

“The Brooding Spirit of the Law”: Supreme Court Justices Reading Dissents from the Bench

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The authors wish to thank the following for reading drafts of this article and offering much appreciated comments: Larry Baum, Hon. D. Price Marshall Jr., Brandon Harrison, William McLean, Christopher Zorn, Melinda Gann Hall, and Jeff Raileanu. The authors also wish to thank Jeffrey Segal for helping to clarify theoretical concerns, Paul Wahlbeck for his gracious assistance for writing code in STATA, and Linda Greenhouse for providing very helpful advice on data collection. These individuals helped shape this work, but we are responsible for any of its deficiencies. The data set analyzed in this article is available upon request.

## The Brooding Spirit of the Law: Supreme Court Justices Reading Dissents from the Bench

*In rare instances, a Supreme Court justice may elect to call attention to his or her displeasure with a majority decision by reading a dissenting opinion from the bench. We document this phenomenon by constructing a data set from audio files of Court proceedings and news accounts. We then test a model explaining why justices use this practice selectively by analyzing ideological, strategic, and institutional variables. Judicial review, formal alteration of precedent, size of majority coalition, and issue area exert influence on this behavior. Ideological distance between the dissenter and majority opinion writer produces a counterintuitive relationship. We suspect that reading a dissent is an action selectively undertaken when bargaining and accommodation among ideologically proximate justices has broken down irreparably.*

### PROFESSIONAL AND STRATEGIC CONSIDERATIONS IN THE NORM OF DISSENT

In 1990, then-Circuit Court Judge Ruth Bader Ginsburg noted “when to acquiesce and when to go it alone is a question our system allows each judge to resolve for herself” (p. 141). Respect is often accorded to those who write in dissent. Justices who frequently write dissenting opinions are often viewed as romantic figures in the history of the law. The so-called Great Dissenters, such as Holmes, Brandeis, Harlan I, Black, Douglas, and Scalia, may have achieved that label and notoriety because writing a dissenting opinion can be thought a means of civil disobedience. Dissenting opinions have the effect of “offering protest and securing systemic change” (Campbell, 1983: 306). As Justice Douglas (1960) wrote:

It is the right of dissent, not the right or duty to conform, which gives dignity, worth, and individuality to man. The right to dissent is the only thing that makes life tolerable for a judge of an appellate court . . . the affairs of government could not be conducted by democratic standards without it (pp. 4-5).

Chief Justice Hughes (1936) wrote that dissenting is “an appeal 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” (p. 68).

Similarly, Justice Cardozo (1925) noted, “The spokesman of the Court is cautious, timid, fearful of the vivid word. . . . The dissenter speaks to the future, and his voice is pitched to a key that will carry throughout the years” (pp. 714-15).

Thus, the justices themselves view dissent as a feature of collegial norms on appellate courts integral to decision making. While systematic influences tend to limit the number of dissents and discourage the practice in general<sup>1</sup> the rate at which it occurs has been of some interest to those who study the Supreme Court. Writing in dissent has become a norm among appellate judges and Supreme Court justices, rather than an exception. It is a component of the collaboration and bargaining characterized by opinion writing and voting fluidity.<sup>2</sup> However, it remains predominantly a behavioral option to which justices resort when those processes are strained. In addition, other forms of expressing dissent can be revealing. The subject of our study here raises the prospect of a more severe response on the part of the justices—dissenting from the bench may indicate that bargaining and accommodation have broken down irreparably. It is an extraordinary event when a justice not only writes in dissent, but purposefully draws attention to that dissent by reading it from the bench.

In this article we examine the institutional practice of reading a dissenting opinion from the bench. Journalists who cover the Court characterize a dissent being read from the bench as a statement of profound disagreement by a dissenting justice, which makes the impact of this rare phenomenon substantial (Greenhouse, 2007; Biskupic, 1999). Reading a dissent from the bench is a means by which justices can signal their displeasure to the press, the American people, and the other branches of government.

Between the 1969-2007 terms of the Court (beginning with the appointment of Chief Justice Burger ending with the most recently available data), Supreme Court justices have written 3,683 dissenting opinions. But the data collected for this article indicate that only 116 dissenting opinions were read from the bench in 108 cases during that period. The largest number of dissenting opinions read from the bench in a single year during that time period is ten. There is only one term when this did not occur (1984), or at least there is no record of it occurring.

In the following sections, we explore the importance of dissent for the study of appellate decision making. Following the demise of the consensual norm on the Court and the corresponding increase in the number of dissents filed by justices, social scientists began examining the attitudinal and institutional bases for the justices' nonconsensual behavior. In the article's final portion, we undertake a preliminary analysis of why justices elect to express departure from a majority opinion using what on a collegial court amounts to the "nuclear option." As part of this preliminary analysis, we examine the rate at which justices dissent from the bench and incidents of reading dissents over time. To explore these findings further, we then conduct a logistic regression analysis to test a theory of reading in dissent based on justices' ideology, the Court's institutional arrangements and justices' strategic behaviors.

#### THE DEMISE OF THE CONSENSUAL NORM: COLLEGIAL COURTS AND MEASURES OF COLLEGIAL DECISION MAKING ON THE UNITED STATES SUPREME COURT

Collegiality is a distinctive feature of appellate courts, taking the form of both consensual and nonconsensual behavior among members. While the very early history of the Court is characterized by a struggle to achieve consensus among the justices,<sup>3</sup> the feature of the

Supreme Court most drastically altered by the constitutional revisions occurring after 1937 (and the one most in need of explanation) was this institutional norm of consensus.<sup>4</sup> Early analyses focused on interactions among the justices of the Court as adapting and tempering the effects of individual attitudes and preferences emerging from the demise of the institutional norm of consensus. J. Woodford Howard (1968) wrote that both those who study public law and those who study judicial behavior “infer individual attitude from a form of group behavior, and with insufficient attention to the group interaction which intervenes between attitude and action and qualifies both” (p. 43). The intersection of personal policy preferences and group behavior is that characteristic of appellate courts, which makes possible the systematic study of attitudes (Segal and Spaeth, 1993) and practices leading to judicial decisions (Corley, 2007).<sup>5</sup> Wahlbeck, Spriggs, and Maltzman (1999) note that while norms of the profession appear to dictate that judges only dissent on legal or policy grounds, social science analyses have pointed to other motivating factors, including ideological differences, or as Pritchett (1945) calls them, the “underlying differences in gospel.”

More recently, scholars have begun to pay renewed attention to the institutional context of the Court—its group dynamics, but also the rules, norms, practices, and other interactions among the justices that structure those group dynamics. Their work reflects a broad concern for mapping the justices’ strategic decisions to write their preferences into the law so far as possible within the context of Court norms, rules, and practices.

Maltzman and Wahlbeck (1996) summed up the strategic approach to the study of collegiality, stating “the strategic model portrays justices as responding to the positions articulated by other justices” (p. 583). Wahlbeck, Spriggs, and Maltzman (1999) note that

“justices are strategic in the sense that they take into account factors other than their policy preferences when making their judicial choices” (p. 493). Justices behave strategically to achieve the goal of exerting influence through opinion writing on the present Court, as well as future ones.

Scholars offer various explanations based on institutional constraints for the move from a norm of unanimity to a norm of writing separate opinions and fluid majorities. Walker, Epstein, and Dixon (1988) consider the importance of institutional constraints, including the increasing discretion of the Court over its own docket, caseload pressures, and leadership styles. Haynie (1992) explores differences in the leadership capability of various chief justices as the dominant reason for the shift. Longer-term influences tend to implicate changes in the nature of interaction among the justice—technology that facilitated more opinion circulation resulting in more bargaining on the merits among justices (Corley, 2007), a building dedicated for the Court’s use, and increasing number of law clerks and support staff (Best, 2002; O’Brien, 1999). However, it is clear that the declining norm of consensus reflected the changing role of the Court in American life<sup>6</sup> and was expressed in the ideological differences among the justices (Pritchett, 1945).

The literature specifically on writing separate opinions has followed these broad emphases (Post, 2001; Hausegger and Baum, 1999; Caldeira and Zorn, 1998; Brace and Hall, 1993; Brennan, 1986; Ulmer, 1986), and scholars have found that justices act strategically when determining whether to write in dissent (Wahlbeck, Spriggs, and Maltzman, 1999; Gerber and Park, 1997). Brace and Hall’s (1993) analysis of state supreme court justices’ dissenting votes in death penalty cases explores the preferences of judges, as well as strategic and institutional constraints. The authors conclude that

preferences, strategic concerns, and institutional constraints contribute to the decision to dissent in an issue area in which the influence of preferences might be high. Other scholars consider strategic determinations on the part of justices to use the threat of dissent as a tool to exert influence over the opinion writing of others (Epstein and Knight, 1998; Brace and Hall, 1993; Howard, 1968; Murphy, 1964). Caldeira (1988) notes that a justice's legacy on the Court—in particular, for leadership and influence upon fellow justices and decisions of the Court—depends in part upon the justice's reputation as a dissenter. As he notes, “a dissenting opinion provides a better vehicle for the full and bold expression of a justice's rhetorical capabilities. Dissent, if effective, may well enhance the reputation of a justice” (p. 256).

Two relatively recent studies explore the phenomenon of separate opinion writing within an institutional context using unique methodology. In their cross-judicial analysis of Rehnquist Court justices who also served on lower appellate courts, Gerber and Park (1997) found that members of the Rehnquist Court were much more likely to engage in nonconsensual behaviors as justices rather than as lower-appellate-court judges. The authors conclude that within the context of the Supreme Court where consensus is not expected, members feel freer to express their policy preferences, and even find such expression in the form of nonconsensual opinion writing beneficial to both the law and Court-crafted policy. Building upon the work of Gerber and Park, Best (2002) explores the influence of a particular institutional facet—the growing “culture of law clerks and support staff”—as an explanation for the increase in disagreement among the justices over the 20th century. He argues that the growing role of clerks and staff in the daily life and case selection procedures of the Court has provided justices a level of autonomy and

release from administrative pressures revealed in the increase of nonconsensual behavior such as separate opinion writing.

“THE CONSTITUTION, AS WE HAVE KNOWN IT, IS GONE:” PERSPECTIVES ON DISSENTING FROM THE BENCH

Reading dissents from the bench is a Supreme Court norm that has largely been unexplored by the academy. The first attempt to quantify and explain this phenomenon was undertaken by Johnson, Black, and Ringsmuth (2009). Their analysis found that as the ideological distance between the dissenting justice and majority opinion increases, the likelihood of a dissent being read from the bench increases by a statistically significant amount. Further, dissenting opinions are more likely to be announced in cases with a minimum winning coalition as opposed to cases with larger majorities. The authors predicted that dissenting justices are more likely to dissent from the bench in statutory interpretation cases when they think that Congress might be inclined to amend the statute and overturn the majority. The results were mixed. While ideological harmony existing between a dissenting justice and the median member of the Senate increases the chance of a dissent being read, the opposite relationship is true when a dissenting justice is ideologically similar to the median member of the House.

There is room for further refining a model of decisions to read in dissent. Johnson, Black, and Ringsmuth (2009) include both concurring and dissenting opinions in their analysis. We limit our inquiry to dissenting opinions because we believe the incentives to write in dissent may be different from the incentives to write a concurrence, especially a regular concurring opinion (which agree with both the majorities' disposition of the case

and its logic). Both regular and special concurring opinions (which agree with the outcome but not the logic) involve a much smaller level of disagreement than found in a dissenting opinion, which makes dissenting opinions more ripe for being read from the bench. Johnson, Black, and Ringsmuth's analysis only examines cases from the 1975 to 2006 terms, while we were able to collect data from 1969 to 2007 terms. More significantly, data collection was limited to Oyez Project (2008) audio records, while we employed a more comprehensive data collection regime. Our analysis includes the Oyez Project's audio records plus LexisNexis and Proquest searches of media coverage of the Court and other miscellaneous data sources. Johnson, Black, and Ringsmuth (2009) find 53 dissents read from the bench out of a universe of 1,171 dissenting and concurring opinions filed. We find 116 dissents read from the bench out of 3,683 dissenting opinions filed. This limited data collection may explain why Johnson, Black, and Ringsmuth did not find a substantively meaningful relationship between exercise of judicial review or alteration of precedent and the likelihood of reading a dissent from the bench. Our intuition tells us that these relationships deserve a second look. Finally, the authors did not attempt to look at case issue area as a potential explanatory factor. Are justices more highly motivated to read from the bench depending on the subject matter of the case? This question warrants examination.

The other major contribution to the literature on dissenting from the bench is more qualitative in nature. Barrett (2007) recounts several prominent examples of dissents being read from the bench, which give rare insight into the internal dynamics of the Court. In *Youngstown Sheet & Tube v. Sawyer* (343 U.S. 579 1952), seven of the nine members of the Court read their opinions from the bench. The exercise took two

and a half hours, one hour of which was dedicated to Chief Justice Vinson's dissent, which the *Washington Post* (Roberts, 1952) described as full of "sarcasm and considerable scorn for his judicial brethren [that was] quite obvious to those in the crowded courtroom."<sup>7</sup>

How frequently do members of the Court cry out in such a manner? We begin our analysis by documenting which justices engage in this practice most often. Every justice who served between the 1969 and 2007 terms has engaged in this practice at least once, with the exceptions of Justices Harlan, Alito, and Roberts (see Table 1).<sup>8</sup> Justice Stevens and Justice Scalia have read in dissent most, with 20 and 15 instances, respectively. However, given the length of Justice Stevens's career, he has demonstrated a relative unwillingness to read his dissent (Stevens has read only 3.4 percent of all dissents he authored), while Scalia engages in this behavior at a much higher rate (7.9 percent of dissents authored). Justice Ginsburg has read 10.6 percent of her dissents from the bench, the highest percentage on record. During the 38 terms examined in this article, a chief justice has only read a dissent from the bench twice. Perhaps the chief justice is more concerned with preserving collegiality because of his position as *primus inter pares* and is, therefore, less willing to dissent as vigorously as his colleagues.

Table 2 maps out the pattern of dissents read from the bench chronologically. The rate of dissents read is 3.2 per term during the Burger Court, slightly lower during the Rehnquist Court, and highest during the first three terms of the Roberts Court. This result is not surprising given the acrimonious environment said to exist on the Court during Burger's tenure and ideological clashes in such policy areas as rights of the criminally accused, privacy, and abortion rights (Woodward and Armstrong, 1979). Chief

Justice Rehnquist was lauded for his commitment to collegiality and careful management of the Court as an institution (Rosen, 2007). However, the Rehnquist Court was characterized by an even more profound shift in ideological direction and jurisprudential emphases, especially in the area of federalism (Keck, 2004). Chief Justice Roberts stated that he hoped his leadership might produce more unanimity (Rosen, 2007), but the early data on his tenure indicate a fractured Court.

#### A THEORY OF READING IN DISSENT

Using these preliminary findings as a guide for generating hypotheses, we explore determinants of justices' decisions to read in dissent. In constructing the model outlined below, we recognize that reading in dissent is closely related to writing in dissent (clearly one cannot read unless one has written), and that determinants of writing in dissent will likely have some predictive value for explaining why justices elect to read from the bench. However, reading a dissent may differ from authoring a dissent in significant ways. We integrate variables that may capture the particular calculus of a justice's decision to read from the bench. As we noted earlier, scholars have taken a theoretical approach that integrates into one model competing approaches to the study of judicial decision making and behavior (Best, 2002; Wahlbeck, Spriggs, and Maltzman, 1999; Gerber and Park, 1997; Brace and Hall, 1993). This literature and our preliminary findings suggest the following hypotheses for an analysis of justices reading in dissent from the bench.

***Ideological Variable.*** Scholars have found a positive correlation between ideology and behavior, demonstrating that ideologically similar justices tend to vote

together and sign on to the same opinions (Brace and Hall, 1993, Brenner and Spaeth, 1988). Wahlbeck, Spriggs, and Maltzman (1999) find that opposite conditions also account for behavior: a justice is more likely to write separately when he or she is ideologically distant from the majority opinion author. We hypothesize that the same condition may increase the likelihood of a justice choosing to read a dissent from the bench.

When the differences in ideologies of the two justices are at their largest, the differences in policy positions may well also be the largest, and this chasm in positions may motivate a dissenting justice to read a dissent from the bench. Furthermore, when a dissenting justice is closer in ideology to the majority opinion writer, the dissenter may be dissuaded from reading a dissent from the bench out of fear of angering a colleague with whom there is a degree of ideological common ground. Johnson, Black, and Ringsmuth (2009) developed a similar hypothesis, for which they found some support in their data.

*Hypothesis 1:* As the ideological distance between a justice writing in dissent and the justice writing the majority opinion increases, the probability that the dissenter will read his or her opinion from the bench increases.

***Strategic Variables.*** When deciding whether to read a dissent from the bench, it is likely that some legal issues provide a greater motivation than others, depending on the salience of the issue. The salient case may evoke a response from a justice motivated by preferences for particular policy outcomes. However, scholars have generally viewed salience as a strategic factor that influences willingness to bargain (Spriggs, Maltzman, and Wahlbeck, 1999) or to write a dissent or concurrence (Collins, 2008; Wahlbeck, Spriggs, and Maltzman, 1999; Brace and Hall, 1993). The theoretical justification for

exploring the influence of salience on justices' behavior relates to the justice's level of concern about a policy outcome. A salient case triggers the desire to influence a majority opinion (Epstein and Knight, 1998) or to establish a jurisprudential alternative that a future Court might adopt. Wahlbeck, Spriggs, and Maltzman (1999) found that Supreme Court justices are more likely to write separately in cases of high political and legal salience. Collins (2008) came to a similar conclusion using public and justice-specific measures of salience.<sup>9</sup> Given the link between salience and the incentives to write in dissent, we hypothesize a similar relationship between salience and the incentive to read in dissent.

*Hypothesis 2:* The probability that a justice will read from the bench increases when the case involves an issue of high salience.

A common method of measuring the level of disagreement on the Court is the presence of many closely divided cases. Authors have found that cases producing a minimum winning coalition influence both the process of collaborative decision making and the strategies for influence justices select when they find themselves in a winning coalition that is of minimum size (Spriggs, Maltzman and Wahlbeck, 1999; Wahlbeck, Spriggs and Maltzman, 1999). Here, unlike the studies just mentioned, we examine decisions to read in dissent for justices who find themselves outside the majority coalition. The presence of a coalition of minimum winning size has not been linked to decisions to author a dissent (although other factors, such as salience, collegiality, and ideological distance, have).

We predict that dissenting justices in cases with a minimum winning coalition would be more likely to read a dissent than in cases where the majority bloc greatly outnumbers the dissenters. We theorize that reading in dissent may be a response born of

frustration with “a strategy failed.” The effect of a closely divided case on dissenting justices may be an increased level of frustration at falling just short of a winning coalition and being excluded from the bargaining and accommodation that characteristically occur within a minimum winning coalition as justices attempt to keep that more fragile coalition together. In 5-4 decisions, the dissenting bloc may be close enough to forming their own majority that they feel more frustration than in 8-1 cases in which a dissenting justice may be resigned to a lonely fate. Scholars have found that bargaining and accommodation among justices within the majority coalition occurs most frequently when that coalition is of minimum winning size (Wahlbeck, Spriggs, and Maltzman 1998). As Maltzman and Wahlbeck (1996) note: “If the initial majority coalition is a minimum winning coalition, authors on both sides will recognize the fragility of their coalitions and thus be particularly responsive to the concerns of those justices forming the original coalition” (p. 584). Being left out of this process of crafting a majority opinion may simply add to the concerns of the dissenting justices over the resolution of the legal issues presented in a case.

*Hypothesis 3:* The probability that a justice will read in dissent from the bench increases as the size of the majority decreases.

Spriggs, Maltzman, and Wahlbeck (1999) explore justices’ efforts to influence majority opinions through a variety of responses to circulated opinion drafts. They find that cooperation among justices in the past influences what strategies a justice uses in response to a circulated draft—a wait statement, suggestion, a threat to leave the majority coalition, and authoring or joining a separate opinion. Reciprocity among justices was strong, and the likelihood of a justice issuing a threat or a suggestion dropped the more often justices cooperated. Likewise, Maltzman, Spriggs, and Wahlbeck (1999) explore

how long-term interactions among the justices structure decisions to author separate opinions; justices tend to reward other justices with whom they have cooperated in the past and punish those with whom they do not cooperate when deciding to write separately. These “tit-for-tat” strategies reflect a justice’s calculations of the long-term strategic costs and benefits of cooperating with other justices. Maltzman, Spriggs and Wahlbeck’s findings on the role collegiality plays were confirmed by Collins (2008). We include Hypothesis 4 to determine if long-term strategic factors, such as maintaining reciprocal relationships among the justices, play a role in the decision to read in dissent.

*Hypothesis 4:* The probability that a justice will read in dissent from the bench declines the more often that a justice and the majority opinion writer have cooperated in the previous term.

***Institutional Variables.*** Judicial review is perhaps the most potent weapon the Supreme Court has in its arsenal.<sup>10</sup> We define judicial review as instances where the Supreme Court considers whether a legislative act, passed by Congress, a state legislature, or a local government, is unconstitutional. The theoretical justification for hypothesizing an increased likelihood of a dissent read from the bench when a majority employs the power rests on two suppositions. First, use of the power has a finality which is lacking in other cases. In cases of statutory interpretation, the losing party may attempt to influence the other two coequal branches to revise or negate an appellate court decision. Thus, a justice in the minority is less likely to read in dissent because the losing party may make use of ordinary politics to improve its position. When the Court exercises its power of judicial review, the losing party must either amend the Constitution or hope that in the future a new Court will change its mind. As Chief Justice Hughes (1936) noted, writing in dissent in such cases may reflect “the brooding spirit of the law”

(p. 68); we hypothesize reading in dissent puts an even finer point on the disagreement among the justices in cases where the Supreme Court acts most clearly in its role as court of last resort.

Hausegger and Baum's (1999) work on inviting congressional action to overrule a Supreme Court ruling raises the possibility that dissents might be read from the bench more frequently in cases of statutory interpretation. They found that the majority opinion author invites congressional override in cases of low salience, which leads Johnson, Black, and Ringsmuth (2009) to make the opposite hypothesis in cases where a dissenting justice is deciding whether to read from the bench. Greenhouse (2007) notes that in the gender-discrimination case *Ledbetter v. Goodyear Tire & Rubber* (2007), Justice Ginsburg "summoned Congress to overturn what she called the majority's 'parsimonious reading' of the federal law against discrimination in the workplace." As a former ACLU attorney, it is easy to see how this case might be salient to Justice Ginsburg. Johnson, Black, and Ringsmuth (2009) find that a justice is more likely to dissent from the bench when the dissenting justice is close in ideological proximity to the median Senate member, which makes sense strategically.

Nonetheless, we predict the use of judicial review may elicit two types of response from a justice in the minority, both increasing the likelihood that the justice will read in dissent. The use of judicial review may activate a response based on a variety of concerns for the Court as an institution: for maintaining the norms of the legal profession, for maintaining the integrity of the law or the Court's place within the federal system, and for the reputation of the Court. Furthermore, since we hypothesize that justices are more likely to read in dissent as the size of the majority diminishes, reading from the bench

might serve the strategic purposes of casting a decision by a majority in an unfavorable light in an effort to bring another justice over to the minority view in some future case involving the use of the review power. Thus, a dissent from a decision in which a majority or plurality exercised the power may implicate institutional and strategic responses from justices in the minority.

*Hypothesis 5:* The probability that a justice will read in dissent from the bench increases when the majority exercises the power of judicial review.

We also predict that formally altering precedent would increase the probability that a dissenting justice would read a dissent from the bench. The Court's dedication to following prior precedent is long established and respected, even by justices who believe in the indeterminacy of law. Justice Cardozo (1949) writes, "The situation would . . . be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not" (p. 150). Thus, in the rare instance when the Court does formally alter a precedent, and the dissenting justices cannot rely on prior precedent to preserve their position, conditions would be ripe for reading a dissent from the bench.

*Hypothesis 6:* The probability that a justice will read in dissent from the bench increases when the majority exercises its power to alter precedent formally.

Ulmer (1986) and Wahlbeck, Spriggs, and Maltzman (1999) have noted the unique role the chief justice plays on the Court. Because the chief justice is only able to control the majority opinion assignment if he is in the majority, the chief justice has a strong incentive to vote with the majority, even if the majority's policy preference is contrary to his own. This logic does not apply directly to the decision to dissent from the

bench, as the chief justice has already committed to writing in dissent in our data set. However, we contend that the chief justice would be disinclined to dissent from the bench out of a concern for judicial temperament. Rosen (2007) argues that this quality is important for any justice to be successful in persuading his colleagues, and it is an especially valuable quality for a chief justice to possess. The existence of a “freshman effect” was first postulated by Howard (1968), who argued that new justices undergo a period of adjusting to life on the Court, which may influence them to avoid conflict with their fellow justices. Dissenting from the bench is one of the most potent ways of signaling judicial conflict to the public. Thus, we argue that justices in their first term are less likely to dissent from the bench.

*Hypothesis 7:* Special institutional roles on the Court, such as being the chief justice or being a freshman justice, create disincentives to dissent from the bench.

Spriggs, Maltzman, and Wahlbeck (1999) examine the effect of workload on the number of revisions a majority opinion writer is willing to circulate. While finding that majority opinion writers behave strategically to accommodate other justices in the majority coalition, increased workload diminishes the number of opinion drafts a majority opinion writer will circulate. Likewise, Sheldon (1999) found that as the number of cases on the docket of the Washington State Supreme Court declined, justices authored more dissenting opinions. With fewer majority opinion assignments resulting from a smaller caseload, justices have more time to research and prepare dissenting opinions. With justices spending a higher percentage of their time disagreeing with their colleagues there are more opportunities for disagreements to boil over into an oral dissent.<sup>11</sup> Conversely, a large caseload would place significant time constraints on each

justice, preventing them from fixating on their dissenting opinions. With more time to focus on authoring dissenting opinions, the norms of consensus on the Court are undermined, and reading a dissent from the bench is a powerful expression of the lack of consensus. A smaller docket also may contain a higher percentage of highly salient cases.

*Hypothesis 8:* As the Supreme Court's annual caseload decreases, the incentive to dissent from the bench increases.

**Data Collection.** The crux of our analysis is an examination of the factors that explain when a justice is likely to read a dissenting opinion from the bench. Thus, the unit of analysis is the justice-dissent, as writing in dissent provides the only opportunity for a justice to read a dissent from the bench. To assess dissenting from the bench, we recoded the original Spaeth data set, which uses the case as the unit of analysis to create a justice-centered data set according to the code provided by Collins (2006).

We included for analysis all cases orally argued and formally decided in which at least one dissent was filed beginning with the Supreme Court's 1969 term through its 2007 term. Cases in which the Court issued a per curiam opinion were excluded from the logistic regression.<sup>12</sup> Our definition of dissenting opinion includes only dissenting opinions written on the merits; we exclude dissents from a denial or dismissal of certiorari or jurisdictional dissents. To include opinions that concurred in part and dissented in part, we incorporate entries for split-vote cases.

We identified those cases in which justices read in dissent from a variety of sources.<sup>13</sup> The most recent three years of the *Journal of the Supreme Court of the United States* (Suter, 2008) include a notation on a dissent read and its reader. To develop

accurate data for other years, we identified cases in which dissents were read as noted by the Oyez Project (2008)<sup>14</sup> and in news media accounts of the Court's proceedings taken from LexisNexis and ProQuest searches.<sup>15</sup> From the Oyez Project's Web site, we downloaded audio files of all opinion announcements across our time frame. Suspecting that opinion announcements during which a dissent was read from the bench require additional time, we then listened to all opinion announcements of at least four minutes in length. We identified fourteen additional data points from Duffy and Lambert (2010). Once collected, the data on dissenting from the bench was merged with our updated justice-centered data set. Thus, the data analyzed here are as close to the universe of cases allowed by currently available records.

**Dependent and Independent Variable Measures.** For each dissenting opinion written, we coded the dependent variable as 1 if a justice read the opinion from the bench and 0 otherwise. Ten instances of a concurring opinion being read from the bench exist.<sup>16</sup> We excluded these from our analysis given that they fall outside the specific kind of behavior we hope to explain. Because of the dichotomous nature of the dependent variable, we estimate a logistic regression analysis model.

We measured the impact of ideology on reading dissents from the bench. To generate an ideology score for each justice for each term they served, we used Judicial Common Space (Epstein et al., 2007). This method defines Ideological Distance as the absolute value of the difference between the Judicial Common Space score of the dissenting justice from that of the majority opinion writer in the term in question. The distance in ideology between majority opinion writer and dissenter range from 0.000

(Justices Stevens and Blackmun in the 1982 term) to 1.512 (Justices Rehnquist and Douglas in the 1974 term) with a median of .684 (the equivalent of Justices Brennan and Stewart in the 1970 term).

As noted above, the salience of a legal issue may increase the likelihood of reading in dissent. The problem, however, lies in objectively defining salience. The most commonly accepted measure of salience is whether the announcement of a Supreme Court decision triggers a front-page story in the *New York Times* (Epstein and Segal, 2000). This approach is problematic for our analysis because of the potential for endogeneity. The decision to place a story on the front page of the *Times* depends on its newsworthiness, of which issue salience certainly plays a significant role. However, a dissent being read from the bench also increases the newsworthiness of a story (Greenhouse, 2007; Biskupic, 1999).<sup>17</sup>

Thus, we approach issue salience from a slightly different perspective. Analyzing Epstein and Segal's data set on *New York Times* coverage, we found three issue areas—privacy, First Amendment, and civil rights—that were significantly overrepresented in the <sup>New York Times</sup> compared to their presence in the Court's overall docket.<sup>18</sup> For example, First Amendment cases make up approximately 8 percent of the Court's docket, yet First Amendment cases make up almost 21 percent of cases triggering coverage in the *New York Times*. This suggests privacy, First Amendment, and civil-rights cases might be the most salient issue areas the Court tackles. We constructed three dummy variables, coding cases raising the relevant issue as 1 and cases involving any other issue as 0.

Using the same coding procedure as Wahlbeck, Spriggs, and Maltzman (1999:500), we measure collegiality by calculating the percentage of the time that the

dissenting opinion author joined a concurring or dissenting opinion authored by the majority opinion writer in the previous term. To filter out the ideological proximity between the two justices, we regressed the percentage of the time that the dissenter joined the majority opinion author's separate opinions on Ideological Distance and captured the residuals from that regression as our measure of Collegiality.

The data for Judicial Review, Alteration of Precedent, and Annual Caseload variables are drawn from Spaeth (2008). We constructed a variable to measure the impact of Judicial Review on the likelihood of reading a dissenting opinion from the bench. Cases involving either state or federal judicial review are marked as 1; all other types of cases are marked 0.<sup>19</sup> The variables Alteration of Precedent, Chief Justice, and Freshman are similarly dichotomous. Furthermore, we calculated the size of the Majority Coalition in each case, ranging from one to seven votes. We define Freshman as the first term of a justice's tenure on the Court. Annual Caseload is defined as the number of orally argued cases decided with written opinions.

**Logistical Regression Analysis.** The results for the binary logistic regression analysis support our contention that a justice's decision to read a dissenting opinion depends upon variables advanced by competing explanations of judicial behavior and justifies the inclusion of ideological, strategic, and institutional explanatory variables (see Table 3). The omnibus test of model coefficients indicates that we can reject the null hypothesis that all of the independent variables taken together have no explanatory power ( $p < 0.001$ ). The Hosmer and Lemeshow Goodness of Fit generates a score of 0.511, indicating no evidence of a lack of fit for the model. The Hosmer and Lemeshow- $R^2$

indicates that the independent variables in the model reduce the model's original variation by a factor of 0.112.<sup>20</sup> Given that certain individual justices dissent from the bench in higher numbers, we should note that justice-specific fixed effects do not invalidate this model.<sup>21</sup> The significance levels measured by a two-tailed test of the variables included indicates strong support for the explanation we offer. We examine that support by hypothesis below.

The most intriguing result of this analysis involves our hypothesis that ideological distance from the majority opinion writer increases the probability that a justice will read in dissent (Hypothesis 1). The analysis does not support this conclusion. In our results, the Ideological Distance has a negative coefficient (Coef. = -0.656). This finding stands in contrast to Johnson, Black, and Ringsmuth (2009), who find a modest, yet statistically significant, positive relationship between the two variables, although our analyses apply different methodologies. To provide a substantive interpretation of this finding, we examined the predicted probability scores of the dependent variable at various points along the curve of ideological distance. Overall, a dissenting opinion has, on average, a 3.13 percent chance being read from the bench. When the difference in ideology is in the bottom quartile (0.00 to 0.37), a dissenting opinion has, on average, a 3.77 percent chance of being read from the bench. When the difference of ideology is in the top quartile (0.93 to 1.50), a dissenting opinion has, on average, a 2.77 percent chance of being read from the bench.

More detailed analysis confirms these findings. In cases where the the justice dissenting from the bench is a liberal<sup>22</sup> and a dissent is read from the bench, our original hypothesis would predict conservatives<sup>23</sup> to be the author of the majority opinion. In fact,

conservatives only account for 46 percent of those majority opinions. Fellow liberals account for 15 percent of the majority opinions in these cases, while moderates<sup>24</sup> make up 39 percent of these oral dissents. In cases where the dissenter reading from the bench is a conservative, liberals are the majority opinion author 53 percent of the time. In the rest of these cases, the majority opinion authors come from moderates (34 percent) or fellow conservatives (12 percent). In cases where the dissenter reading from the bench is a moderate and a dissent is read from the bench, fellow moderates make up 27 percent of corresponding majority opinion authors with the rest coming from either liberals or conservatives.

Regarding issue salience (Hypothesis 2), the results are mixed. Civil Rights cases and First Amendment cases are not statistically significant predictors of reading a dissent from the bench. Privacy cases do bear a statistically significant positive influence on the odds of reading a dissent from the bench, and the marginal effects of the variable indicate it has one of the strongest influences in our model (Marg. Effects = 0.046). Privacy cases are perhaps the ripest for justices to pursue preference maximization. The still unsettled nature of the law in this area, and the lack of precise language within the Constitution establishing the ground upon which to argue bring such preferences to the fore. In addition, privacy cases often involve government intrusion into some of the most personal and emotional facets of human life.

In Hypothesis 3, we predict that justices would be more likely to read a dissent from the bench as the size of the majority diminishes. The analysis supports this conclusion. The marginal effect of an infinitesimal change in the size of the majority coalition from its mean increases the probability of a dissent being read from the bench

by a factor of -.005. This result makes sense as part of a strategic consideration of coalition building and maintenance. As Maltzman and Wahlbeck (1996) note, voting fluidity among the justices declines as the size of the majority coalition declines, an indication that the justices work to hold coalitions together when their stability is threatened. As we noted above, dissenting is part of this broader strategic use of bargaining and accommodation, and its use for strategic purposes declines as the size of the majority coalition declines. Thus, justices are less likely to change their initial votes and more likely to write in dissent as the majorities' margin of victory decreases (Maltzman and Wahlbeck, 1996). The results here are consistent with this overall description, as reading in dissent represents the tail end of this of the collegial process. It is undertaken when all other efforts to craft consensus have broken down.

Hypothesis 4 predicted that a dissenting justice who has a strong collegial relationship with the majority opinion author would be less likely to dissent from the bench than in cases when their past cooperation was less strong. While the coefficient of this variable is negative, as predicted, the relationship is weak and is not statistically significant. Collegiality, which we measured independently of ideological compatibility, has no influence on the incentive to read a dissent from the bench. We ran an alternate model in which Ideological Distance was removed and Collegiality was included without purging it of its ideological component. We redefined as the percentage of separate opinions written by the majority opinion writer that the dissenting justice joined in the previous term (without using the residuals from regressing this percentage against ideological distance). Even in this model, past cooperation did not have a statistically significant relationship on the incentive to read in dissent.

The data support the hypothesis that a justice is more likely to read in dissent when the majority reviews the constitutionality of a legislative enactment (Hypothesis 5). Invocation of the judicial review power by the Court has a positive relationship with the likelihood that a justice will read in dissent within the model (Coef. = 0.967). Justice Brandeis' concern that "in most matters it is more important that the applicable rule of law be settled than that it be settled right" also includes one major condition: "provided correction can be had by legislation" (*Burnet v. Coronado Oil and Gas Co.*, 285 U. S. 393 1932). In cases involving judicial review, correction cannot be had through legislative means. Clearly, when such corrective measures are not available, the probability that a justice may read a dissent increases.<sup>25</sup>

Furthermore, the analysis strongly supports the conclusion that a dissenting justice is more likely to read from the bench when the majority coalition in a case exercises its power to alter precedent formally (Hypothesis 6). Altering precedent has a strongly positive effect on the probability that a justice will read in dissent; the marginal effect measured at the mean is 0.0414. The strength of this finding makes sense when considering the importance of previous precedent to judging. When a majority formally alters precedent, those that disagree with this development in judicial policy are apt to fall back on the judicial values of consistency and stability in law. Reading in dissent is their weapon of last resort when they cannot form a majority coalition around that preference.

The special institutional roles held by the chief justice and freshmen members of the Court did yield a coefficient in keeping with our Hypothesis 7, but only the Chief Justice variable achieved statistical significance.<sup>26</sup> . As noted above, the Chief Justice occupies a unique leadership position on the Court, often playing the role of consensus

and coalition builder. Other researchers have established that the Chief Justice is less likely to respond to majority opinion writers with the threat of writing separately, or even to issue a wait statement or suggestion (Ulmer, 1986; Spriggs, Maltzman and Wahlbeck, 1999). We suspected, therefore, that the incentive for the Chief Justice to read in dissent is low. The direction of the coefficient supports that hypothesis. The data for Annual Caseload indicate that as the Court's docket shrinks, the probability of dissents being read from the bench increases (Coef. = -0.014). When the Court tackles fewer cases in a term, justices can spend more time concentrating on dissenting opinions, thus undermining the consensual norm on the Court and increasing the chance for dissensus to spill over into dissents being read from the bench.

### **The Role of Ideology in the Decision to Read a Dissent from the Bench**

The chief components of the strategic account of judicial decision making (Epstein and Knight 1998) are that "justices' actions are directed toward the attainment of goals; justices are strategic; and institutions structure justices' interactions" (pp. 10-11). The strategic account views judges as rational actors who engage in a calculation of the relative benefits associated with particular actions. Based on this cost-benefit analysis, they select those behaviors that provide the best chances for achieving their goals. Yet, judges must condition their selections based on what they can reasonably hope to achieve, given the preferences of other actors whose decisions intersect with their own (Baum, 2006). Finally, the rules of institutions establish the ground upon which formal and informal interaction will occur, giving structure to the interconnectedness of decision making. The rules of the institution are related to the pressure exerted by justices to

secure preferred outcomes under those rules. Given the results of this analysis, where does our explanation for justices' decisions to read in dissent from the bench fit within the strategic account of judicial decision making? In particular, how do we account for the apparently unique finding that ideological proximity increases the likelihood of a dissent being read rather than dampening it? And why does Collegiality not shape the incentives to dissent from the bench?

Our finding that Ideological Distance is not the most powerful explanatory variable in our model is not necessarily unique. While the influence of ideology upon justices' decisions is relatively unconstrained in comparison to other courts (Gerber and Park, 1997), scholars have found that the explanatory power of ideology varies across stages in the decision making process. For example, while policy preferences explain initial votes, Maltzman and Wahlbeck (1996) find that the influence of attitudes is filtered through strategic policy considerations and institutional norms throughout the process of crafting majority and separate opinions. The strategic nature of the bargaining process (such as whether the majority coalition is of minimum size or not) and institutional pressures limit and shape the influence of policy preferences on policy outcomes. Similarly, Spriggs, Maltzman, and Wahlbeck (1999) find that the influence a justice can exert on the policy content of a majority decision through bargaining is a function of justices' policy preferences as conditioned by agreement among a minimum of five justices, which is an institutional norm that structures the context in which bargaining occurs.

However, our finding that a justice is likely to read in dissent when an ideologically proximate justice writes the majority opinion is unique to the study of

dissent. Analyses of justices' decisions to author separate opinions (Wahlbeck, Spriggs, and Maltzman, 1999; Brace and Hall, 1993; Brenner and Spaeth, 1988) reveal that justices are more likely to write separately or join a separate opinion when they are most ideologically distant from the majority opinion author. If this finding applied to dissents read from the bench, we would expect that a dissenter would not read in dissent when the majority opinion writer was ideologically proximate. The same preferential and strategic factors that free an ideologically distant justice to write in dissent would restrain the ideologically proximate justice from reading in dissent.

An explanation for why ideology has the opposite effect on decisions to read in dissent must consider the strategic motivations of dissenting justices who are ideologically compatible and ideologically distant from the majority opinion writer. In the case of the ideologically distant justice, we might conclude that the incentives to write in dissent are different from the incentives to read in dissent. Greater ideological distance from the majority opinion writer may dampen the enthusiasm of a justice to read in dissent in the same way as size of the majority coalition. Like the justice in an 8-1 decision, a justice ideologically distant from the majority opinion writer may find writing in dissent sufficient, and consign him- or herself to being an ideologically lonely outsider.<sup>27</sup> Certainly, in some high-profile cases a Scalia will read in dissent from a majority opinion authored by a Stevens. However, the results of this analysis suggest that such a circumstance does not systematically explain justices' decision to read in dissent.

On the other hand, when two ideological compatriots split between writing the majority opinion and writing a dissent, the dissenter may be motivated to vent frustration by reading the dissent. Because ideology does not have the greatest explanatory power in

the model, this scenario takes place only in certain limited instances, and for good reason. Strategically, reading a dissent when the majority opinion writer is ideologically close to the dissenter weakens the relationship between those two justices. From a strategic standpoint, the incentive not to read is great, which might explain the lack of statistical significance we found in the Collegiality variable.

Thus, the results of this study make sense when we consider that reading a dissent from the bench might signal the breakdown of bargaining and accommodation. What follows are inferences emerging from this study that require further analysis. When an ideologically similar justice is writing the majority opinion, the dissenting justice is more likely to engage in bargaining than when the majority opinion writer is an ideological opposite (Spriggs, Maltzman and Wahlbeck, 1999). This process aims either to extract concessions in the majority opinion or to persuade the majority opinion writer to switch his or her vote. In some instances, when that process fails, the dissenter may feel inclined to dissent from the bench out of frustration, regardless of the level of collegiality between the two justices. This analysis underscores why reading a dissent from the bench can be considered the “nuclear option” for expressions of dissonance on the Court. Further research is needed to establish a precise empirical connection between reading a dissent from the bench and the bargaining and accommodation process.

## **Conclusion**

As part of the norm of dissensus, dissenting from the bench, which is arguably the final and most severe expression of disagreement, retains a level of importance beyond the occasional anecdote included in news coverage of the Court. It provides an example

of a point in the decision-making process where rules and norms explain more than policy preferences. From the present analysis we might conclude that justices are more strongly influenced by the former. Furthermore, a traditional assumption concerning incentives for justices to write separately—the lack of ideological compatibility with the majority opinion writer—does not extend to decisions to reading in dissent from the bench. A justice ideologically similar to a majority opinion writer is more likely to read in dissent from the bench. We explain this finding in terms of the breakdown of the institutional norm of bargaining and accommodation.

These results convey that the behavior we study here is meaningful within the broader analysis of Supreme Court decision-making processes. Federal courts are unique institutions that function under a different set of constitutional and political constraints than the two other branches of the federal government. These somewhat unique constraints set the bounds of acceptable behavior in pursuit of policy-preference maximization. These preferences are not simply limited to maximizing policy influence. While ideology and policy preferences are important dynamics in the life of the Supreme Court, a strictly “law as politics” approach to judicial behavior is not sufficient to capture a fuller understanding of judicial decision making.

Similarly, the institutional norms and group dynamics measured in this analysis are important not merely for their legal implications, but also for their policy implications. As we recognize above, when a justice cannot maximize her policy preferences by assembling a majority coalition, she often takes comfort in the norm of *stare decisis*, which in significant ways restrains the power of the majority in any particular case from running roughshod over settled law. Thus new institutionalism is

(and ought to be) influenced by judicial behavioralism, and *vice versa*. Justices' behavior in pursuit of the goal of preference maximization is limited by how their brethren will behave, and the behavior of all is shaped and channeled by the rules, norms, and traditions of the institution.

The relatively low coefficient of the ideology variable and its counterintuitive negative direction indicate that, while ideology has much explanatory power in the decision on the merits and the decision to write separately, the decision to read in dissent is not so much a product of ideological disagreement as it is institutional norms (the use of the review power and formal alteration of precedent), strategic concerns, (the size of the majority coalition), and other ideological concerns (issues the justices find salient). In the end, as Justice Ginsburg (1990) noted at the outset, the decision to employ the “nuclear option” is one “our system allows each judge to resolve for herself” (p. 141)—selectively and cautiously.

**Table 1: Dissents Read from the Bench by Individual Justices**

<b>Justices</b>	<b>Dissents Read</b>	<b>Dissents Authored*</b>	<b>Percent (Read/Authored)</b>
Alito	0	14	0.0
Black	3	36	8.3
Blackmun	10	255	3.9
Brennan	1	404	0.2
Breyer	9	110	8.1
Burger	1	115	0.9
Douglas	8	223	3.6
Ginsburg	8	75	10.6
Harlan	0	25	0.0
Kennedy	3	83	4.8
Marshall	4	320	1.3
O'Connor	3	163	1.8
Powell	5	150	3.3
Rehnquist	1	302	0.3
Roberts	0	11	0.0
Scalia	15	191	7.9
Souter	6	100	6.0
Stevens	20	597	3.4
Stewart	12	129	9.3
Thomas	2	141	1.4
White	5	239	1.7
Total	116	3,683	3.1

\*Based on data from the 1969-2007 terms of the U.S. Supreme Court. Includes dissents in cases with a *per curiam* majority opinion.

**Table 2: Dissents Read per Year by Chief Justice**

<b>Chief Justice (Terms Served)*</b>	<b>Dissents Read (Average per term)**</b>
Warren Burger (1969-1985)	51 (3.2)
William Rehnquist (1986-2004)	53 (2.9)
John Roberts (2005-07)	12 (4.0)
Total	116 (3.1)

\*Terms served represent the number of full terms that each chief justice served in office.

\*\* Includes dissents from cases with *per curiam* majority opinions.

**Table 3: Logistic Regression Analysis of Dissents Read from the Bench**

Model Summary (N=3,600)

Hosmer and Lemeshow Goodness of Fit	0.511	Hosmer and Lemeshow R-Squared	0.112
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Variables in the Equation	Coef.	Std. Err.	Sig.	Marginal Effects
<b>Ideological Variables</b>	-0.656	0.005	0.015	-0.013
Ideological Distance				
<b>Strategic Variables</b>	1.274	0.366	0.000	0.046
Privacy				
First Amendment	-0.380	0.331	0.250	-0.006
Civil Rights	0.275	0.249	0.270	0.006
Size of Majority	-0.252	0.063	0.000	-0.005
Collegiality	-0.427	0.884	0.629	-0.008
<b>Institutional Variables</b>	0.967	0.225	0.000	0.019
Judicial Review				
Alteration of Precedent	1.301	0.362	0.000	0.047
Chief Justice	-1.986	1.011	0.050	-0.018
Freshman	-1.355	1.021	0.185	-0.015
Annual Caseload	-0.014	0.003	0.000	-0.000
<b>Constant</b>	-1.155	0.447	0.010	

\* Does not include cases with a *per curiam* majority opinion.

## References

- Barrett, J. Q. (2007). "Commending Opinion Announcements by Supreme Court Justices." <http://www.stjohns.edu/media/3/55c14b0772794f148fec48e3c14851a7.pdf> (accessed October 26, 2008).
- Baum, L. (2006). *The Supreme Court*. Washington, DC: CQ Press.
- Best, B. J. (2002). *Law Clerks, Support Personnel, and the Decline of Consensual Norms on the U.S. Supreme Court, 1935-1995*. New York: LFB Scholarly Publishing, LLC.
- Biskupic, J. (1999). "Voicing Dissent: Rare, Loud and Clear," *Washington Post*, July 7.
- Brace, P., and M. G. Hall (1993). "Integrated Models of Judicial Dissent," *52 Journal of Politics* 54.
- Brennan, W. (1986). "In Defense of Dissent," *37 Hastings Law Journal* 427.
- Brenner, S., and H. J. Spaeth (1988). "Ideological Position as a Variable in the Authoring of Dissenting Opinions on the Warren and Burger Courts," *16 American Politics Quarterly* 317.
- Caldeira, G. A. (1988). "In the Mirror of the Justices: Sources of Greatness on the Supreme Court," *10 Political Behavior* 247.
- Caldeira, G. A., and C. Zorn (1998). "Of time and Consensual Norms in the U.S. Supreme Court," *42 American Journal of Political Science* 874.
- Campbell, J. L. III (1983). "The Spirit of Dissent," *66 Judicature* 305.
- Cardozo, B. N. (1949). *The Nature of the Judicial Process*. New Haven, CT: Yale University Press.
- (1925). "Law and Literature," *14 Yale Law Review* 699.
- Collins, P. (2008). "Amici Curiae and Dissensus on the U.S. Supreme Court," *5 Journal of Empirical Legal Studies* 143.
- Corley, P. C. (2007). "Bargaining and Accommodation on the United States Supreme Court," *90 Judicature* 157.
- Douglas, W. O. (1960). *America Challenged*. Princeton, NJ: Princeton University Press.
- Epstein, L., A. Martin, J. Segal, and C. Westerland (2007). "The Judicial Common Space," *23 Journal of Law, Economics, and Organization* 303.
- Epstein, L., and J. Knight (1998). *The Choices Justices Make*. Washington, DC: CQ Press Inc.
- Duffy, J. and E. Lambert (2010). "Dissents from the Bench: A Compilation of Oral Dissents Issued by U.S. Supreme Court Justices." *102 Law Library Journal* (forthcoming).
- Epstein, L., and J. A. Segal (2000). "Measuring Issue Salience," *44 American Journal of Political Science* 66.
- Gerber, S. D., and K. Park (1997). "The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of Rehnquist Court Justices," *91 American Political Science Review* 390.
- Ginsburg, R. B. (1990). "Remarks on Writing Separately," *65 Washington Law Review* 133.
- Greenhouse, L. (2007). "Oral Dissents Give Ginsburg a New Voice on Court," *New York Times*, May 31.

- Hausegger, L., and L. Baum (1999). "Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation," 43 *American Journal of Political Science* 162.
- Haynie, S. L. (1992). "Leadership and Consensus on the U.S. Supreme Court," 54 *Journal of Politics* 1158.
- Howard, J. W., Jr. (1968). "On the Fluidity of Judicial Choice," 62 *American Political Science Review* 43.
- Hughes, C. E. (1936). *The Supreme Court of the United States: Its Foundation, Methods, and Achievements: An Interpretation*. New York: Columbia University Press.
- Jackson, R. H. (1955). *The Supreme Court in the American System of Government*. Cambridge, MA: Harvard University Press.
- Johnson, T. R., R. Black, and E. Ringsmuth (2009). "Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?" 93 *University of Minnesota Law Review* 1560.
- Keck, T. M. (2004). *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. Chicago: University of Chicago Press.
- Maltzman, F., and P. J. Wahlbeck (1996). "Strategic Policy Considerations and Voting Fluidity on the Burger Court," 90 *American Political Science Review* 581.
- Murphy, W. (1964). *Elements of Judicial Strategy*. Chicago: University Press of Chicago.
- O'Brien, D. M. (1999). "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions. In C. W. Clayton and H. Gilman (eds.) *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- (1996). *Storm Center: The Supreme Court in American Politics*, 4<sup>th</sup> ed. New York: Norton Publishers.
- Oyez Project (2008). <http://www.oyez.org> (accessed December 16, 2008)
- Perry, H. W. (1991). *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Post, R. (2001). "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court." *UC Berkeley Public Law Research Paper No. 48*. <http://ssrn.com/abstract=265946> (accessed October 26, 2008)
- Pritchett, C. H. (1946). *The Roosevelt Court: A Study in judicial Politics and Values*. New York: MacMillian Publishing.
- (1945). "Dissent on the United States Supreme Court," 39 *American Political Science Review* 42.
- Roberts, C. M. (1952). "Supreme Court Declares Steel Seizure Illegal in 6-3 Decision; 650,000 CIO Steelworkers Launch Nation-wide Walkout in Basic Plants," *Washington Post*, June 3.
- Rosen, J. (2007). *The Supreme Court: The Personalities and Rivalries that Defined America*. New York: Times Books.
- Segal, J. A., and H. J. Spaeth (1993). *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.
- Sheldon, C. H. (1999). "The Incidence and Structure of Dissensus on a State Supreme

- Court.” In C. W. Clayton and H. Gilman (eds.), *Supreme Court Decision-Making: New Institutionalist Approaches*. Chicago: University of Chicago Press.
- Simon, J. F. (2003). *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*. New York: Simon and Shuster.
- Spaeth, H. J. (2008). The Original U.S. Supreme Court Judicial Database. The Judicial Research Initiative. <http://www.cas.sc.edu/poli/juri/sctdata.htm> (accessed October 26, 2008)
- Spriggs, J. F. II, F. Maltzman and P. J. Wahlbeck (1999). “Bargaining on the U.S. Supreme Court: Justices’ Responses to Majority Opinion Drafts,” 61 *Journal of Politics* 485.
- Suter, W. (2008). *The Journal of the Supreme Court of the United States*. <http://www.supremecourtus.gov/orders/journal.html> (accessed December 16, 2008)
- Tomz, M., G. King, and L. Zeng (2003). “Relogit: Rare Events Logistic Regression,” 8 *Journal of Statistical Software* 1.
- Ulmer, S. S. (1986). “Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger. In S. Goldman and C. M. Lamb (eds.), *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts*. Lexington: University Press of Kentucky.
- (1998). “Marshalling the Court: Bargaining and Accommodation on the U.S. Supreme Court,” 42 *American Journal of Political Science* 294.
- Wahlbeck, P. J., J. F. Spriggs, and F. Maltzman (1999). “The Politics of Dissents and Concurrences on the U.S. Supreme Court,” 27 *American Politics Quarterly* 488.
- Walker, T. G., L. Epstein and W. Dixon (1988). “On the Mysterious Demise of Consensual Norms in the United States Supreme Court,” 50 *Journal of Politics* 361.
- Woodward, B., and S. Armstrong (1979). *The Brethren: Inside the Supreme Court*. New York: Simon and Shuster.

## Endnotes

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<sup>1</sup> Despite the tradition of dissent, and the lack of specific guidelines for dissenting noted by Justice Ginsburg, there are various constraints that curb the willingness of judges to write in dissent. These range from professional to strategic and institutional. As Wahlbeck, Spriggs and Maltzman (1999) note, Canon 19 of the *Judicial Canons of Ethics* (American Bar Association), encourages self-restraint, solidarity among judges, and loyalty to one's court instead of dissent. On courts of last resort, judges are explicitly admonished to dissent conscientiously only when there is a difference of opinion on a fundamental principle. Systematic pressures discouraging dissent include a general concern for a court's internal dynamics and public reputation (O'Brien, 1996). Ginsburg (1990) states that "concern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately" (pp. 141-42). Other constraints limit the number of dissents judges write. These include time limitations, the danger of "crying wolf," and maintaining relationships with fellow judges.

<sup>2</sup> Ginsburg (1990) cites Justices Cardozo and Brandeis for their strategic use of dissenting in the interests of institutional reputation. Both justices understood that writing in dissent can play a part in the process of strategic bargaining over the content of majority opinions. After circulating dissenting opinions and winning concessions within the majority opinion, both often withdrew their dissents from publication where, in their view, the decision of the majority was narrowly written. Thus, the two justices employed the threat of dissent strategically as part of the process of bargaining and extracting concessions from the majority coalition in a case. Scholarship bears out this perspective, portraying writing or joining separate opinions as strategic decisions to put pressure on the majority and exert some influence on outcomes (Brace and Hall, 1993; Epstein and Knight, 1998).

<sup>3</sup> U.S. Supreme Court decisions under Chief Justices Jay and Ellsworth were typically delivered *seriatim*. This earliest norm (in which no majority opinion emerged at all) was supplanted by Chief Justice Marshall, who carefully cultivated the consensual norm of unanimity among a group of six justices of diverse backgrounds and political views, in part to establish and preserve the institutional legitimacy of the fledgling Court (Simon, 2003). A norm of consensus continued long after Marshall's tenure (O'Brien, 1999). This institutional change virtually precluded any public record of variation in the opinions of justices about the decision of the Court in any particular case. Ginsburg (1990) notes Marshall's preference for a single, unanimous opinion of the Court. But she also notes that Marshall himself "dissented on several occasions and once especially concurred" (p. 136).

<sup>4</sup> The inaugural behavioral analysis of the U.S. Supreme Court, Pritchett's *The Roosevelt Court*, (1946), focused on the rise of dissensus among justices appointed to the Court between 1937 and 1943 as that feature of institutional life most clearly in need of explanation. Pritchett viewed the shift away from unanimity as a reflection of a concurrent jurisprudential shift toward an emphasis on indeterminacy in law and its adaptive qualities. These were emphases emerging from early 20th century legal

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pragmatist and realist traditions. O'Brien (1999) notes that "the New Deal justices infused American legal Realism and liberal legalism into the Court, but they were not of one mind. They quickly began disagreeing and pursuing their differences" (p. 103).

<sup>5</sup> That is to say, the movement away from consensus to a norm of nonconsensual opinion writing is responsible for providing social scientists with that raw data to serve as the basis for studying judicial "decision-making and process—how and why courts decide what they do, and with what political effects" (Howard 1968:43). As O'Brien (1999) has noted, the lack of a consensual norm is necessary to conducting "behavioral studies of law, courts and judicial politics" at all (p. 112).

<sup>6</sup> See also Jackson (1955).

<sup>7</sup> This incident should not come as a surprise; Vinson took over a sharply divided Court, which had grown more fractured over time as a result of intra-bloc conflict, a high turnover on the Court, and Roosevelt appointees' higher levels of dissent (O'Brien, 1999; Haynie, 1992; Douglas, 1980).

<sup>8</sup> Even the usually taciturn Justice Thomas—who has spent more time talking to CBS's *60 Minutes* than in open Court recently—has read two dissenting opinions from the bench.

<sup>9</sup> We ran a version of our model with Collins' justice-specific salience measure (2008) instead of our own. The results are as follows:

	B	S.E.	Sig.	M.E.
Ideological Distance	-0.680	0.269	0.012	-0.013
Salience	0.485	0.485	0.359	0.010
Size of Majority	-0.235	0.062	0.000	-0.005
Collegiality	-0.570	0.903	0.528	-0.011
Judicial Review	0.900	0.223	0.000	0.019
Alteration of Precedent	1.352	0.355	0.000	0.053
Chief Justice	-1.921	1.010	0.057	-0.019
Freshman	-1.368	1.023	0.181	-0.016
Caseload	-0.015	0.003	0.000	0.000
Constant	-1.125	0.446	0.012	

<sup>10</sup> We chose to utilize the judicial review measure within the Spaeth data set, rather than the declaration of unconstitutionality variable, intentionally. When a case involves judicial review, we predict a dissenting justice has incentive to read a dissent from the bench regardless of whether the judge wanted to uphold the constitutionality of a law or strike down a law.

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<sup>11</sup> O'Brien (1999) compares numbers of opinions of the Court to the number of total opinions issued. His analysis is based on actual numbers rather than percentages of total cases docketed or given plenary review. Thus, there is little evidence that a reduced workload actually leads to greater consensus as the justices work to hammer out differences. Total number of opinions issued declines during Rehnquist's chief justiceship. But it appears to do so in tandem with the reduction in the number of opinions the Court issued. Furthermore, O'Brien assigns the decline in the number of total opinions written to a combination of factors including Justice Brennan's insistence on assigning a single minority opinion, chief justices' managerial styles, and a declining caseload.

<sup>12</sup> Because of the nature of nonunanimous per curiam opinions (generally defined as an opinion of the Court issued without a notation of authorship), it is difficult to establish a precise comparison of justices' ideology or collegiality as independent variables explaining reading in dissent. This is so because, while we can establish a measure of ideology for the dissenting justice, the author of the per curiam remains unknown. Thus, we exclude all nonunanimous per curiam opinions from the analysis. These cases amount to less than 200 cases. For similar reasons, we exclude dissenting opinions jointly written by multiple justices (fewer than 100 opinions excluded). Collins (2008) posits that per curiam opinions can be included in this type of analysis by using the ideology score of the median justice in the majority coalition. We view this assumption as too risky, as it is not falsifiable.

<sup>13</sup> Data points for dissents read by sources: Supreme Court Journal, 10 cases; the Oyez Project, 62; other news sources (Lexis and ProQuest searches), 31; and Duffy and Lambert (2010) 14.

<sup>14</sup> Johnson, Black, and Ringsmuth (2007) analyzed dissent from the bench by including only cases in which an audio recording was made of the decision announcement as cataloged by the Oyez Project (2008). We elected to expand our data collection beyond audio recordings by including media coverage of the Court and the Supreme Court Journal (Suter, 2008). Using audio recording as the sole basis for identifying cases in which a dissent was read from the bench may fail to identify some cases because not all of the Court's recordings have been archived with Oyez. By expanding our data sources, we have eliminated many of the false negatives that relying on the Oyez Project alone would produce.

<sup>15</sup> We searched the LexisNexis and ProQuest databases for the words "read" and "dissent" falling within five words of each other.

<sup>16</sup> *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); *Gregg v. Georgia*, 428 U.S. 153 (1976) (White, J., concurring); *Jurek v. Texas*, 428 U.S. 262, 277 (1976) (White, J., concurring); *Profitt v. Florida*, 428 U.S. 242, 260 (1976) (White, J., concurring); *California v. Texas*, 437 U.S. 601 (1978) (per curiam) (White, J., concurring) *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring);

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*Missouri v. Jenkins*, 495 U.S. 33 (1990) (Kennedy, J., concurring orally); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Kennedy, J., concurring); *Rapanos v. U.S.*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring); and *Meredith v. Jefferson County*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring).

<sup>17</sup> Assuming that legal elites follow media coverage of the Court, it is possible that other methods of determining issue salience critiqued by Epstein and Segal (2000)—cases mentioned in legal textbooks, elite law reviews, and the *Congressional Quarterly* list—could suffer from the same defect, in addition to the other shortcomings they identified. We ran a version of our model with the New York Times measure of salience rather than the one we constructed. The results, which are derived from data between the 1969-95 terms are as follows:

	R <sup>2</sup> = 0.148			
	B	S.E.	Sig.	M.E.
N = 2861				
Ideological Distance	-1.399	0.376	0.000	-0.017
Salience	1.733	0.275	0.000	0.037
Size of Majority	-0.135	0.078	0.084	-0.002
Collegiality	-0.308	1.140	0.787	-0.004
Judicial Review	0.714	0.301	0.018	0.009
Alteration of				
Precedent	0.635	0.507	0.210	0.010
Chief Justice	-1.306	1.020	0.200	-0.009
Freshman	-0.927	1.032	0.369	-0.008
Caseload	-0.004	0.005	0.493	0.000
Constant	-3.229	0.879	0.000	

<sup>18</sup> We categorize all issues that the Court tackles according to the same classification system employed by Spaeth (2008).

<sup>19</sup> These include statutory-interpretation cases, administrative-review cases, diversity-jurisdiction cases, cases arising from the supervisory power over lower courts, and common-law cases.

<sup>20</sup> We also ran our regression model through the Rare Events Logistic Regression procedures developed by Tomz, King, and Zeng (2003). Since both logistic regression procedures produced models with similar levels of statistical significance, we employed the traditional logistic regression procedures for simplicity's sake.

<sup>21</sup> Adding each individual justice as independent variables in a conditional logit model does not dramatically change the statistical significance or substantive strength of the other independent variables in the model.

<sup>22</sup> We define liberal members of the Court as Justices Blackmun, Douglas, Marshall, Brennan, Stevens, Souter, Ginsburg, and Breyer.

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<sup>23</sup> We define conservative members of the Court as Justices Rehnquist, Scalia, Thomas, Roberts, and Alito.

<sup>24</sup> We define moderate members of the Court as Justices Black, Harlan, Stewart, White, Powell, O'Connor, and Kennedy. We realize that classifying Justice Black as a moderate might cause controversy, but one should take into account this study begins with the 1969 term of the Court when Justice Black was at the end of his career.

<sup>25</sup> Brandeis (*Di Santo v. Pennsylvania*, 273 U.S. 341927) also said: "The human experience embodied in the doctrine of *stare decisis* teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity" (p. 42). Brandeis uses almost precisely the same language here as in *Burnet*, but includes a comment comparing sources of law, and noting that the same principle (better a settled law than a correct one) applies to adherence to precedent and statutory interpretation. However, one can see that the basis for correcting error still differs. Where the Court can only police itself, dissenting strenuously appears rational. Where a legislature may correct a court, the rationality of dissenting diminishes.

<sup>26</sup> Using a one-tailed significance test, the chief justice variable would be statistically significant at the .05 level.

<sup>27</sup> This explanation raises the possibility of multicollinearity between these two explanatory variables. However, these variables are not highly correlated (analysis produces a correlation coefficient of 0.0063).