

Cambridge, Mass., July 16, 1923.

To the Editor:

Some of your recent correspondents have called into question the propriety, not to speak of the wisdom, of dissenting opinions in Constitutional cases, and have naively suggested the suppression of dissents as a remedy for “five-to-four” decisions by the Supreme Court. Such a proposal seeks to subvert the historic tradition of the Court which your correspondents profess to revere. Let me avouch two of the greatest authorities:

“I am of the opinion” wrote Mr. Justice Story in Briscoe v. Bank of Kentucky, 11 Pet. 257, 350, “that upon Constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent.”

And after his succession to Marshall’s place, Chief Justice Taney writes:

“It has, I find, been the uniform practice in this court, for the justices who differed from the court on constitutional questions, to express their dissent. (Rhode Island v. Massachusetts, 12 Pet. 657, 752.)

This practice has been unbroken in the history of the Court. If some of your readers need to be reminded how the duty of expressing dissenting opinions has been discharged, by some of the great figures in the later history of the Court (still remaining, however, in the uncontroversial period of the past) let them examine the dissenting opinions of Mr. Justice Miller. Out of seven hundred eighty-three opinions rendered by him in the twenty-eight years of his Associate Justiceship, one hundred sixty-nine are dissenting opinions. (Gregory’s Samuel Freeman Miller, VIII)

Felix Frankfurter

[9 A.B.A.J. 536 (1923).]