

ALEX KOZINSKI & JAMES BURNHAM

I Say Dissental, You Say Concurral

Increasing numbers of circuit judges are writing dissents from, and concurrences in, orders denying rehearing en banc—colloquially known as dissentals and concurrals. Not everyone is happy about this practice, and some judges have lamented their proliferation. The authors here argue that this has become an entrenched feature of the federal appellate process, and it’s a good thing too.

After losing an en banc vote back in 1960, Judge Clark penned a dissental mildly chiding the Second Circuit for having failed to take the case en banc.¹ Judge Friendly took umbrage, impugning the legitimacy of a practice that enabled

any active judge [to] publish a dissent from any decision, although he did not participate in it and the Court has declined to review it en banc thereafter, a practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur.²

One of Judge Friendly’s successors, Judge Pooler, recently reiterated his complaint. She disparaged dissentals as “oddities” with “as much force of law as if those views were published in a letter to the editor of [the authors’] favorite local newspaper.”³ Judge Pooler lamented:

-
1. *United States v. N.Y., New Haven & Hartford R.R.*, 276 F.2d 525, 549 (2d Cir. 1960) (Clark, J., dissental).
 2. *Id.* at 553 (Friendly, J., concurral).
 3. *United States v. Stewart*, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J., concurral).

the unsuccessful request for an en banc rehearing becomes an occasion for any active judge who disagrees with the panel to express a view on the case even though not called upon to decide it. By employing the simple tactic of calling for an en banc poll, active judges provide themselves with an opportunity to opine on a case that was never before them.⁴

This practice, she concluded, works “mischief” by undermining the original panel’s message with “further advisory opinions” that are “unnecessary” and only “muddy[] the waters.”⁵

Despite such objections, dissents have persisted, even flourished. It’s time we put the legitimacy debate behind us and embraced the dissent as an established and useful part of the appellate process.

* * *

There is a significant body of thoughtful literature about why judges in the American tradition exercise the right of public dissent. Justice Brennan described dissents as “appeal[s] to the future,” and argued that “[t]hrough dynamic interaction among members of the present Court and through dialogue across time with the future Court, we ensure the continuing contemporary relevance and hence vitality of the principles of our fundamental charter.”⁶ Chief Justice Hughes called dissents “appeal[s] to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”⁷ Justice Cardozo described the dissenter as “the gladiator

4. *Id.*

5. *Id.* at 519-20; *see also, e.g.*, *Defenders of Wildlife v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring), *rev’d*, 551 U.S. 644, 673 (2007); *Indep. Ins. Agents of Am., Inc. v. Clarke*, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (statement of Randolph, J.). Many of these examples are chronicled by Indraneel Sur in *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1328-31.

6. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432, 438 (1986).

7. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES—ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 68 (1928).

I SAY DISSENTAL, YOU SAY CONCURRAL

making a last stand against the lions.”⁸ Indeed, the seeds planted by dissenting judges sometimes germinate and grow into stout trees.⁹

Among the recognized legitimate reasons for dissenting are the following: to encourage a higher court to reverse; to dissuade a coordinate court from following the majority; to express a hope that the same court in the future will overrule today’s majority; to provide an educational tool to students of the law and the public; and to sound a call to arms to the political branches.¹⁰ No one has suggested that the *Citizens United* or *Ledbetter* dissents are “of dubious policy,” “unnecessary,” or that they work “mischief” or “muddy[] the waters.” Quite the contrary.¹¹ Justice Brandeis was beatified for *Olmstead*;¹² Justice Harlan, canonized for *Plessy*.¹³

A dissent is a public disagreement with the actions of a body of which you are a member. It is a declaration that you would do something different—usually the exact opposite of what the group is doing. Dissents are most commonly associated with published opinions, but they certainly are not so limited. There are dissents from procedural orders,¹⁴ from jurisdictional

-
8. BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 34 (1986); see also Sur, *supra* note 5, at 1318 n.13 (citing works by Justices Scalia, Ginsburg, and Brennan, and Judges Wald and Lipez).
 9. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
 10. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 979 (2010) (Stevens, J., dissenting) (“At bottom, the Court’s opinion is thus 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.”), *echoed in* President Barack H. Obama, State of the Union Address (Jan. 27, 2010) (“I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.”); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) (“Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 U.S.C. and 42 U.S.C.).
 11. See, e.g., Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 44 (2008) (“The oral dissent[] delivered by Justice[] . . . Ginsburg in the October 2006 Term ha[d] a latent power, a power that does not come from simply questioning the position of judicial colleagues with a pinched view of the role of . . . gender in our democracy.”).
 12. *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).
 13. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).
 14. See, e.g., *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1028 (9th Cir. 1982) (Boochever, J., dissenting) (“I respectfully dissent. I think that Judge Muecke properly certified his recusal

orders,¹⁵ from dismissals for mootness,¹⁶ from the grant or denial of certificates of probable cause,¹⁷ from certificates of appealability,¹⁸ and from referral of a case to a state court for resolution of a state-law issue¹⁹—to name just a few. In fact, there's nothing a collegial court does that is so trivial it does not occasionally give rise to a dissent—yet no one bats an eyelash. Why then the apoplexy about dissents?

Dissent detractors, like Judge Friendly, claim that dissents are illegitimate because the authors were not members of the panel that originally decided the case. But that misses the point: The judge is not dissenting from the panel opinion, but from the order of the full court declining to take the case en banc. That criticism will necessarily involve a discussion of the merits, but the same is true of an en banc call. If it were truly illegitimate for an off-panel judge to criticize the panel's opinion, then en banc calls could only be made by the judges who decided the case—the judicial equivalent of the fox guarding the henhouse.

Odd as it may seem, that *was* the law once (at least in the Ninth Circuit), and it provoked the first-ever dissent, authored by Judge Denman.²⁰ The law

order, pursuant to 28 U.S.C. § 1292(b), and that we should have accepted the interlocutory appeal.”), *aff'd mem.*, 459 U.S. 1191 (1983).

15. See, e.g., *United States v. Castillo*, 464 F.3d 988, 990 (9th Cir. 2006) (Bybee, J., dissenting) (“I believe that we cannot dismiss this case for want of jurisdiction without seeking en banc approval.”), *vacated*, 496 F.3d 947 (9th Cir. 2007) (en banc).
16. See, e.g., *Suntharalinkam v. Keisler*, 506 F.3d 822, 828 (9th Cir. 2007) (en banc) (Kozinski, J., dissenting) (“We ought to be chary in finding mootness in a situation such as this . . .”).
17. See, e.g., *Weeks v. Jones*, 52 F.3d 1559, 1574 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part) (“I would grant Weeks’s requests for a certificate of probable cause and for a stay to allow for oral argument.”).
18. See, e.g., *Ramirez Cardenas v. Thaler*, 651 F.3d 442, 447 (5th Cir. 2011) (Garza, J., dissenting) (“I would exercise our authority under Rule 2 of the Rules of Appellate Procedure to suspend the relevant portion of Rule 22 and would deny [the] COA. I therefore must dissent.”).
19. See, e.g., *Carroll v. United States*, 923 F.2d 752, 754 (9th Cir. 1991) (Kozinski, J., dissenting) (urging “the Arizona Supreme Court to just say no”).
20. See *Crutchfield v. United States*, 142 F.2d 170, 177 (9th Cir. 1943) (Denman, J., dissent). Judge Denman was still at it in 1952, when, as Chief Judge, he complained about “[t]he cavalier refusal of the court to consider the contentions of the corporation’s petition” and “[t]he shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities . . .” *W. Pac. R.R. v. W. Pac. R.R.*, 197 F.2d 994, 1018 (9th Cir. 1951) (Denman, C.J., dissent) (not a divorce case). Judge Denman was vindicated posthumously by the adoption of Federal Rule of Appellate Procedure 35, which “provides that [en banc] suggestions will be directed to the judges of the court in regular active service.” FED. R. APP. P. 35 advisory committee’s note.

was an ass in that regard²¹ and was eventually changed.²² Everyone now accepts that off-panel judges can disturb a panel decision by writing internal memos urging that it be reheard en banc. No one claims such judges are meddling or that they're insufficiently familiar with the facts or law. Off-panel judges have to know the case as well as or better than the panel judges if they hope to pull off a successful en banc call. En banc memos are usually as sophisticated as the panel opinion, sometimes more so. If the call is unsuccessful, they get turned into equally sophisticated dissents.

Dissenting naysayers also seem to argue that it's inappropriate to dissent from a discretionary decision, such as whether to go en banc. But orders denying discretionary relief are no less subject to reasonable disagreement than those resolving the merits. Nothing in the law is more discretionary than the denial of certiorari, yet the Justices routinely register certses,²³ sometimes with immediate and dramatic effect.²⁴ Justice White filed certses whenever he believed there was a conflict in the circuits.²⁵ Justices Brennan and Marshall certsed in all capital cases.²⁶ Certses occasionally prompt a response.²⁷ Twenty-one of the twenty-three Justices who have served on the Court in the last four decades have authored certses.²⁸ These go back to at least 1938 when Justices Black and Reed certsed, without opinion, in *Mooney v. Smith*.²⁹

-
21. Cf. CHARLES DICKENS, *OLIVER TWIST* 461 (Penguin Books 1966) (1837-1839) (“If the law supposes that,” said Mr. Bumble, squeezing his hat emphatically in both hands, ‘the law is a ass—a idiot.’”).
 22. FED. R. APP. P. 35.
 23. See, e.g., *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., certsent) (arguing that certiorari should be granted to “squarely confront both the meaning and the constitutionality of [18 U.S.C.] § 1346”).
 24. See, e.g., *Skilling v. United States*, 130 S. Ct. 393 (2009) (granting certiorari to consider the proper scope of 18 U.S.C. § 1346); *Weyhrauch v. United States*, 129 S. Ct. 2863 (2009) (same); *Black v. United States*, 129 S. Ct. 2379 (2009) (same).
 25. See, e.g., *Kennedy v. United States*, 469 U.S. 965, 965 (1984) (White, J., certsent) (“Because the decision of the Court of Appeals in this case conflicts with [a] decision of the Court of Appeals for the First Circuit . . . , I would grant certiorari.” (citing *United States v. Canus*, 595 F.2d 73 (1st Cir. 1979))).
 26. See, e.g., *O’Bryan v. McKaskle*, 465 U.S. 1013, 1013 (1984) (Brennan & Marshall, JJ., certsent) (“Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant certiorari and vacate the death sentence in this case.” (citing *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976))).
 27. See, e.g., *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., certcurral); *id.* at 993 (Breyer, J., certsent).
 28. See *infra* Appendix A.
 29. 305 U.S. 598 (1938) (mem.).

There have been hundreds in the intervening seven decades. While Justice Stevens has spoken out against certiorari petitions of vexatious litigants unless they paid the filing fee.³¹ To each his own.

By our count, 45 judges have filed some 290 dissents in over 230 cases in the Ninth Circuit. This includes 41 of the 71 who have served as active judges since 1970.³² And all but 10 of those 71 have joined dissents written by others.³³ Hundreds more dissents have been filed in the courts of appeals nationwide.³⁴ Some judges are so dissent-happy they file two in the same case.³⁵

Dissents often generate heated debate.³⁶ Invariably, they address issues that are of great moment at the time.³⁷ Earlier this year, the Seventh Circuit

30. See, e.g., *Singleton v. Comm’r*, 439 U.S. 940, 942 (1978) (Stevens, J., concurring).

31. See, e.g., *Shieh v. Kakita*, 517 U.S. 343, 344 (1996) (Stevens, J., dissenting).

32. See *infra* Appendix B.

33. See *infra* Appendix C.

34. See, e.g., *United States v. McKnight*, No. 10-2297, 2012 WL 364049, at *2 (7th Cir. Feb. 6, 2012) (Posner, J., dissent) (“The appeal presents an important question that deserves the attention of the full court . . .”); *Isaacs v. Kemp*, 782 F.2d 896, 897 n.1 (11th Cir. 1986) (Hill, J., dissent) (“Dissents from orders denying rehearing en banc have proliferated in our court . . . to the point where the practice may be said to have become institutionalized.” (emphasis omitted)); *Walker v. United States*, 327 F.2d 597, 600 (D.C. Cir. 1963) (Wright, J., dissent); *Fooks v. United States*, 246 F.2d 629, 637 (D.C. Cir. 1957) (Bazelon, J., dissent); *Mitchell v. Household Fin. Corp.*, 208 F.2d 667, 672 (3d Cir. 1954) (Biggs, C.J., dissent).

35. See *Beatty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (Reinhardt, J., dissent); *id.* at 1076 (more Reinhardt, J., dissent).

36. See, e.g., *Novak v. Beto*, 456 F.2d 1303, 1304 (5th Cir. 1972) (Wisdom, J., dissent) (“With deep distress and profound regret I note the refusal of a majority of the members of this Court to give en banc consideration to this case.”); *id.* at 1308 (Coleman, J., concurring) (“Without the slightest qualm or misgiving I voted to deny rehearing en banc in this case.”); *Chessman v. Teets*, 239 F.2d 205, 223 (9th Cir. 1956) (Lemmon, J., concurring) (“Chessman has been accorded all due process except the long overdue process of his execution. By such execution, perhaps, the blot upon . . . California’s juristic escutcheon will be, if not wholly erased, at least partly dimmed.”); *id.* at 223-24 (Denman, C.J., dissent) (“Though it may well be a matter of life or death to Chessman, Judge Lemmon would have it that the Supreme Court in its opinion overruled, sub silentio, its several holdings that any important appellate proceeding is a part of the due process of the Fourteenth Amendment. . . . It is absurd to argue in any case, that the Supreme Court, by mere silence on a contention not presented to it, decides that contention adversely to the party making it. A fortiori is the absurdity of such a contention in a capital case.”).

37. See, e.g., *Hamdi v. Rumsfeld*, 337 F.3d 335, 357 (4th Cir. 2003) (Luttig, J., dissent), *cited in* 542 U.S. 507, 526 (2004); *Falwell v. Flynt*, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissent), *rev’d sub nom.* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

I SAY DISSENTAL, YOU SAY CONCURRAL

refused en banc rehearing in *United States v. Holcomb*, but every single one of the court's active judges authored or joined a concurral or dissent.³⁸ The three opinions (one concurral and two dissents) grapple fully with the merits and each other. But for their captions, they look, smell, walk, and talk like the opinions of an en banc court. It would be hard to dispute that the Seventh Circuit had a de facto en banc in *Holcomb*. Chief Judge Easterbrook's concurral was, in fact, nominated for the 2011 Green Bag Exemplary Legal Writing contest under the category "Opinions for the Court" rather than under "Concurrences, Dissents, Etc."³⁹ Can anyone say with a straight face that these three opinions, involving every active judge of the Seventh Circuit, added nothing useful to the law?

Proliferation and institutionalization of dissents makes perfect sense. As appellate courts grow, each judge has less of an opportunity to sit on the panels that decide the burning issues of the day. Dissents have become a way for judges to express a view on the merits of important cases decided by their courts when the luck of the draw does not assign them to the original three-judge panel. There is every indication that dissents serve an important function and are taken seriously by courts, the public, the academy, and the legal profession:

- They are cited by the Supreme Court in its opinions.⁴⁰
- Supreme Court Justices ask questions about them during oral argument.⁴¹

38. 657 F.3d 445 (7th Cir. 2011).

39. *Recommended Reading*, in THE GREEN BAG ALMANAC & READER 2012, at 9, 9 (Ross E. Davies & Ira Brad Matetsky eds. 2011), available at http://www.greenbag.org/green_bag_press/almanacs/almanac_2012_excerpts.pdf.

40. See, e.g., *Bobby v. Bies*, 556 U.S. 825 (2009) (citing and quoting a dissent by Judge Sutton seven times in a seven-page opinion (citing *Bies v. Bagley*, 535 F.3d 520, 531-32 (6th Cir. 2008) (Sutton, J., dissent))); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (citing 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissent)); *Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007) (citing 418 F.3d 1055, 1058 (9th Cir. 2005) (O'Scannlain, J., dissent)); *Johnson v. California*, 543 U.S. 499, 505 (2005) (citing 336 F.3d 1117, 1117 (9th Cir. 2003) (Ferguson, J., dissent)); see also Sur, *supra* note 5, at 1350-51 & nn.158-59.

41. See, e.g., Transcript of Oral Argument at 49-50, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472) (Ginsburg, J.) ("But there was something that I did want to ask you about, Judge O'Scannlon's [sic] opinion. He said, if—if you prevail and you are right, what happens in Arlington Cemetery, where there's the Argonne Cross Memorial and the Canadian Cross of Sacrifice, both right here in Arlington, what happens to them?" (referencing *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008) (O'Scannlain, J., dissent))).

- They are relied upon by Supreme Court Justices in totally different cases.⁴²
- They are considered by other courts in deciding whether to follow the panel opinion.⁴³
- “[T]he Solicitor General of the United States and private litigants quote from rehearing dissents when petitioning or fending off arguments”⁴⁴
- “Several rehearing dissents have promoted the development of the law by stimulating law professors to write articles and law students to write commentaries.”⁴⁵
- They are cited in casebooks and treatises.⁴⁶
- They have been authored by Supreme Court Justices in their former lives as circuit judges.⁴⁷

-
42. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (citing *United States v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, C.J., dissental)); *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001) (citing *Little Six, Inc. v. United States*, 229 F.3d 1383, 1385 (Fed. Cir. 2000) (Dyk, J., dissental)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (citing *Kamilewicz v. Bank of Bos. Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissental)).
43. See, e.g., *Khan v. Filip*, 554 F.3d 681, 687 n.2 (7th Cir. 2009) (“[S]even other circuits agree with our interpretation, and the Ninth Circuit’s refusal to rehear *Ramadan* en banc prompted a strongly worded dissent from nine judges.” (citing *Ramadan v. Keisler*, 504 F.3d 973, 973 (9th Cir. 2007) (O’Scannlain, J., dissental)); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227-34 (11th Cir. 2005) (en banc) (following a dissental rather than the panel opinion (citing *Farrakhan v. Washington*, 359 F.3d 1116, 1116 (9th Cir. 2004) (Kozinski, J., dissental)); see also *Sur*, *supra* note 5, at 1354-55 & nn.170-73.
44. *Sur*, *supra* note 5, at 1352-53 (footnotes omitted).
45. *Id.* at 1358 (footnotes omitted); see, e.g., Richard Briffault, *The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 *FORDHAM URB. L.J.* 399, 415-16 (2005) (analyzing the dissentals in *Landell v. Sorrell*, 406 F.3d 159, 167 (2d Cir. 2005) (Walker, C.J., dissental); *id.* at 174 (Jacobs, J., dissental); *id.* at 178 (Cabranes, J., dissental); *id.* at 179 (Raggi, J., dissental)); *Sur*, *supra* note 5, at 1357-58 & nn.183-84; Patrick J. McDonald, Note, *Cerqueira v. American Airlines: What Are the Appropriate Limits of an Air Carrier’s Permissive Refusal Power?*, 20 *GEO. MASON U. C.R. L.J.* 111, 127 (2009) (analyzing the dissentals in *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 20 (1st Cir. 2008) (Torruella, J., dissental); *id.* at 23 (Lipez, J., dissental)).
46. See, e.g., JAY DRATLER & STEPHEN M. MCJOHN, *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* § 3.01 n.11.9 (2006) (explaining that patent applicants should try to avoid product-by-process claims (citing *Atl. Thermoplastics Co. v. Faytex Corp.*, 974 F.2d 1279, 1293 (Fed. Cir. 1992) (Newman, J., dissental)); RICHARD A. EPSTEIN, *TORTS* § 19.3.3 n.65 (7th ed. 1999) (explaining the contours of the right of publicity (citing *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1512 (9th Cir. 1993) (Kozinski, J., dissental))).

I SAY DISSENTAL, YOU SAY CONCURRAL

- They are cited by Congress.⁴⁸
- They come up at confirmation hearings.⁴⁹
- They are the subject of commentary by the press,⁵⁰ are occasionally glorified by Hollywood,⁵¹ and are routinely blogged about.⁵²

In the days when federal courts of appeals were much smaller, en banc activity was relatively rare. This is because most judges participated in a significant number of key decisions, and this usually kept circuit law in line with the views of a majority of the court's active judges. But as courts have grown, outlier panels happen more frequently, commensurately increasing the number of en banc calls. During the course of those internal debates, off-panel judges

-
47. See, e.g., *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissental); *Koehler v. Bank of Berm. (N.Y.) Ltd.*, 229 F.3d 187, 187 (2d Cir. 2000) (Sotomayor, J., dissental); *Artway v. Att'y Gen. of N.J.*, 83 F.3d 594, 595 (3d Cir. 1996) (Alito, J., dissental); *Fin. Inst. Emps. of Am., Local 1182 v. NLRB*, 750 F.2d 757, 757-58 (9th Cir. 1984) (Kennedy, J., dissental); *Goldman v. Sec'y of Def.*, 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissental); *Chaney v. Heckler*, 724 F.2d 1030, 1030 (D.C. Cir. 1984) (Scalia, J., dissental).
 48. See, e.g., H.R. REP. NO. 102-836, at 8 n.27 (1992), reprinted in 1992 U.S.C.C.A.N. 2553, 2560 n.27 (analyzing the need to amend the Copyright Act to overturn two Second Circuit decisions (citing *New Era Pub'ns Int'l, APS v. Henry Holt & Co.*, 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissental))); S. REP. NO. 98-357, at 19 n.55, 36 n.138 (1984), reprinted in 1984 U.S.C.C.A.N. 2348, 2365 n.55, 2382 n.138 (discussing the need for legislation to protect religious expression in public schools (quoting *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 680 F.2d 424, 426 (5th Cir. 1982) (Reavley, J., dissental))).
 49. See, e.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1257 n.94 (2006) (statement of Goodwin Liu, Assistant Professor of Law at Boalt Hall School of Law) ("Judge Alito dissented from the denial of rehearing *en banc* in another *Batson* case . . ." (emphasis omitted) (referencing *Simmons v. Beyer*, 44 F.3d 1160, 1176 (3d Cir. 1995) (Greenberg, J., dissental, with Alito, J., joining))); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 778-79 (2005) (statement of Carol M. Browner, EPA Administrator, 1993-2001) ("While Judge Roberts' dissenting opinion . . . is not definitive as to his position on the Commerce Clause power or on the Endangered Species Act, it is certainly worth noting that he rejected the . . . panel's unanimous opinion which specifically rejected a claim that Congress lacked the Commerce Clause authority to protect the 'hapless toad.'" (quoting *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissental))).
 50. See, e.g., Adam Cohen, *The Government Can Use GPS To Track Your Moves*, TIME, Aug. 25, 2010, <http://www.time.com/time/magazine/article/0,9171,2015765,00.html> (discussing *United States v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, C.J., dissental)).
 51. See, e.g., CLAIMING THE TITLE: GAY OLYMPICS ON TRIAL (Aquarius Media 2009).
 52. See, e.g., Jonathan H. Adler, *Atkins and Double Jeopardy*, VOLOKH CONSPIRACY (Aug. 14, 2008, 9:42 AM), <http://volokh.com/2008/08/14/atkins-and-double-jeopardy> (discussing the opinion and dissental in *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008)).

develop views—often strong and considered views—as to how the case should be decided. Those views might coincide with the ones expressed in the panel opinion, dissent, or concurrence, or they may be quite different.⁵³

Judge Pooler is certainly right that dissents are “advisory opinions,” in the sense that they do not bind courts or litigants, but the same can be said of every dissent and most concurrences ever written. It can also be said for the many other sources of inspiration and guidance courts look to, such as decisions by courts of coordinate or inferior jurisdiction, restatements, treatises, law review articles, biblical references, the Talmud, the Koran, Roman law, Hammurabi’s Code, the Napoleonic Code, Gratian’s *Decretum*, Saint Thomas Aquinas, Sun Tzu, and decisions of various international tribunals—to name just a few. Dissents and concurrences fall comfortably within Bryan Garner’s definition of persuasive precedent.⁵⁴

In addition to enriching the law, dissents give judges an opportunity to focus public scrutiny on a particular case. The fact that a number of appellate judges took pains to voice their public disagreement with an opinion of their court is significant. It no doubt increases the likelihood of certiorari review⁵⁵ and stimulates change through the political process.⁵⁶

Majority opinions are hardly sitting ducks for the criticism dissents may heap on them. If a panel majority finds that a dissent scores some valid points, it can modify its opinion to eliminate the problem, something that happens regularly in the Ninth Circuit. Indeed, fear that internal criticisms will be taken public often causes judges to moderate outlier opinions so as to present a smaller target for public criticism and possible certiorari. One of us (yes, the hot one) is even aware of a case where the panel withdrew its opinion and reversed the result, after winning the en banc vote, in the teeth of a

53. See, e.g., *Abebe v. Mukasey*, 554 F.3d 1203, 1204 (9th Cir. 2009) (en banc) (per curiam); *id.* at 1208 (Clifton, J., concurring in the judgment); *id.* at 1213 (Thomas, J., dissenting); *Abebe v. Holder*, 577 F.3d 1113, 1113 (9th Cir. 2009) (Berzon, J., dissental).

54. BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 680-81 (2d ed. 1995).

55. See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (reversing the panel and noting that “eight judges dissented from the denial of rehearing en banc” (citing *al-Kidd v. Ashcroft*, 598 F.3d 1129, 1137 (9th Cir. 2010) (O’Scannlain, J., dissental); and *id.* at 1142 (Gould, J., dissental))); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (“Four judges voted to grant a petition for rehearing en banc. . . . Because we agreed with their assessment of the importance of these cases, we granted certiorari.” (citing *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissental))).

56. See, e.g., H.R. REP. NO. 102-836, at 8 n.27 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2560 n.27 (citing *New Era Pub’ns Int’l, APS v. Henry Holt & Co.*, 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissental)).

I SAY DISSENTAL, YOU SAY CONCURRAL

stinging dissental. And, of course, judges who think the dissental is wrong or unfair can file a concurrel.⁵⁷ Not that it always helps.⁵⁸

Dissentals don't create a substantial additional burden on the judiciary. It's easy to convert an en banc call to a dissental and an en banc opposition to a concurrel. Moreover, if a dissental levels fair criticisms that the panel opinion does not answer, the opinion ought to be amended to take the new arguments into account. The law and the parties will suffer if panel majorities fail to modify their opinions in the teeth of cogent criticism. And if the panel believes that the opinion already meets all legitimate criticism, it should be content to leave well enough alone.

Finally, there seem to be judges who believe that some dissentals are legitimate while others are not. For example, Judge Berzon once argued that dissentals "pose a dilemma for those who believe the original opinion correct," give "a distorted presentation of the issues," and create "the impression of rampant error in the original panel opinion."⁵⁹ She has nonetheless filed her fair share of dissentals.⁶⁰ Even Judge Friendly jumped on the dissental bandwagon.⁶¹ We've read many dissentals, long and short, and see no principled way of distinguishing those that work "particular mischief" from those that are swell.⁶²

* * *

"Cases arguably warranting en banc review are those in which the stakes are unusually high or the law is especially unclear."⁶³ It does honor to the law,

57. Judge Friendly filed a concurrel in *United States v. New York, New Haven & Hartford Railroad*, 276 F.2d 525, 553 (2d Cir. 1960) (Friendly, J., concurrel), and Judge Clark referred to it as a "counterdissent," *id.* at 549 (Clark, J., dissental). We believe "concurrel" more accurately describes an opinion concurring in the denial of rehearing en banc.

58. See, e.g., *al-Kidd*, 598 F.3d at 1130 (Smith, J., concurrel), *rev'd*, 131 S. Ct. 2074; *Defenders of Wildlife v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurrel), *rev'd*, 551 U.S. 644, 673 (2007).

59. *Defenders of Wildlife*, 450 F.3d at 402 (Berzon, J., concurrel).

60. See, e.g., *Abebe v. Holder*, 577 F.3d 1113, 1113 (9th Cir. 2009) (Berzon, J., dissental); *Molski v. Evergreen Dynasty Corp.*, 521 F.3d 1215, 1216 (9th Cir. 2008) (Berzon, J., dissental); *S. Or. Barter Fair v. Jackson Cnty.*, 401 F.3d 1124, 1124 (9th Cir. 2005) (Berzon, J., dissental).

61. *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1174 (2d Cir. 1970) (Friendly, J., dissental).

62. A category into which Judge Pooler would presumably lump her own dissentals. See, e.g., *Rosario v. Ercole*, 617 F.3d 683, 688 (2d Cir. 2010) (Pooler, J., dissental); *United States v. Fell*, 571 F.3d 264, 295 (2d Cir. 2009) (Pooler, J., dissental).

63. *Sur*, *supra* note 5, at 1318.

promotes justice, and serves the interests of an informed public when citizens learn that appellate judges have given difficult and important cases exacting scrutiny—not just one judge or even the three-judge panel, but an entire court of appeals.

As Judge Clark put it in the case that started out this essay, “I do believe the court gains standing by encouraging free and thorough canvassing of these issues without the deadening influence of constraining restrictions.”⁶⁴ Dissentals are here to stay. Get over it.

Alex Kozinski is the Chief Judge of the United States Court of Appeals for the Ninth Circuit and a longtime dissenter. See, e.g., Int’l Olympic Comm. v. S.F. Arts & Athletics, 789 F.2d 1319, 1320 (9th Cir. 1986), spurned by 483 U.S. 522 (1987).

James Burnham is a former law clerk to Chief Judge Kozinski who survived his two-year clerkship from June 2009 to June 2010, but just keeps coming back for more. The views herein do not necessarily reflect the views of James’s current employer, Jones Day, on the merits of dissentals or concurrals (or anything else).

Preferred citation: Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurrall*, 121 YALE L.J. ONLINE 601 (2012), <http://yalelawjournal.org/2012/04/10/kozinski&burnham.html>.

64. United States v. N.Y., New Haven & Hartford R.R., 276 F.2d 525, 549 (2d Cir. 1960) (Clark, J., dissental).

I SAY DISSENTAL, YOU SAY CONCURRAL

APPENDIX A

Supreme Court Justices Who Have Authored Certsents Since 1970

| Justice | Certsent Example |
|-----------|---------------------------------------------------------------------------------------|
| Alito | Harper v. Maverick Recording Co., 131 S. Ct. 590, 590 (2010) |
| Black | Eilers v. Hercules, Inc., 403 U.S. 937, 937 (1971) |
| Blackmun | Lawson v. Dixon, 510 U.S. 1171, 1171 (1994) |
| Brennan | Trapper v. North Carolina, 451 U.S. 997, 997 (1981) |
| Breyer | Office of the President v. Office of the Indep. Counsel, 525 U.S. 996, 996 (1998) |
| Burger | Russell v. Catherwood, 399 U.S. 936, 936 (1970) |
| Douglas | Shumar v. United States, 423 U.S. 879, 879 (1975) |
| Ginsburg | Padilla v. Hanft, 547 U.S. 1062, 1064 (2006) |
| Harlan | Wiseman v. Massachusetts, 398 U.S. 960, 960 (1970) |
| Kagan | None ⁶⁵ |
| Kennedy | Trans Union LLC v. FTC, 536 U.S. 915, 915 (2002) |
| Marshall | McCray v. New York, 461 U.S. 961, 963 (1983) |
| O'Connor | Nw. Airlines, Inc. v. Duncan, 531 U.S. 1058, 1058 (2000) |
| Powell | Shell Oil Co. v. Dep't of Energy, 450 U.S. 1024, 1024 (1981) |
| Rehnquist | Huch v. United States, 439 U.S. 1007, 1007 (1978) |
| Roberts | Virginia v. Harris, 130 S. Ct. 10, 10 (2009) |
| Scalia | Concrete Works of Colo., Inc. v. City and Cnty. of Denver, 540 U.S. 1027, 1027 (2003) |
| Sotomayor | Williams v. Hobbs, 131 S. Ct. 558, 558 (2010) |

65. Although Justice Kagan has never authored a certsent, she joined Justice Sotomayor's certsent in *Buck v. Thaler*, 132 S. Ct. 32, 35 (2011) (Sotomayor, J., certsent).

| | |
|---------|--------------------------------------------------------------|
| Souter | Durden v. California, 531 U.S. 1184, 1184 (2001) |
| Stevens | None |
| Stewart | Drake v. Zant, 449 U.S. 999, 1001 (1980) |
| Thomas | Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080, 1080 (2002) |
| White | Kennedy v. United States, 469 U.S. 965, 965 (1984) |

I SAY DISSENTAL, YOU SAY CONCURRAL

APPENDIX B

Dissentals Authored in the Ninth Circuit, 1943-2011⁶⁶

| Year | Case | Judge(s) |
|------|-------------------------------------------------------------------------|-------------------------|
| 1943 | Crutchfield v. United States, 142 F.2d 170, 177 | Denman |
| 1949 | Independence Lead Mines Co. v. Kingsbury, 175 F.2d 983, 992 | Denman |
| 1949 | Alexander v. United States, 173 F.2d 867, 868 | Denman |
| 1952 | W. Pac. R.R. v. W. Pac. R.R., 197 F.2d 994, 1012, 1016, 1020 | Denman, Fee |
| 1952 | Bradley Mining Co. v. Boice, 198 F.2d 790, 791 | Pope |
| 1955 | Ly Shew v. Dulles, 219 F.2d 413, 416 | Denman |
| 1956 | Strand v. Schmittroth, 235 F.2d 756, 756 | Chambers |
| 1956 | Chessman v. Teets, 239 F.2d 205, 221 | Denman |
| 1967 | Lenske v. United States, 383 F.2d 20, 30 | Chambers |
| 1971 | Lee Fook Chuey v. INS, 439 F.2d 244, 251 | Carter |
| 1971 | United States v. Hayden, 445 F.2d 1365, 1380 | Jertberg |
| 1971 | Munoz v. U.S. Dist. Court for Cent. Dist. of Cal., 446 F.2d 434, 436-37 | Chambers, Trask, Carter |
| 1972 | Struck v. Sec'y of Def., 460 F.2d 1372, 1378 | Duniway |
| 1973 | Naughten v. Cupp, 476 F.2d 845, 847 | Chambers |
| 1973 | United States v. Springer, 478 F.2d 43, 46 | Chambers |
| 1973 | Lau v. Nichols, 483 F.2d 791, 805 | Hufstедler |
| 1973 | United States v. Price, 484 F.2d 485, 485 | Wallace |
| 1973 | Plazola v. United States, 487 F.2d 157, 158 | Hufstедler |
| 1973 | United States v. Hoctor, 487 F.2d 270, 272 | Carter |
| 1974 | Adams v. S. Cal. First Nat'l Bank, 492 F.2d 324, 340 | Hufstедler |
| 1975 | MacCollom v. United States, 511 F.2d 1116, 1125 | Wallace |

66. This list is current as of December 22, 2011.

| | | |
|------|-----------------------------------------------------------------------------------------------|----------------------------------------|
| 1975 | McDonnell Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal., 523 F.2d 1083, 1087 | Chambers |
| 1976 | Wilson v. United States, 534 F.2d 130, 134 | Hufstedler |
| 1976 | United States v. Scully, 546 F.2d 255, 271 | Hufstedler |
| 1976 | United States v. Ryan, 548 F.2d 782, 792 | Hufstedler |
| 1976 | United States v. Pacheco-Ruiz, 549 F.2d 1204, 1206 | Chambers, Trask |
| 1980 | United States v. Penn, 647 F.2d 876, 889-90 | B. Fletcher, Pregerson, Ferguson |
| 1981 | Miller v. Rumsfeld, 647 F.2d 80, 80 | Boochever, Norris |
| 1981 | United States v. Goodheim, 664 F.2d 754, 756 | Sneed |
| 1982 | William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1060 | Wallace |
| 1982 | Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 | Reinhardt |
| 1983 | United States v. Harvey, 711 F.2d 144, 144 | Kennedy |
| 1983 | Jerry T. O'Brien, Inc. v. SEC, 719 F.2d 300, 300 | Kennedy |
| 1984 | Students of Cal. Sch. for the Blind v. Honig, 745 F.2d 582, 582 | Sneed |
| 1984 | Fin. Inst. Emps. of Am., Local 1182 v. NLRB, 750 F.2d 757, 757-58 | Kennedy, Norris |
| 1985 | Levine v. U.S. Dist. Court for Cent. Dist. of Cal., 775 F.2d 1054, 1055 | Norris |
| 1986 | Int'l Olympic Comm. v. S.F. Arts & Athletics, 789 F.2d 1319, 1320 | Kozinski |
| 1986 | United States v. Claiborne, 790 F.2d 1355, 1356 | Kozinski |
| 1986 | Saldana v. INS, 793 F.2d 222, 222 | Sneed |
| 1986 | Cubanski v. Heckler, 794 F.2d 540, 540 | Kozinski |
| 1986 | Christian Sci. Reading Room Jointly Maintained v. City and Cnty. of S.F., 807 F.2d 1466, 1467 | Norris |
| | | |

I SAY DISSENTAL, YOU SAY CONCURRAL

| | | |
|------|------------------------------------------------------------------------|--------------------------------------|
| 1987 | Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 584 | Noonan |
| 1987 | Pangilinan v. INS, 809 F.2d 1449, 1450 | Kozinski |
| 1987 | Sw. Marine, Inc. v. Campbell Indus., 811 F.2d 501, 502 | Noonan |
| 1987 | Hall v. City of Santa Barbara, 833 F.2d 1270, 1282 | Schroeder |
| 1988 | Duro v. Reina, 860 F.2d 1463, 1463 | Kozinski |
| 1988 | Gutierrez v. Mun. Court of Se. Judicial Dist., 861 F.2d 1187, 1188 | Kozinski |
| 1989 | United States v. Cunningham, 890 F.2d 199, 200 | O'Scannlain |
| 1990 | United States v. Phelps, 895 F.2d 1281, 1282 | Kozinski |
| 1990 | High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 376 | Canby |
| 1990 | McGuire v. Estelle, 919 F.2d 578, 578 | Kozinski |
| 1991 | Cammack v. Waihee, 944 F.2d 466, 467, 472 | Reinhardt, Pregerson, Kozinski |
| 1991 | Love v. United States, 944 F.2d 632, 633 | O'Scannlain |
| 1991 | Nichols v. McCormick, 946 F.2d 695, 696 | Norris |
| 1991 | Creech v. Arave, 947 F.2d 873, 888 | Trott |
| 1991 | Richmond v. Lewis, 948 F.2d 1473, 1492 | Pregerson |
| 1991 | Harris v. Vasquez, 949 F.2d 1497, 1539 | Reinhardt |
| 1992 | McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1226, 1231, 1237 | Kozinski, Reinhardt, Noonan |
| 1992 | Greenawalt v. Ricketts, 961 F.2d 1457, 1457 | Schroeder, Reinhardt |
| 1992 | Klarfeld v. United States, 962 F.2d 866, 866 | Kozinski |
| 1992 | United States v. Goland, 977 F.2d 1359, 1359 | Pregerson |
| 1992 | Mata v. Ricketts, 981 F.2d 397, 399 | Norris |
| 1993 | Elder v. Holloway, 984 F.2d 991, 992, 1000 | Kozinski, Reinhardt |
| 1993 | Act Up!/Portland v. Bagley, 988 F.2d 868, 874 | Norris |

| | | |
|------|-------------------------------------------------------------------------|---------------------------|
| 1993 | White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1512 | Kozinski |
| 1993 | Estate of Reynolds v. Martin, 994 F.2d 690, 690 | Beezer |
| 1993 | Brewer v. Lewis, 997 F.2d 550, 550 | Reinhardt |
| 1993 | United States v. Lopez-Vasquez, 1 F.3d 751, 756 | O'Scannlain |
| 1993 | United States v. Koon, 6 F.3d 561, 565, 568 | Reinhardt, Kozinski |
| 1993 | Garcia v. Spun Steak Co., 13 F.3d 296, 296 | Reinhardt |
| 1994 | Fetterly v. Paskett, 15 F.3d 1472, 1472 | Kozinski |
| 1994 | United States v. Weitzenhoff, 35 F.3d 1275, 1293 | Kleinfeld |
| 1995 | United States v. Koon, 45 F.3d 1303, 1304, 1310 | Reinhardt, O'Scannlain |
| 1995 | United States v. \$405,089.23 U.S. Currency, 56 F.3d 41, 42 | Rymer |
| 1995 | Moran v. Godinez, 57 F.3d 690, 691 | Pregerson |
| 1995 | Walker v. S.F. Unified Sch. Dist., 62 F.3d 300, 301 | Reinhardt |
| 1995 | Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1252 | Canby |
| 1996 | <i>In re</i> Extradition of Smyth, 72 F.3d 1433, 1433, 1438 | Noonan, Reinhardt |
| 1996 | Nw. Envtl. Advocates v. City of Portland, 74 F.3d 945, 946 | O'Scannlain |
| 1996 | Compassion in Dying v. Washington, 85 F.3d 1440, 1440, 1446 | O'Scannlain, Trott |
| 1996 | Roulette v. City of Seattle, 97 F.3d 300, 311 | Pregerson, Norris |
| 1997 | Espinoza-Gutierrez v. Smith, 109 F.3d 551, 551 | Kozinski |
| 1997 | Finley v. Nat'l Endowment for the Arts, 112 F.3d 1015, 1016 | O'Scannlain |
| 1997 | Guam Soc'y of Obstetricians & Gynecologists v. Ada, 113 F.3d 1089, 1090 | O'Scannlain |
| 1997 | Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 711-12 | Schroeder, Norris |

I SAY DISSENTAL, YOU SAY CONCURRAL

| | | |
|------|------------------------------------------------------------------------------------------------|------------------------------------|
| 1997 | Am.-Arab Anti-Discrimination Comm. v. Reno, 132 F.3d 531, 532 | O'Scannlain |
| 1998 | Rendish v. City of Tacoma, 134 F.3d 1389, 1389 | Reinhardt |
| 1998 | San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters Local 1506, 137 F.3d 1090, 1090 | Reinhardt |
| 1998 | Monterey Mech. Co. v. Wilson, 138 F.3d 1270, 1273, 1280 | Reinhardt, Hawkins |
| 1998 | United States v. Parker, 146 F.3d 696, 697 | Reinhardt |
| 1998 | Scott v. Ross, 151 F.3d 1247, 1248 | Kozinski |
| 1998 | Holmes v. Cal. Army Nat. Guard, 155 F.3d 1049, 1050 | Pregerson |
| 1999 | United States v. Harris, 165 F.3d 1277, 1277 | Kozinski |
| 1999 | United States v. Mussari, 168 F.3d 1141, 1142 | Kozinski |
| 1999 | United States v. Burdeau, 180 F.3d 1091, 1093 | Kozinski |
| 1999 | Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1161 | Reinhardt |
| 1999 | Planned Parenthood of S. Az. v. Lawall, 193 F.3d 1042, 1043 | O'Scannlain |
| 1999 | <i>In re Silicon Graphics Inc. Sec. Litig.</i> , 195 F.3d 521, 522 | Reinhardt |
| 1999 | Wendt v. Host Int'l, Inc., 197 F.3d 1284, 1285 | Kozinski |
| 2000 | Kleve v. Hill, 202 F.3d 1155, 1155 | Kozinski |
| 2000 | Rich v. Woodford, 210 F.3d 961, 961, 965 | Reinhardt, Kozinski, Wardlaw |
| 2000 | KDM <i>ex rel.</i> WJM v. Reedsport Sch. Dist., 210 F.3d 1098, 1099 | O'Scannlain |
| 2000 | Bollard v. Cal. Province of Soc'y of Jesus, 211 F.3d 1331, 1331 | Wardlaw |
| 2000 | Free Speech Coal. v. Reno, 220 F.3d 1113, 1114 | Wardlaw |
| 2000 | Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 999 | Kozinski |
| 2000 | United States v. Stephens, 232 F.3d 746, 747 | O'Scannlain |
| 2001 | Abovian v. INS, 257 F.3d 971, 971 | Kozinski |
| 2001 | United States v. Kaczynski, 262 F.3d 1034, 1034 | Kozinski |

| | | |
|------|--------------------------------------------------------------------------|------------------------------------------------|
| 2001 | United States v. Recio, 270 F.3d 845, 846 | O'Scannlain |
| 2001 | United States v. Orso, 275 F.3d 1190, 1192 | Trott |
| 2001 | Anderson v. Calderon, 276 F.3d 483, 483 | Reinhardt |
| 2002 | LaVine <i>ex rel.</i> LaVine v. Blaine Sch. Dist., 279 F.3d 719, 720 | Reinhardt, Kleinfeld |
| 2002 | United States v. Chavez-Valenzuela, 281 F.3d 897, 897 | O'Scannlain |
| 2002 | Spears v. Stewart, 283 F.3d 992, 996 | Reinhardt |
| 2002 | Douglas v. Cal. Dep't of Youth Auth., 285 F.3d 1226, 1226 | O'Scannlain |
| 2002 | Hason v. Med. Bd. of Cal., 294 F.3d 1166, 1167 | O'Scannlain |
| 2002 | United States v. Sigmond-Ballesteros, 309 F.3d 545, 545 | Kleinfeld |
| 2003 | Lawson v. Washington, 319 F.3d 498, 499 | Berzon |
| 2003 | Mukhtar v. Cal. State Univ., Hayward, 319 F.3d 1073, 1075 | Reinhardt |
| 2003 | Gentry v. Roe, 320 F.3d 891, 892 | Kleinfeld |
| 2003 | Valeria v. Davis, 320 F.3d 1014, 1015 | Pregerson |
| 2003 | Winn v. Killian, 321 F.3d 911, 911 | Kleinfeld |
| 2003 | Newdow v. U.S. Cong., 328 F.3d 466, 471, 482 | O'Scannlain, McKeown |
| 2003 | Silveira v. Lockyer, 328 F.3d 567, 568, 570, 592 | Pregerson, Kozinski, Kleinfeld, Gould |
| 2003 | Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1112 | Kozinski |
| 2003 | Taniguchi v. Schultz, 332 F.3d 1205, 1206 | Pregerson |
| 2003 | Johnson v. California, 336 F.3d 1117, 1117 | Ferguson |
| 2003 | Vasquez-Lopez v. Ashcroft, 343 F.3d 961, 963 | Berzon |
| 2003 | Haugen v. Brosseau, 351 F.3d 372, 375 | Tallman |
| 2004 | Doe v. Tenet, 353 F.3d 1141, 1142 | Kleinfeld |
| 2004 | Mena v. City of Simi Valley, 354 F.3d 1015, 1015, 1019 | Kleinfeld, Gould |

I SAY DISSENTAL, YOU SAY CONCURRAL

| | | |
|------|-------------------------------------------------------------------|--------------------------|
| 2004 | Belmontes v. Woodford, 359 F.3d 1079, 1080, 1086 | Callahan, Bea |
| 2004 | Farrakhan v. Washington, 359 F.3d 1116, 1116 | Kozinski |
| 2004 | Nordyke v. King, 364 F.3d 1025, 1025, 1026 | Kleinfeld, Gould |
| 2004 | Collins v. Rice, 365 F.3d 667, 670 | Bea |
| 2004 | Ileto v. Glock, Inc., 370 F.3d 860, 861, 868 | Callahan, Kozinski |
| 2004 | Nunes v. Ashcroft, 375 F.3d 810, 811, 817 | Tashima, Reinhardt |
| 2004 | Rivera v. NIBCO, Inc., 384 F.3d 822, 823 | Bea |
| 2004 | United States v. Rivas-Gonzalez, 384 F.3d 1034, 1036, 1039 | Pregerson, Wardlaw |
| 2004 | Providence Health Plan v. McDowell, 385 F.3d 1168, 1175 | Thomas |
| 2004 | Thai v. Ashcroft, 389 F.3d 967, 967 | Kozinski |
| 2005 | Williams v. Woodford, 396 F.3d 1059, 1059 | Rawlinson |
| 2005 | Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 798, 806-07 | Kleinfeld, Gould, Bea |
| 2005 | S. Or. Barter Fair v. Jackson Cnty., 401 F.3d 1124, 1124 | Berzon |
| 2005 | United States v. Patterson, 406 F.3d 1095, 1095, 1101 | Kozinski, Kleinfeld |
| 2005 | United States v. Vargas-Amaya, 408 F.3d 1227, 1227 | Callahan |
| 2005 | Chen v. Gonzales, 411 F.3d 1049, 1049 | Bea |
| 2005 | Gaston v. Palmer, 417 F.3d 1050, 1050 | O'Scannlain |
| 2005 | Bockting v. Bayer, 418 F.3d 1055, 1056 | O'Scannlain |
| 2005 | Musladin v. Lamarque, 427 F.3d 647, 647, 652 | Kleinfeld, Bea |
| 2005 | Belmontes v. Stokes, 427 F.3d 663, 663 | Callahan |
| 2005 | United States v. Omer, 429 F.3d 835, 835 | Graber |
| 2005 | Tchoukhrova v. Gonzales, 430 F.3d 1222, 1223 | Kozinski |
| 2006 | United States v. Stephens, 439 F.3d 1083, 1083 | Tallman |
| 2006 | Kennedy v. City of Ridgefield, 440 F.3d 1091, 1091 | Tallman |

| | | |
|------|-------------------------------------------------------------------------------------------|-----------------------|
| 2006 | United States v. Ortiz-Hernandez, 441 F.3d 1061, 1062 | Paez |
| 2006 | United States v. Afshari, 446 F.3d 915, 915 | Kozinski |
| 2006 | Brady v. Abbott Labs., 446 F.3d 924, 924 | Hawkins |
| 2006 | Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1094 | Bybee |
| 2006 | Defenders of Wildlife v. EPA, 450 F.3d 394, 395, 401 | Kozinski, Kleinfeld |
| 2006 | United States v. Scott, 450 F.3d 863, 889 | Callahan |
| 2006 | Brown v. Lambert, 451 F.3d 946, 955 | Tallman |
| 2006 | Smith v. Mitchell, 453 F.3d 1203, 1203 | Bea |
| 2006 | Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1054 | O'Scannlain |
| 2007 | United States v. Fort, 478 F.3d 1099, 1100 | Wardlaw |
| 2007 | Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895 | Bybee |
| 2007 | Hoffman v. Arave, 481 F.3d 686, 686 | Bea |
| 2007 | United States v. Baza-Martinez, 481 F.3d 690, 691 | Graber |
| 2007 | United States v. Black, 482 F.3d 1044, 1045 | Kozinski |
| 2007 | Sanchez v. Cnty. of San Diego, 483 F.3d 965, 966, 969 | Pregerson, Kozinski |
| 2007 | <i>In re Exxon Valdez</i> , 490 F.3d 1066, 1068, 1071 | Kozinski, Bea |
| 2007 | United States v. Ressam, 491 F.3d 997, 998 | O'Scannlain |
| 2007 | United States v. Castillo-Basa, 494 F.3d 1217, 1218 | Callahan |
| 2007 | United States v. Ziegler, 497 F.3d 890, 892, 899 | W. Fletcher, Kozinski |
| 2007 | Sarausad v. Porter, 503 F.3d 822, 823 | Callahan |
| 2007 | Ramadan v. Keisler, 504 F.3d 973, 973 | O'Scannlain |
| 2007 | Irons v. Carey, 506 F.3d 951, 952 | Kleinfeld |
| 2007 | Phillips v. Hust, 507 F.3d 1171, 1172 | Kozinski |
| 2007 | Crater v. Galaza, 508 F.3d 1261, 1261 | Reinhardt |
| 2008 | United States v. Jenkins, 518 F.3d 722, 723, 723 | Kozinski, O'Scannlain |
| 2008 | Porter v. Bowen, 518 F.3d 1181, 1181 | Kleinfeld |

I SAY DISSENTAL, YOU SAY CONCURRAL

| | | |
|------|------------------------------------------------------------------------|--------------------------------------------------|
| 2008 | Betz v. Trainer Wortham & Co., 519 F.3d 863, 865 | Kozinski |
| 2008 | United States v. Burlington N. & Santa Fe Ry., 520 F.3d 918, 952 | Bea |
| 2008 | Molski v. Evergreen Dynasty Corp., 521 F.3d 1215, 1216, 1220 | Berzon, Kozinski |
| 2008 | United States v. Horvath, 522 F.3d 904, 907, 913 | Bea, Kozinski |
| 2008 | Buono v. Kempthorne, 527 F.3d 758, 760 | O’Scannlain |
| 2008 | Correll v. Ryan, 539 F.3d 938, 970 | Callahan |
| 2008 | Witt v. Dep’t of Air Force, 548 F.3d 1264, 1265, 1276, 1280 | O’Scannlain, Kleinfeld, Kozinski |
| 2008 | Truth v. Kent Sch. Dist., 551 F.3d 850, 851 | Bea |
| 2008 | Belmontes v. Ayers, 551 F.3d 864, 866 | Callahan |
| 2008 | Barnes-Wallace v. City of San Diego, 551 F.3d 891, 892 | O’Scannlain |
| 2009 | Golden Gate Rest. Ass’n v. City and Cnty. of S.F., 558 F.3d 1000, 1004 | M. Smith |
| 2009 | United States v. Whitehead, 559 F.3d 918, 918, 921 | Gould, Reinhardt |
| 2009 | Quon v. Arch Wireless Operating Co., 554 F.3d 769, 774 | Ikuta |
| 2009 | United States v. Mayer, 560 F.3d 948, 951 | Kozinski |
| 2009 | Lopez-Rodriguez v. Holder, 560 F.3d 1098, 1099 | Bea |
| 2009 | Cooper v. Brown, 565 F.3d 581, 581, 635, 635, 635 | W. Fletcher, Wardlaw, Fisher, Reinhardt |
| 2009 | De Mercado v. Mukasey, 566 F.3d 810, 812 | Pregerson |
| 2009 | Nelson v. NASA, 568 F.3d 1028, 1038, 1050, 1052 | Callahan, Kleinfeld, Kozinski |
| 2009 | Moore v. Czerniak, 574 F.3d 1092, 1162, 1166 | Callahan, Bea |
| 2009 | Abebe v. Holder, 577 F.3d 1113, 1113 | Berzon |

| | | |
|------|--------------------------------------------------------------|------------------------|
| 2009 | United States v. Paul, 583 F.3d 1136, 1136 | O'Scannlain |
| 2009 | Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 658 | O'Scannlain |
| 2009 | United States v. Hao Quang Tran, 586 F.3d 681, 681 | Gould |
| 2009 | United States v. Amezcu-Vasquez, 586 F.3d 1176, 1176 | O'Scannlain |
| 2010 | Conn v. City of Reno, 591 F.3d 1081, 1085 | Kozinski |
| 2010 | United States v. Alderman, 593 F.3d 1141, 1141 | O'Scannlain |
| 2010 | United States v. Lemus, 596 F.3d 512, 513 | Kozinski |
| 2010 | United States v. Gonzalez, 598 F.3d 1095, 1100 | Bea |
| 2010 | al-Kidd v. Ashcroft, 598 F.3d 1129, 1137, 1142 | O'Scannlain, Gould |
| 2010 | Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 670, 672 | Kozinski, Gould |
| 2010 | Schad v. Ryan, 606 F.3d 1022, 1026 | Callahan |
| 2010 | Kawashima v. Holder, 615 F.3d 1043, 1046 | Graber |
| 2010 | United States v. Pineda-Moreno, 617 F.3d 1120, 1121, 1126 | Kozinski, Reinhardt |
| 2010 | United States v. Terrell, 621 F.3d 1154, 1155 | M. Smith |
| 2010 | Cooper v. FAA, 622 F.3d 1016, 1022 | O'Scannlain |
| 2010 | United States v. Edwards, 622 F.3d 1215, 1216 | Gould |
| 2010 | Valdivia v. Schwarzenegger, 623 F.3d 849, 850 | Bea |
| 2010 | Pearson v. Muntz, 625 F.3d 539, 541 | Ikuta |
| 2010 | Landrigan v. Brewer, 625 F.3d 1132, 1140 | Kozinski |

I SAY DISSENTAL, YOU SAY CONCURRAL

| | | |
|------|-------------------------------------------------------------------------------------|------------------------|
| 2010 | Doe <i>ex rel.</i> Doe v. Kamehameha Schs., 625 F.3d 1182, 1183, 1184 | Kozinski, Reinhardt |
| 2010 | Pollard v. GEO Grp., Inc., 629 F.3d 843, 845 | Bea |
| 2010 | Bryan v. MacPherson, 630 F.3d 805, 815 | Tallman |
| 2011 | Teclezghi v. Holder, 628 F.3d 1055, 1056 | Pregerson |
| 2011 | AmeriCredit Fin. Servs., Inc. v. Penrod (<i>In re</i> Penrod), 636 F.3d 1175, 1175 | Bea |
| 2011 | United States v. Alvarez, 638 F.3d 666, 677, 687 | O’Scannlain, Gould |
| 2011 | Beaty v. Brewer, 649 F.3d 1071, 1072, 1076 | Reinhardt x 2 |
| 2011 | Rosas-Castaneda v. Holder, 655 F.3d 875, 877 | Kozinski |
| 2011 | Hrdlicka v. Reniff, 656 F.3d 942, 943 | O’Scannlain |
| 2011 | Thompson v. Runnels, 657 F.3d 784, 784 | Callahan |
| 2011 | Starr v. Cnty. of L.A., 659 F.3d 850, 851 | O’Scannlain |
| 2011 | Trunk v. City of San Diego, 660 F.3d 1091, 1091 | Bea |

APPENDIX C

The following have served as active judges of the Ninth Circuit since 1970 but never authored a dissent:⁶⁷ Alarcón, Anderson, Barnes, Browning, Brunetti, Choy, Christen, Clifton, Ely, Farris, Fernandez, Goodwin, Hall, Hamley, Hug, Kilkenny, Koelsch, Leavy, Merrill, Murguia, D.W. Nelson, T.G. Nelson, Poole, Silverman, Skopil, N.R. Smith, Tang, Thompson, Wiggins, Wright.

Of those, the following have nonetheless joined dissents written by others:

| Judge | Year | Case |
|----------------|------|-----------------------------------------------------------------------------|
| Alarcón | 1992 | Klarfeld v. United States, 962 F.2d 866, 866 |
| Anderson | 1987 | Sw. Marine, Inc. v. Campbell Indus., 811 F.2d 501, 502 |
| Browning | 1976 | Wilson v. United States, 534 F.2d 130, 139 |
| Brunetti | 1986 | Saldana v. INS, 793 F.2d 222, 222 |
| Choy | 1974 | MacCollum v. United States, 511 F.2d 1116, 1125 |
| Clifton | 2006 | United States v. Stephens, 439 F.3d 1083, 1083 |
| Ely | 1976 | Wilson v. United States, 534 F.2d 130, 139 |
| Goodwin | 1987 | Sw. Marine, Inc. v. Campbell Indus., 811 F.2d 501, 502 |
| Hall | 1993 | United States v. Lopez-Vasquez, 1 F.3d 751, 756 |
| Hug | 2000 | Kleve v. Hill, 202 F.3d 1155, 1155 |
| Koelsch | 1976 | Wilson v. United States, 534 F.2d 130, 139 |
| Leavy | 1988 | Duro v. Reina, 860 F.2d 1463, 1463 |
| D.W. Nelson | 2003 | Johnson v. California, 336 F.3d 1117, 1117 |
| T.G. Nelson | 2003 | Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1112 |
| Poole | 1991 | Love v. United States, 944 F.2d 632, 633 |
| N.R. Smith | 2011 | Hrdlicka v. Reniff, 656 F.3d 942, 943 |

67. This list is current as of December 22, 2011.

I SAY DISSENTAL, YOU SAY CONCURRAL

| | | |
|----------|------|--------------------------------------------------------------------|
| Tang | 1992 | United States v. Goland, 977 F.2d 1359, 1359 |
| Thompson | 1988 | Gutierrez v. Mun. Court of Se. Judicial Dist., 861 F.2d 1187, 1188 |
| Wiggins | 1993 | United States v. Lopez-Vasquez, 1 F.3d 751, 756 |
| Wright | 1974 | MacCollom v. United States, 511 F.2d 1116, 1125 |