, in recent years—notably, *Dobbs v. Jackson Women’s Health Org.*²⁰

While the Court now consists of the most female justices to sit on the bench at once, one of the most controversial decisions of the 2021-2022 term arguably eradicated women’s bodily autonomy.²¹ Prior to Justice Stephen Breyer’s retirement—which opened the door for Justice Jackson’s momentous appointment—the Court delivered its landmark decision in *Dobbs*, ruling that “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.” Justice Kagan, joined by Justice Breyer and Justice Sotomayor, delivered a vehement dissent accusing the majority of reversing *Roe* and *Casey* solely “because it has always despised them, and now it has the votes to discard them,” undertaking a “cavalier approach in overturning [the] Court’s precedents,” with “no good reason for the upheaval in law and society it sets off.”²² Justice Kagan framed her dissent as a warning to America for turmoil to come, remarking that the majority hid the “geographically expansive effects of its holding,” and disregarded the consequences that *Dobbs* would have on women of color, women of little means, and women as a (second-)class.²³ Particularly, she gave Americans notice that other autonomous rights, previously decided by the Court to be implicitly protected by the Fourteenth Amendment, were presumably on the chopping block because of the majority’s utter lack of legal reasoning in reaching its decision.²⁴ The underlying tone of this dissent, and the dissents that follow in the next term,

²⁰ *I Public Confidence in the U.S. Supreme Court is at its Lowest Since 1973*, *supra* note 19.

²¹ *See Dobbs*, 142 S. Ct. at 2317 (Kagan, J., dissenting) (“[The Court] says that from the very moment of fertilization, a woman has no rights to speak of.”).

²² *Id.* at 2284, 2335, 2319 (Kagan, J., dissenting).

²³ *Id.* at 2318–19 (Kagan, J., dissenting); *see also id.* at 2325 (Kagan, J., dissenting) (stating that the majority “consigns women to second-class citizenship.”).

²⁴ *See id.* at 2331–32 (Kagan, J., dissenting) (referencing Justice Thomas’ concurrence which calls for reconsideration of *Griswold*, *Lawrence*, and *Obergefell*, and other “demonstrably erroneous” substantive due process precedents).

showcase “visceral, personal gut punches” at the majority for making baseless decisions and abandoning *stare decisis* merely due to the Court’s newfound conservativeness.²⁵

In its 6-3 decision in *303 Creative LLC v. Elenis*, the Court held that the First Amendment prohibited Colorado from compelling an individual to create speech that they do not believe in.²⁶ Justice Sotomayor, as Justice Kagan did in *Dobbs*, pointed to the Court’s total absence of logical reasoning in deciding this case.²⁷ She remarked that five years makes quite a difference, and not just on the Court itself.²⁸ Like Justice Kagan, Justice Sotomayor noted that the makeup of the Court seemed to be the only factor in influencing the reversal of precedent—something that the Court is not a stranger to, but should not be what stands between persons having liberties or not.²⁹ Justice Sotomayor used her dissent to educate the majority on the discrimination that LGBTQ+ individuals have faced for decades and to remind them of the numerous times the Court has been on their side to protect their constitutional rights.³⁰ In several instances, Justice Sotomayor expressed her shock that the Court somehow came to its decision without citing common-law cases to support its

²⁵ See THE GALLUP PODCAST at 15:41 (“Those . . . visceral, personal gut punches that you’re seeing justices delivering to one another? That stuff is brand new. That is the stuff we have not seen certainly, you know, since the FDR court-packing, roiling public conversation around the court.”).

²⁶ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023).

²⁷ See *id.* at 2338 (Sotomayor, J., dissenting) (“The majority simply skips over the Court’s key reasoning for why any speech compulsion was nevertheless “incidental” to the [First] Amendment’s regulation of conduct...”); see also *id.* at 2339 (Sotomayor, J., dissenting) (“Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing.”).

²⁸ As Justice Kagan did in her dissent of *Dobbs*, Justice Sotomayor alluded to the Court’s majority right-wing ideology as fuel for their decision to overturn precedent with no legal basis for doing so. See *id.* at 2322 (Sotomayor, J., dissenting).

²⁹ See ROBERT L. HAYMAN, *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW*, 353 (Richard Delgado & Jean Stefancic eds., 1998) (discussing Justice Brennan’s 1990 decision to uphold a federal affirmative action plan which the Court overturned in 1995 when it regained a conservative majority).

³⁰ See *303 Creative LLC*, 143 S. Ct. at 2322, 2326–29 (Sotomayor, J., dissenting).

position.³¹ Justice Jackson followed suit in her dissent of *Jones v. Hendrix*, calling on Congress to right the wrongs of the majority.³²

Justice Jackson, the Supreme Court's newest associate justice, individually delivered her dissent in *Jones* to express concern with the majority's "nothing-to-see-here approach with respect to the incarceration of potential legal innocents."³³ She conveyed her personal disagreement with the majority's interpretation of the "saving clause" by using a statutory analysis of the law in question, 28 U.S.C. § 2255(e)³⁴. While her dissent holds no precedential weight, its value may become as influential as Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, which arguably led to Congress passing the Ledbetter Act in 2009 in response to the Supreme Court's ruling.³⁵ In a fashion similar to her fellow dissenters, Justice Jackson delivered a fierce dissenting opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*³⁶ In this case, the majority held that Harvard's and UNC's admissions programs could not be reconciled with the Equal Protection Clause of the Fourteenth Amendment because of their use of race in the process.³⁷ Justice Jackson, joined by Justice Kagan and Justice Sotomayor, passionately objected to the Court's ruling, stating that "the majority pulls the ripcord and announces 'colorblindness for

³¹ See *303 Creative LLC*, 143 S. Ct. at 2326 (Sotomayor, J., dissenting) ("Tellingly, the majority cites no common-law case espousing the monopoly rationale.").

³² See *Jones v. Hendrix*, 143 S. Ct. 1857, 1899 (2023) (Jackson, J., dissenting) (opining that the majority opinion "creates an opening for Congress to step in and fix this problem.").

³³ *Jones*, 143 S. Ct. at 1878 (Jackson, J., dissenting).

³⁴ *Id.* at 1878–81 (Jackson, J., dissenting).

³⁵ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643–61 (2007) (Ginsburg, J., dissenting) ("[T]he ball is in Congress' court."); see also Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 6 (finding that the Supreme Court's ruling in *Ledbetter* "significantly impairs statutory protections against discrimination in compensation.").

³⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.* (No. 20-1199) was consolidated with *Students for Fair Admissions, Inc. v. Univ. of N.C.* (No. 21-707). Justice Jackson recused herself from No. 20-1199 because of her affiliation with Harvard and authored her dissent with respect to No. 21-707 only. No. 20-1199 was decided 6-2, and No 21-707 was decided 6-3. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2176 (2023).

³⁷ *Id.* at 2154.

all’ by legal fiat. But deeming race irrelevant in law does not make it so in life.”³⁸ Again echoing the sentiments of her fellow dissenters, Justice Jackson wrote that the majority’s judgment was made “without any basis in law, history, logic, or justice,” sounding the same alarm of a Court at risk of losing its legitimacy with each decision it makes.³⁹ Justice Jackson asserted that the Court exhibited “let-them-eat-cake obliviousness” by pandering to “those who either do not know our Nation’s history or long to repeat it.”⁴⁰

With legal precedent as shield and vigorous verbiage as sword, the liberal-minded female Associate Justices eloquently made sure the majority, and Americans, knew that they would continue to advocate for individual’s rights while on the bench, regardless of having to fight an uphill battle or if their tone is misconstrued as “inappropriate or jarring.”⁴¹ Women are often viewed as unfit for political life, which perpetuates the theory of gender inferiority even in our nation’s highest court.⁴² Despite this, the justices’ dissents showcase a shifted tone between members of the bench and a determination to be heard, even when in the minority.⁴³ Many of those implicated in the cases brought before the Court identify as minorities—women, people of color, incarcerated individuals, LGBTQ+ folks⁴⁴—whose voices have been silenced or whose opinions are shunned for decades before coming to the Court.⁴⁵ As an Indian-American woman navigating

³⁸ *Students for Fair Admissions Inc.*, 143 S. Ct. at 2277 (Jackson, J., dissenting).

³⁹ *Id.* at 2264 (Jackson, J., dissenting); *see also* THE GALLUP PODCAST (discussing the impact of the Roberts Court’s decisions on public perceptions of the Court’s legitimacy).

⁴⁰ *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2277–78 (Jackson, J., dissenting).

⁴¹ NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW*, 151, (Richard Delgado & Jean Stefancic eds., 1998) (“The argument that feminists should control their anger runs the danger of playing into the hands of a stereotype: that expressions of anger by women are unfeminine, and therefore inappropriate and jarring.”).

⁴² *See* HAYMAN, *supra* note 29, at 236–37 (“The critical element in theories of gender inferiority has been the idea that a ‘woman’s nature,’ a nature that ‘unfitted’ her for, among other things, political life.”).

⁴³ *See* THE GALLUP PODCAST, *supra* note 13.

⁴⁴ *See generally* the decisions of *Dobbs*, *Students for Fair Admissions*, and *303 Creative, LLC* (ruling against the interests of the named minority groups).

⁴⁵ *See 303 Creative, LLC*, 143 S. Ct. at 2326–29 (Sotomayor, J., dissenting) (recounting the struggles that LGBTQ+ individuals have faced throughout the years).

through the legal profession, I can only hope to have at least half the courage of the female jurists of the Supreme Court to pioneer and persevere in the face of adversity during my career of lifelong advocacy.