

## FOREWORD

### GREAT DISSENTS IN FOURTH AMENDMENT CASES

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The National Center for Justice and the Rule of Law,<sup>1</sup> which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the *Fourth Amendment Initiative* is its annual symposium on important search and seizure topics. On February 13, 2009, the Center hosted the symposium, "*Great Dissents in Fourth Amendment Cases*," which was the second day of an appellate judge conference on selected Fourth Amendment topics. In the audience were approximately thirty appellate judges from across the country, as well as academics,

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members of the law school community, and others. It was web-cast, and this symposium edition of the law journal is widely distributed.

Five dissents were examined at the symposium and in the articles written for this edition of the *Mississippi Law Journal*. The authors have chosen the seminal dissents of Justice Brandeis in *Olmstead v. United States*,<sup>2</sup> Justice Douglas in *Terry v. Ohio*,<sup>3</sup> Justice Harlan in *United States v. White*,<sup>4</sup> Justice Marshall in *Schneckloth v. Bustamonte*,<sup>5</sup> and Justice O'Connor in *Atwater v. Lago Vista*.<sup>6</sup> The distinguished authors are Professor Paul Butler of the George Washington University Law School, Professor Catherine Hancock<sup>7</sup> of Tulane University School of Law, Professor Arnold H. Loewy of Texas Tech University School of Law, Professor Wayne A. Logan of Florida State University College of Law, and Professor Carol S. Steiker of Harvard Law School.

What makes a dissent “great”? Depending on one’s point of view, there are many candidates<sup>8</sup> for such designation, ranging

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<sup>2</sup> 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

<sup>3</sup> 392 U.S. 1, 35-39 (1968) (Douglas, J., dissenting).

<sup>4</sup> 401 U.S. 745, 769-95 (1971) (Harlan, J., dissenting).

<sup>5</sup> 412 U.S. 218, 277-90 (1973) (Marshall, J., dissenting).

<sup>6</sup> 532 U.S. 318, 360-73 (2001) (O'Connor, J., dissenting).

<sup>7</sup> See also Catherine Hancock, *Justice Powell's Garden: The Ciraolo Dissent and Fourth Amendment Protection for Curtilage-Home Privacy*, 44 SAN DIEGO L. REV. 551 (2007) (addressing another important dissent in a Fourth Amendment case).

<sup>8</sup> E.g., *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting) (exclusion's role); *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 191 (2004) (Breyer, J., dissenting) (impact of requiring person to identify himself); *Minnesota v. Carter*, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting) (standing of house guests); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (O'Connor, J., dissenting) (role of individualized suspicion); *County of Riverside v. McLaughlin*, 500 U.S. 44, 59 (1991) (Scalia, J., dissenting) (length of time to detain prior to probable cause hearing); *Illinois v. Rodriguez*, 497 U.S. 177, 189 (1990) (Marshall, J., dissenting) (apparent authority to consent); *California v. Greenwood*, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (normative approach to privacy); *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Blackmun, J., dissenting) (workplace privacy expectations); *Illinois v. Krull*, 480 U.S. 340, 361 (1987) (O'Connor, J., dissenting) (application of exclusionary rule to acts of legislature); *Ybarra v. Illinois*, 444 U.S. 85, 98 (1979) (Rehnquist, J., dissenting) (relationship of two clauses in context of detention of bar patron); *Smith v. Maryland*, 442 U.S. 735, 747 (1979) (Stewart, J., dissenting) (pen registers); *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978) (Stewart, J., dissenting) (relation of the First and Fourth Amendments); *Rakas v. Illinois*, 439 U.S. 128, 156 (1978) (White, J., dissenting) (automobiles and privacy); *United States v. Robinson*, 414 U.S. 218, 238 (1973) (Marshall, J., dissenting) (rejecting per se search inci-

from Justice Brandeis's dissent in *Olmstead*, which first proposed privacy as a centralizing principle and offered a broad view of the applicability of the Amendment, Justice Frankfurter's defense of the warrant preference model of reasonableness,<sup>9</sup> Justice Brennan's normative approach to privacy in such cases as *Greenwood*,<sup>10</sup> to Justice Black's conservative views of the structure of the Fourth Amendment in *Katz*<sup>11</sup> and *Berger*.<sup>12</sup> But is there more to a dissent that makes it important beyond espousing a particular point of view? Is it the clarity of the vision?<sup>13</sup> Is it the principled nature of the opinion? Is it merely the author's facility with language or the sentiment expressed?<sup>14</sup> Is it the fact that, in a subsequent case, that view prevailed?

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dent to arrest rule); *Couch v. United States*, 409 U.S. 322, 344 (1973) (Marshall, J., dissenting) (relation of the Fourth and Fifth Amendments); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) (role of suppression); *Alderman v. United States*, 394 U.S. 165, 200 (1969) (Fortas, J., concurring in part and dissenting in part) (standing); *Lopez v. United States*, 373 U.S. 427, 446 (1963) (Brennan, J., dissenting) (secret recording by undercover agent); *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting) (liberal versus literal approach to interpretation).

<sup>9</sup> See cases cited *infra* note 15.

<sup>10</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>11</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>12</sup> *Berger v. New York*, 388 U.S. 41 (1967).

<sup>13</sup> An articulation of the dangers of the effects of technological advances and calls for a liberal construction were repeatedly made throughout the twentieth century, beginning with Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). After *Olmstead*, many other dissenting justices expressed similar concerns. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 218, 226 (1986) (Powell, J. dissenting) (noting that advances in technology allow police to conduct surveillance without physical trespass); *Dow Chem. Co. v. United States*, 476 U.S. 227, 251 (1986) (Powell, J., concurring in part and dissenting in part) (suggesting that dissemination of technological advances threatens privacy rights); *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting) ("[T]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps."); *On Lee v. United States*, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting) (noting that police intrusion of privacy will increase as technology progresses); *Goldman v. United States*, 316 U.S. 129, 137-39 (1942) (Murphy, J., dissenting) (noting that science has created additional threats to privacy).

<sup>14</sup> E.g., *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting):

[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Turning to a related question, is there a candidate for the label “great dissenter” in Fourth Amendment cases? That is, some one member of the Court who, over time, espoused a vision of the Amendment that was in opposition to the majority that stands out as particularly noteworthy. A few candidates come to mind; justices who dissented in a series of cases that together created a theme or coherent alternative vision for Fourth Amendment analysis. One was Justice Frankfurter, who vigorously argued for the central role of a warrant and the need for objective criteria to measure reasonableness.<sup>15</sup> Another is Jus-

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*See also* *On Lee v. United States*, 343 U.S. 747, 759-60 (1952) (Frankfurter, J., dissenting) (commenting on wiretapping, he observed that “[f]ew sociological generalizations are more valid than that lawlessness begets lawlessness”). Justice Brandeis’s dissent, which is discussed by Professor Steiker, is perhaps the most literary of all Fourth Amendment opinions. Thus, for example, Brandeis urged that “a principle to be vital must be capable of wider application than the mischief which gave it birth.” *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting). Rejecting a literal construction to the Amendment, he argued:

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

*Id.* at 478. In a similar vein is *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting). In contrast, Justice Black’s dissent in *Katz v. United States*, 389 U.S. 347, 373 (1967), stands out for his defense of a literal approach to construing the Amendment:

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to “keep the Constitution up to date” or “to bring it into harmony with the times.” It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

<sup>15</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting); *Harris v. United States*, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting). Frankfurter is sometimes overlooked because of his refusal to apply the Fourth Amendment directly to the activities of state and local government; instead, he sought an accommo-

tice Douglas, whose dissent in *Terry* is discussed by Professor Butler; he produced a series of dissents opposing the Warren Court's remodeling of traditional Fourth Amendment analysis<sup>16</sup> and outlining his concerns about the encroachments of modern life.<sup>17</sup> A third is Justice Brennan, who was an architect of the Warren Court's remodeling of the Amendment's structure.<sup>18</sup> When that era ended, he became a prolific member of the minority on the Court, criticizing the Burger and Rehnquist Courts' Fourth Amendment jurisprudence.<sup>19</sup> Finally, in contrast to Douglas and Brennan's liberal views, which sought expansive coverage of the Amendment, Justice Black wrote some remarkable dissents, seeking to interpret the Amendment literally and restrict its application to historical police practices.<sup>20</sup>

There are, of course, other important dissents and dissenters. Turning to a current member of the Court, Justice Stevens has served on the Court since December 19, 1975, and that term has encompassed the tenure of three different Chief Justices. His tenure is remarkable for the sheer number of his dissents and concurring opinions. Stevens has expressed his views in

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dation by utilizing a due process rationale. *See, e.g.*, *Frank v. Maryland*, 359 U.S. 360 (1959); *Irvine v. California*, 347 U.S. 128, 142-49 (1954) (Frankfurter, J., dissenting); *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>16</sup> *E.g.*, *United States v. Matlock*, 415 U.S. 164, 178 (1974) (Douglas, J., dissenting).

<sup>17</sup> *E.g.*, *Osborn v. United States*, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting).

<sup>18</sup> *E.g.*, *Warden v. Hayden*, 387 U.S. 294 (1967); *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>19</sup> *E.g.*, *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting) (sobriety checkpoints); *Horton v. California*, 496 U.S. 128, 142 (1990) (Brennan, J., dissenting) (plain view); *Maryland v. Buie*, 494 U.S. 325, 339 (1990) (Brennan, J., dissenting) (protective sweeps); *Florida v. Riley*, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting) (helicopter surveillance of curtilage); *California v. Greenwood*, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (expectations of privacy in garbage left for collection); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (Brennan, J., dissenting) (open fields doctrine); *Nix v. Williams*, 467 U.S. 431, 458 (1984) (Brennan, J., dissenting) (inevitable discovery doctrine); *United States v. Leon*, 468 U.S. 897, 928 (1984) (Brennan, J., dissenting) (good faith exception to exclusion); *Illinois v. Gates*, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting) (methodology to assess usefulness of informant tips); *New York v. Belton*, 453 U.S. 454, 463 (1981) (Brennan, J., dissenting) (bright line rule for vehicle searches incident to arrest); *Andresen v. Maryland*, 427 U.S. 463, 484 (1976) (Brennan, J., dissenting) (particularity requirement); *Stone v. Powell*, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting) (application of exclusionary rule to habeas corpus proceedings).

<sup>20</sup> *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting); *Berger v. New York*, 388 U.S. 41, 70 (1967) (Black, J., dissenting).

virtually every major Fourth Amendment opinion since joining the Court, regardless of whether the government or the individual prevailed. Perhaps Justice Stevens's most influential dissent was in *California v. Hodari D.*<sup>21</sup> In that case, Justice Scalia, writing for the majority, redefined the concept of a seizure, marking the point at when a person submits to a show of authority by the police or when the police apply physical force.<sup>22</sup> This contrasted to the commonly held view prior to *Hodari D.* that applicability of the Fourth Amendment was not dependent upon an individual's actions and that it did not matter if the person stopped as a result of the intimidating police action.<sup>23</sup> Justice Stevens, dissenting in *Hodari D.*, mounted a significant defense of that view, arguing, inter alia, that "the character of the citizen's response should not govern the constitutionality of the officer's conduct."<sup>24</sup> A dozen state courts, on independent state grounds, have rejected the *Hodari D.* majority's approach based, in large part, on Stevens's dissent.<sup>25</sup> Does the mere number of his dissents put Stevens in a category of a great dissenter or does the persuasiveness of his views in *Hodari D.*, as measured by the number of courts adopting that dissent, so qualify that dissent?

Neither this symposium nor this introduction identifies all the candidates for characterization as "great" dissents. Too many points of view preclude such a task. Nonetheless, the ar-

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<sup>21</sup> 499 U.S. 621 (1991).

<sup>22</sup> *Id.* at 622-29.

<sup>23</sup> See generally THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 5.1.4.2 (2008).

<sup>24</sup> 499 U.S. at 645 (Stevens, J., dissenting).

<sup>25</sup> See *Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992); *Jones v. State*, 745 A.2d 856, 868 (Del. 1999); *State v. Quino*, 840 P.2d 358, 362 (Haw. 1992); *Commonwealth v. Stoute*, 665 N.E.2d 93, 95-98 (Mass. 1996); *Welfare of E.D.J.*, 502 N.W.2d 779, 781-83 (Minn. 1993); *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002); *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994); *State v. Beauchesne*, 868 A.2d 972, 979 (N.H. 2005); *People v. Bora*, 634 N.E.2d 168, 169-70 (N.Y. 1994); *State v. Puffenbarger*, 998 P.2d 788, 792 (Or. Ct. App. 2000); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330, 336 (Tenn. 2002); *State v. Young*, 957 P.2d 681, 686 (Wash. 1998). The Supreme Court of Louisiana has also rejected *Hodari D.* as the sole standard to determine when a seizure occurs and has added, for the purpose of the Louisiana Constitution, the additional protection against "imminent actual stops." *State v. Tucker*, 626 So. 2d 707, 712 (La. 1993).

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ticles by the distinguished scholars that comprise this symposium add to our knowledge of the Fourth Amendment and contribute to the debate as to its meaning. I thank the authors for contributing to the symposium and furthering our knowledge of Fourth Amendment jurisprudence.