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The Evolution of Dissent in the United States Supreme Court

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M.A., Emory University, 2008

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An abstract of a dissertation submitted to the Faculty of the James T. Laney School of Graduate Studies of Emory University in partial fulfillment of the requirements for the degree of
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Abstract

The Evolution of Dissent in the United States Supreme Court

By Susan Navarro Smelcer

This project explores the evolution of dissenting opinions across the history of the United States Supreme Court. Political scientists and legal scholars traditionally have viewed dissent as ancillary to the judicial decision-making process. This perception is a function of the fact that most studies of judicial behavior focus on the modern Court—that is, the Court as it was following the New Deal—*after* dissenting had become commonplace. In this project, I provide a more nuanced perspective on dissent by examining how the practice has changed over time, as well as the institutional conditions under which that change has occurred. Using original data, I argue that dissent behavior in the early Court was closely tied to the Court's institutional prestige. In particular, when public support for the Court was low or the Court was susceptible to attack by other institutions, Justices tended to restrict their use of dissent. This behavior largely disappeared following the New Deal, and dissents took on an expanded—in some cases, even celebrated—role in the life of the Court. Ideological disagreement is clearly necessary for such division to occur, but it is not sufficient. I hypothesize that, in the modern Court, Justices use minority opinions not simply as modes of personal expression but also as tools to achieve a variety of social and legal ends. In particular, I argue that, following the New Deal, Justices began to see dissents as a way to communicate their preferred line of reasoning for reconsideration (and potentially adoption) by a future Court. Using a formal model, I derive hypotheses regarding the conditions under which future Courts will adopt minority opinions. In general, I observe that the *quality* of dissenting opinions plays an important role in predicting adoption. I test these hypotheses using original data and discover that higher quality dissents, as measured by both opinion clarity and citation-based measures of legal craftsmanship, are more likely to be cited and discussed by future Courts than lower quality opinions, holding all else equal. Taken as a whole, this project represents a novel approach to understanding dissents and their role in the development of the Court as an institution and the law itself.

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Chapter 1

Introduction

Why do Justices dissent? Some scholars would regard this question as banal, beaten to death by the rose-colored view of dissent as the brave voice of a lone judge seeking justice in the face of a misguided Court. From this perspective, dissent is disagreement and very little more. But dissents are more complicated creatures, born not only of policy disagreement but institutional concerns that shape both the way dissents are perceived by the Justices themselves and society at large. Although ideological agreement is necessary for dissent, it is certainly not sufficient.

In this project, I examine the evolution of dissenting opinions across the history of the United States Supreme Court. I argue that the Court's institutional strength affects the nature of these opinions and the willingness of Justices to dissent. If the Court is not institutionally secure, dissent will generally be absent. Only when this condition is satisfied—and Justices are assured that the Court's prestige is robust to such division—will the Justices engage in robust dissent.

I begin by examining opinion-writing practices in the Court's earliest years. I assess how the Court's relatively low institutional strength influenced the suppression of the dissenting opinion as a mechanism to gain power in the face of a dominant Congress. As the Court's power grew, however, the Justices became more comfortable challenging the majority opinion and, to some extent, began to form large voting blocs.

After the constitutional revolution of the 1930s, however, the norm of acquiesence observed by the Justices collapsed. At this point, the Justices' opinion-writing behavior

begins to change dramatically, and the writing of minority opinions becomes the new normal.

Dissents, however, vary tremendously from case to case, Justice to Justice, and term to term. If all disagreement was simply the product of ideological conflict after meeting some sort of legitimacy threshold, then any variation in the characteristics of dissent—such as in clarity, bredth, or the language of the opinion itself—should simply be noise. But this is not the case. Dissents, like other forms of political communication, are written *for* a particular purpose. In essence, like campaign speeches, statements delivered on the floor of the House or Senate, or presidential addresses, Justices' opinions are meant to communicate a political message. Only by understanding the types of messages that can be sent can dissent behavior be understood.

While I do not propose a comprehensive theory for dissent as political communication, I argue that dissent serves at least three purposes. First, starting from the perspective of the strategic choice literature, I argue that dissents are not simply the failure of a bargaining process among members of a collegial court but serve to improve the majority opinion. This function has been observed by a variety of commentators, including judges themselves.

Next, I argue that dissents serve a much broader purpose within the political system—an affiliative function. Starting from Ronald Dworkin's ideas of what constitutes moral membership in a deliberative democracy and Heather Gerken's concept of dissenting by deciding, I argue that the Court can demonstrate its important role in a deliberative democracy by giving voice to political minorities through dissenting opinions. Although minority opinions have no legal force, they can serve an important second-order representative function.

Finally, I posit that dissent can play an important role in shaping the future path of the law. This idea itself is not particularly novel and is exactly the sentiment that has captured extensive scholarly examination of the topic. As Jacobson (2005) has observed,

> An opinion in American courts is a first draft of justice, subject to recall and revision. By publishing dissents along with majority opinions common law

> honors losing visions of justice; it suggests that it would be legitimate and appropriate for them one day to form a majority; it makes law in principle infinitely revisable (33).

I extend this argument by proposing that the way in which dissents are written—including the opinion's linguistic clarity and embeddedness in the law—can influence the probability of adoption by a future court. I find modest support for this proposition and uncover many more questions for future research.

This project proceeds as follows. In Chapter 2, I examine how both legal scholars and political scientists have analyzed dissent over time. From this starting point, I begin my own study of the evolution of dissent in Chapter 3, beginning with the practice of seriatim opinion writing in the pre-Marshall court and assessing the practice through the Hughes Court in the 1930s.

In Chapter 4, I analyze changes in the frequency and structure of dissenting opinions from the Stone Court in the 1940s through the most recent Roberts Court. I offer some reflections on these changes in Chapter 5. In doing so, I conceptualize dissent as a distinct and important form of political communication and discuss three potential benefits: improving the majority opinion through the collegial bargaining process, constituting a representative function within our deliberative democracy, and providing a path for future legal change.

In Chapter 6, I propose a formal model that produces hypotheses about the conditions under which a court will choose to adopt a previous published dissenting opinion, focusing on opinion *quality*, as opposed to policy. Chapter 7 provides a partial empirical test of these predictions using orginal data. This test generates preliminary support for the proposition that opinion *quality* is independently important to the Court's decision to cite or adopt dissent. Chapter 8 concludes.

Chapter 2

Dissent in Existing Models of Judicial Decision-Making

Much political science scholarship has examined the occurrence of dissent as part of a broader project to explain judicial decision-making. This effort was rooted in the birth of legal realism in the early 20th century. Legal realism emerged as a positivist reaction to traditional explanations of the sources of law and judicial power, namely legal formalism and the theory of natural law. Unlike formalist or naturalist understandings of the law, in which the law was viewed as fixed but "discoverable" by judges using the appropriate techniques, legal realism embraced the idea that judges did more than discover the law. In this view, judges actively created the law. Legal realism was the starting point for a burgeoning behavioralist examination of judicial behavior in the social sciences, and political scientists began to use more sophisticated methodological tools to study the choices judges make.

Although legal realism revolutionized conventional thinking about how the law was made, it lacked a clear framework for understanding judges' motivations. One explanation suggested that judges were political actors, and decisions were motivated primarily by judges' *attitudes*. Over time, many scholars embraced this *attitudinalist* model of judicial decision-making. Their research, which focused almost entirely on judges' policy preferences, found that these preferences were strongly predictive of their decisions. Critics,

however, believed this model was overly simplistic and unable to accurately describe a legal environment rich in strategic, institutional, and legal context.

Dissents have been largely ignored by both legal scholars and political scientists, especially in early studies of judicial decision-making, as largely irrelevant. Legal formalism (at least, the American brand popular throughout the 19th century) treated dissents as aberrations or errors in judgement. Legal realists accorded a somewhat higher position to dissents, if only to support the idea that reasonable minds, subject to different whims, influences, or backgrounds, could draw divergent conclusions when faced with a difficult legal question. As the prominence of the behaviorialist movement increased and attitudinalist theories took hold, dissents—regarded as clear indicators of judges' preferences—grew in importance. Through the leverage gained by dissent, scholars were able to demonstrate in a methodologically rigorous way, what legal realists merely suggested years before.

Only recently have dissents been viewed as having value beyond an expression of simple legal or policy disagreement. Studies positing the importance of institutions in shaping judges' behavior have suggested, with mixed results, that dissents may be used as signals to other courts or tools used to coerce one's colleagues into adopting a less-preferred policy position. These explanations, however, stop short of giving dissents substantive value in their own right. There is, however, a growing literature that seeks to integrate legal and political perspectives by examining how judges use legal tools, such as the treatment of precedent and opinion construction, to achieve political ends. These perspectives provide more opportunities to explore how judges may use dissent to achieve their policy goals. This project adds to that ever-growing literature by arguing that the substance and structure of dissent—and not simply the act of dissenting—plays an important role in shaping the law.

This chapter provides an overview of developments in the study of judicial behavior by both legal scholars and political scientists. The discussion begins with an examination of the roots of modern political theories of judicial behavior: the legal realist reaction to formalist legal thought. Next, developments in behavioralist theories of judicial behavior are examined with a focus on the rise of attitudinalist models of judicial decision-making. This chapter concludes with a discussion of strategic perspectives of judges and courts, as

well as brief overview of recent efforts to integrate legal and political approaches to understanding judicial behavior. To the extent that dissenting opinions have been addressed in the literature, the following discussion incorporates an examination of how scholars have characterized and explained the occurrence of dissenting opinions in each of these theories.

2.1 The Rise of Behavioralism in the Study of Judicial Behavior

The study of judicial behavior by social scientists found its genesis in the legal realist movement of the early 20th century. Legal realists put forward an understanding of judicial decision-making and the law that contrasted with the dominant mode of legal thought at the time: legal formalism.

Legal formalism, also known as classical legal thought, is most closely associated with Christopher Columbus Langdell, dean of the Harvard Law School from 1871 through 1895. The formalist view, as posited by Langdell, conceived of the law as a science. Understanding the law required the use of a methodology in which abstract principles were extracted from cases and applied within a rigidly logical system to future cases (Friedman 1985, 613; Feldman 2000, 96). This, argued Langdell, would produce a result that was objective and totally detached from the judge's moral or political values (Cross 1997, 255).[1]

From this perspective, the policy outcome produced by this methodology was "irrelevant," even if that outcome was utterly absurd. Any result from the rigorous application of abstract rules was seen as acceptable because it was produced by the logical system itself (Feldman 2000, 94). Although this perspective consciously eschewed an instrumentalist approach to the law, its method tended to produce outcomes that systematically benefited the growing commercial class. As a result, some have argued that formalism was functionally indistinguishable from the social Darwinist philosophy *en vogue* at the time (Horowitz 1975; Feldman 2000, 100).

[1] Formalism can be contrasted with an earlier, widely held understanding in which the common law existed separately from natural law and, through the writings of judges, imperfectly reflected its principles (Feldman 2000, 93). Formalists viewed the law as generated from the commands of the state, and the principles of the law were inseparable from the opinions written by judges. Law, in Langdell's conception of it, was judge-made law; neither statutory or other forms of law were included in this enterprise (Friedman 1985, 613–14; Feldman 2000, 93–96).

Despite the enormous power that judges wielded over the operation of businesses and the lives of workers, formalists insisted that judges were simply protectors, as opposed to creators, of the law. The belief in formalism's objectivity and lack of agency also reinforced the idea of law as a science. Lawyers and judges were the only ones who could perform their function because it required specialized, "scientific" training (Friedman 1985, 381–82). In some ways, legal formalism echoed famed English jurist William Blackstone, who in his *Commentaries on English Law*, conceived of judges as "the depository of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the laws of the land." (Blackstone 1765-1769, § 3, 69).[2]

The formalist perspective also assumed that there were "right" and "wrong" answers to legal questions. Any instance in which abstract principles were incorrectly or illogically applied would yield a "wrong" answer. Due to the American custom of publishing an opinion of the Court, disagreement—and thus, dissent—would only be expected to occur when a Justice was in error.[3] Given that dissents were viewed as a signal of incompetence, infidelity to the law, or a lack of "logical" application, dissents issued by Supreme Court Justices were perceived as egocentric, damaging to the legitimacy of the Court, disruptive to the administration of justice, and a source of uncertainty in the public's perception of the law (see, e.g., Evans 1938; Palmer 1948, 680; Moorhead 1952, 821).

2.1.1 Legal Realism and the Genesis of Empirical Studies of Judicial Behavior

Legal realism rose in response to the detrimental social and economic consequences of legal formalism's application by judges. In particular, Justice Oliver Wendell Holmes's dissent in *Lochner v. New York*[4] was a catalyst for this movement. In *Lochner*, the Court struck down a New York law limiting the maximum work week allowable in bakeries as an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of

[2]Twenty years earlier, Montesquieu (1745) expressed a similar sentiment, noting that "the judges of the nation are . . . only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor" (163). Unlike Blackstone, who, in the tradition of Sir Edward Coke, sought to distinguish the legal profession as uniquely qualified to discern the law through judges' specialized training in "artificial" (as opposed to natural) reasoning, Montesquieu sought to limit the reach of judges in favor of greater legislative power in shaping the law. For a discussion of this, see Popkin 2007, 6–25, 45–47.

[3]In the British context, with the promulgation of *seriatim*, or separate, opinions, disagreement takes on a different quality. This distinction is discussed more fully in Chapter 3.

[4]198 U.S. 45 (1905).

the individual to contract" (56). Justice Holmes, through this dissent and other writings, became Langdell's first major critic (Feldman 2000, 106, 111).[5] Beginning with the *Lochner* dissent, the legal realist movement began to grow, reaching its apogee in the 1920s and 1930s (Cross 1997, 255; Feldman 2000, 109; Segal and Spaeth 2002, 87).

This movement, led by those such as Roscoe Pound (another dean of the Harvard Law School), Benjamin Cardozo, Karl Llewellyn, and others, rejected formalists' claims of objectivity through the use of rational abstraction (see, e.g., Pound 1907, 1908; Cardozo 1921; Llewellyn 1949-1950). In *A History of American Law*, Lawrence M. Friedman described legal realists' objections to Langdell's approach to the law in the following way:

> [Langdell's philosophy of the law] . . . was not experimental, or experiential; his method was Euclid's geometry, not physics or biology. Langdell considered law a pure, independent science; it was, he conceded, empirical; but the only data he allowed were reported cases. If law is at all the product of society, then Langdell's science of law was geology without rocks, astronomy without stars" (1985, 617).

Moreover, legal realists decried judges who avoided taking responsibility for the social outcomes of their decisions by wrapping themselves in the rhetoric of formalist logic. Judges, they argued, could never truly divorce themselves from the influence of the world around them and their own prejudices. The law necessarily depended on the *interpretation* of facts; it could not exist as pure reason alone. Thus, the mantle of objectivity formalists so stiffly wore, argued legal realists, was simply a cloak for their own biases and prejudices (Feldman 2000, 110–12).

If judges do not divine the law by applying abstract principles and pure logic, how do judges actually make decisions? To answer this question, legal realists looked to empirical methods in order discover the factors that influenced judicial behavior. Many legal realists focused on personal characteristics of judges. Others began empirical investigations of legal institutions. These scholars believed that empirical studies "would provide the knowledge necessary for the instrumental control and reordering of society" (Feldman

[5] See *The Common Law* (1881 and *The Path of the Law* (1897).

2000, 109–13).

2.1.2 Behavioralist Studies and Their Focus on Judges' Attitudes

From the impetus of legal realism emerged a nascent movement in the field of political science to quantify and measure judges' behavior. In particular, political scientists sought behavioral explanations for judges' actions. Early behavioralists, like the legal realists who came before, believed that extra-legal factors could and should be used to explain patterns of judicial decision-making. Additionally, reflecting the enthusiastic multi-disciplinary embrace of empirical research, these scholars argued that any study of judges should engage in both prediction and explanation by developing a coherent theory and measuring observable phenomena (Segal and Spaeth 2002, 88–89, citing Somit and Tanenhaus 1967, 177–78).

Throughout this period of development, the work of these scholars generated both substantive and methodological innovations. For the first time, scholars had produced rigorous empirical evidence that judges did indeed react to stimuli apart from the law—namely their own policy preferences. These policy preferences were termed "attitudes." Judges were thought to reveal these policy preferences most often in "controversial" or "difficult" cases, as evidenced by dissent. Importantly, political scientists began to adopt methodologies and, in some cases, theory from other disciplines to measure, explain, and predict the behavior of judges.

The earliest studies in the behavioralist tradition were C. Herman Pritchett's examinations of Supreme Court Justices' voting behavior. In various articles (see, e.g., Pritchett 1941, 1948*b*) and books (see, e.g., Pritchett 1948*a*, 1954), Pritchett employed statistical techniques, such as cross-tabulations, to examine voting behavior in the Supreme Court across a variety of cases. In particular, Pritchett used cases in which the Court's decision was divided, meaning at least one justice had dissented from the majority opinion, to examine the motivations for judges' decisions. These cases, he argued, provided "tangible" data on a number of interrelated issues (891).

In multiple studies, Pritchett used cross-tabulations of the Justices' votes to determine

that, in "controversial cases," Justices' personal policy preferences influence their decisions. Additionally, he found that Justices had a tendency to vote in stable blocs with other like-minded Justices. Still, Pritchett argued that one should not lose sight of the fact that decisions in most cases were unanimous. Moreover, although his research focused on judges' preferences, he believed that many factors—including attitudes—influenced Justices' decisions. In particular, Pritchett argued,

> There can be no question that all the justices are impelled, more or less often, to arrive at results in their decision which they would never reach if they had the freedom of legislative choice. But the range of discretion which is available to a member of the Court is quite wide enough to permit his personal values to exercise a controlling influence in a considerable proportion of his decisions (Pritchett 1948*b*, 67).

Pritchett's path-breaking work led to a blossoming of other quantitative studies of decision-making on the Supreme Court by scholars incorporating ever more sophisticated statistical methods from other social science disciplines experiencing their own behavioralist revolutions. One notable series of such studies was conducted by Glendon Schubert (see, e.g., Schubert 1958, 1965). Schubert consciously built on Pritchett's studies of the Court. However, Schubert pursued a more complex methodological approach in his examination of judges' attitudes by adopting statistical estimators and methodologies from the field of social psychology. In particular, Schubert measured attitudes from Justices' votes using scaling techniques. Schubert's work, however, tended to de-emphasize the importance of other considerations that may influence Justices, such as legal factors, and offered only a limited discussion of the context in which these votes were cast. This approach was also adopted to a greater or lesser extent by other scholars, such as Kort (1957), Ulmer (1960), and Spaeth (1962).

As the observant (or maybe even the not-so-observant) reader may notice, dissent forms a central component of behavioralists' studies of the Supreme Court during this period. Scholars' estimations of judges' preferences are only possible due to the presence of dissent. If judges' behavior was motivated, at least in part, by their policy preferences, then

any dissenting votes cast would be a function of their policy disagreements with judges in the majority coalition. Unlike formalist perspectives of earlier periods, behavioralists viewed dissent as a normal component of the judicial process—a perspective made possible by behavioralism's foundation on the legal realist movement.

Not all scholars believed that this new approach was beneficial to the field's understanding of the Court, however. One prominent critic was Wallace Mendelson (1963, 1964). In particular, Mendelson argued that the behavioralist movement in the social sciences examined how judges make the law without properly considering the constraining nature of the law. By using such methodology without the appropriate context, this type of work gives the illusion of precision without the accuracy. Mendelson lamented that the behavioralist enterprise is fundamentally flawed because "[w]e want to count the number of coins when the question is . . . the amount of money" (Mendelson 1963, 595, citing Sparrow 1947, 163).

2.1.3 Attitudinalism Emerges as the Dominant Behavioral Model

Despite the criticism of Mendelson and those like him, the field continued to move forward with its quantitative behavioralist approach to understanding judicial behavior. Whereas earlier studies provided innovations by incorporating methodological techniques from the field of psychology, later studies borrowed from the field of economics. In particular, these studies elevated attitudinal theory from one of multiple possible explanations posited by earlier behavioralist studies to the most critical, if not only, determinant of judicial decision-making on the Court (see, e.g., Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002).

With this application of economic theory to judicial decision-making, judges were no longer viewed as passive actors reacting to their policy preferences and a host of other stimuli. Rather, judges were envisioned to be rational actors actively pursuing their policy preferences within an institutional context that enabled and encouraged such behavior. Judges' preferences were generally viewed as unidimensional, meaning that each judge's most preferred policy preference was conceptualized as a single point on a continuum of

possible ideologies ranging from liberal to conservative.

Although operating in a collegial setting, these scholars argued that Justices are relatively unconstrained in their decision-making, meaning that they take neither the preferences of their colleagues or other political actors, such as lower courts or other branches of government, into account. In other words, these scholars asserted that no other normative or institutional concerns influence Justices on their merits decisions. This, they argued, is a function of several factors. First, the Supreme Court controls its own docket; this is a prerequisite for sincere voting on the merits. Additionally, Justices are not accountable to any electorate or selectorate. Once confirmed by the Senate, Justices have life tenure.[6] These authors also assumed that, given the current prestige of appointment to the Court and the historically long tenure enjoyed by those on the bench, Justices lack any ambition for higher office. As a result, they would not be induced to vote in a manner contrary to their policy preferences to gain a higher position. This lack of accountability is further compounded by the fact that the decisions of the Supreme Court are not reviewed by any other judicial body, meaning that the Court is one of last resort. Finally, Justices are furthered removed by the political pressures faced by other actors due to the difficulty and infrequency of overturning Supreme Court decisions (Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002). Given these factors, Justices are presumed to sincerely vote for their most preferred policy option, and policy outcomes are primarily determined by the distribution of preferences on the Court.

From this perspective, the occurrence of dissent becomes more likely as preferences on the Court diverge. Variations in vote coalitions may be attributed to disparities in the salience, or importance, of the issue (see, for example, Segal and Spaeth 2002, 304). From this perspective, dissent is "functionally meaningless" (Cross 1997, 306). Neither can dissent be prevented through internal bargaining between members of the Court nor is it presumed to speak to any political actors beyond the courthouse walls. Moreover, because attitudinalism focuses on the directionality of judges' decisions, the content and structure

[6]Technically, all judges appointed to courts constituted under Art. III, Sec. 1, of the U.S. Constitution, including the Supreme Court, serve in office "during good Behaviour." The only way that Article III judges may be removed is through the process of impeachment by the U.S. House of Representatives and conviction on at least one of those Articles by the Senate.This process is delineated in Art. I, Sec. 3, Cl. 6–7, and Art. II, Sec. 4, of the U.S. Constitution.

of those opinions is systematically ignored.

2.2 Putting Attitudinalism in a Strategic Environment

The Supreme Court exists within a complex institutional and political environment. Whereas attitudinalist perspectives assume that each Justice will vote sincerely, meaning that they will vote according to their preferences, the opinion-writing process is a *collective* one in which an opinion writer must attract the votes of a majority of Justices. Additionally, although the Court's decisions are not subject to review by a higher court and are difficult to overturn, their opinions must still be interpreted by lower courts and implemented by executive agencies at the federal state, and local levels. Although Justices may seek their most preferred policy outcome, they do so within meaningful institutional and political constraints (Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000). In other words, according to this rational choice, or "strategic," perspective, Justices must not only consider their own policy preferences, but the preferences of the other actors in their institutional environment. Thus, a Justice's decisions may be shaped by both the internal collegial context and the external institutional context in which the Court is situated.

2.2.1 Strategic Considerations Resulting from the Collegial Bargaining Process

Some strategic models view the Court's internal bargaining processes as the primary constraint on opinion writing. The bargaining process begins after oral argument when the Justices meet in conference and hold a preliminary vote. This vote tentatively determines members of the majority and minority coalitions. The Chief Justice or, if the Chief Justice is not a member of the majority coalition, the most senior Justice, assigns a majority opinion writer. The majority opinion writer plays the important role of authoring and circulating the first draft of the opinion.

A Justice may join the majority opinion without requiring any policy changes. However, even among those who join, it is rare that the first draft of an opinion is left untouched by other members of the majority coalition. The average opinion is revised and circulated three to four times (Maltzman, Spriggs and Wahlbeck 2000).

If a Justice desires changes in the majority opinion, he may act strategically and "wait" to join. Waiting gives Justices a great deal of leverage in the bargaining process, especially if the vote is close (O'Brien 2000), and may take several forms. A Justice may appear to be unsure and prefer to see whether another opinion might better address his concerns. Alternatively, he may refuse to sign on to an opinion and issue suggestions for changes the opinion's proposed policy. Finally, a Justice may issue a threat or a firm intention to write separately (Maltzman, Spriggs and Wahlbeck 2000, 63–67).

If these bargaining techniques do not produce the desired changes, the Justice may write and circulate a concurring or dissenting opinion in a last ditch effort to influence the legal reasoning of the majority opinion (Epstein and Knight 1998, 76–77; Maltzman, Spriggs and Wahlbeck 2000, 67–68). Justice Ruth Bader Ginsburg indicated that separate opinions "when drafted and circulated among the judges . . . may provoke clarifications, refinements, modifications in the court's opinion" (Ginsburg 1990, 140, as cited in Maltzman, Spriggs and Wahlbeck 2000, 67). Justice William Brennan has similarly argued that dissents can expose flaws in the majority's legal analysis, thereby keeping the majority "honest." He noted that "[t]his function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas" (Brennan 1986, 430). If writing separately has produced the desired effect of changing the legal analysis of the majority opinion, then a Justice may decide to withdraw that opinion and join the majority opinion instead (Maltzman, Spriggs and Wahlbeck 2000, 67–68).

However, if changes are not produced, then the Justice may choose to sanction the majority coalition through a concurring opinion, pointing out the flaws in the majority's argument, or withdraw his support entirely and write or join a dissenting opinion (Maltzman, Spriggs and Wahlbeck 2000, 67–69). This outcome, in some ways, represents a failure of the collegial bargaining process.[7]

[7]Beyond the internal strategic considerations, various aspects of the collegial bargaining process have been found to affect the probability that a Justice will write separately. For instance, Justices are less likely to write dissenting opinions during periods of high workload or if he is the Chief Justice. On the other hand, Justices are more likely to do so if their preferences are divergent from that of the majority opinion writer or those of the majority coalition; if the case is especially complex; or if a Justice has a high degree of cooperation with the majority opinion writer. Moreover, Supreme Court Justices appear to act strategically when considering whether to join or dissent from a majority opinion during the opinion-writing process (Spriggs, Maltzman and Wahlbeck 1999, 498–502; Maltzman, Spriggs and Wahlbeck 2000, 81–91).

From this perspective, dissents are not viewed as "functionally meaningless." However, they have little value beyond that of a bargaining chip. Dissents are important only to the extent they represent a credible threat to derail the majority's policy goals. The content and structure of such opinions are irrelevant, and dissents are assumed to have no substantive or intrinsic value.

2.2.2 Strategic Considerations Resulting from the Structure of the Judiciary

Whereas some strategic studies have emphasized the influence of the collegial nature of the Court's decision-making process, others studies have focused on the formation and effect of judicial opinions within the hierarchical context of the federal judiciary and the broader political system. The Supreme Court possesses the authority to review all cases arising in the federal court system and those state court cases involving a federal question.[8] However, since 1925, the Court has had a more discretion setting its agenda.[9] Today, the vast majority of the Court's docket is discretionary. Each year, thousands of litigants petition the Court for review. Of these, the Court grants review by issuing a writ of certiorari (a practice commonly referred to as "granting cert") for less than 100 (Epstein et al. 2012, 74–75). Once the Court publishes an opinion on the appropriate disposition of cases concerning a particular issue, the Court relies on the lower courts to faithfully interpret and comply with its decision. Thus, the relationship between the Supreme Court and lower courts is often conceptualized as that of a principal and its agent.

Early studies of lower court compliance conceptualized the federal judiciary as an administrative structure in which there was "internal friction" or "drag" (Murphy 1959). In other words, due to the hierarchical structure of the Court, there exists "tension" between the the Supreme Court and the interpreting state and lower federal courts due to differing policy interests.[10] This model has been referred to by some as the "bureaucratic

[8]The jurisdiction of the Supreme Court is enumerated in Article III, Sec. 2, of the U.S. Constitution. The hierarchical structure of the federal judiciary, as well as the Court's ability to review state court decisions, was first delineated in the Judiciary Act of 1789.

[9]In particular, the Judges' Bill of 1925 removed much of the Supreme Court's mandatory jurisdiction. The Court was given additional discretion with respect to its docket with the passage of a June 27, 1988, Act.

[10]Some work, such as Beiser (1968), examines whether state courts are more or less likely to comply with Supreme Court decisions than federal courts. Beiser finds, however, that state court compliance is no different than compliance by lower federal courts (791–95).

model," given the similarities between the judicial hierarchy and the principle-agent problem experienced by the President in controlling the federal bureaucracy (Gruhl 1980, 502). An alternate model, the "interaction model," differs from the bureaucratic model in that, rather than emphasizing the policy tensions across the judicial hierarchy, it focuses on the Supreme Court's inability to set policy across an entire spectrum of issues. Thus, non-compliance in this model can be attributed to a non-credible threat of review and insufficient guidance.[11] The most well-known studies of non-compliance (emphasizing either the bureaucratic or interaction model) have examined lower court reactions to highly salient Supreme Court decisions, such as *Brown v. Board of Education* (1954) (see, e.g., Steamer 1960; Peltason 1961; Vines 1964; Rosenberg 1991). In general, these studies paint a grim picture of "the slippage that may develop between policies of the Supreme Court and those of its judicial subordinates" (Baum 1978, 208).

While early studies found that lower courts were largely non-complaint with Supreme Court decisions, more recent examinations of this topic have generally found the opposite to be true. The differences in these findings, however, has not necessary resulted from major changes in the lower courts, but rather the data used to evaluate those courts' behavior. As noted by Baum (1978), early compliance studies tended to focus on controversial civil liberties decisions to the exclusion of the "relatively routine and uncontroversial—though not unimportant—policies that comprise much of the Supreme Court's output" (210).[12]

To provide a more comprehensive view of compliance, later studies have examined a broader selection of cases, reflecting both salient and non-salient Supreme Court decisions, and adopted a distinctly principle-agent perspective, combining aspects of the earlier bureaucratic and interaction models of compliance. Notably, these studies have found that the Courts of Appeals are highly compliant with Supreme Court decisions. Multiple studies of lower court reactions to libel cases, an area far less controversial than school

[11] For a discussion of the differences between these two models, see Gruhl (1980), 502–04.

[12] This sentiment was echoed by Stephen Wasby, who wrote, "Just as there are relatively few stories about dogs biting people (unless it concerns a new method the mailman has for repelling canines) but people who bit dogs are newsworthy, so it is that noncompliance with court ruling gets more attention than compliance, even though the latter may be more frequent. Because political scientists share expectations with other members of society, who expect compliance, we find that their work has emphasized noncompliance rather than compliance and impacts in areas of controversy rather than routine activity" (Wasby 1970, 3, as quoted in Gruhl 1980, 504).

desegregation, found that both the district and circuit courts complied "overwhelmingly" with the Court's libel decisions (Gruhl 1980, 517–19; Songer and Sheehan 1990, 306–07).[13] Similar results were found in studies of lower court compliance with the Court's labor and antitrust decisions (Songer 1987), as well as its search and seizure decisions (Songer, Segal and Cameron 1994). In particular, circuit courts were discovered to be "faithful agents" of the Court, whose decisions were both congruent with and responsive to changes in the Court's doctrine (Songer, Segal and Cameron 1994, 681–90). Circuit courts also appeared to respond to the preferences of the contemporaneous Supreme Court. In other words, circuit courts treat "much more harshly" the precedents of past Supreme Courts that are ideologically distant from the current Supreme Court (Westerland et al. 2010, 891, 901-2).[14]

After uncovering empirical evidence that lower courts were, in fact, faithful agents of the Supreme Court, scholars began to examine the institutional mechanisms by which such compliance is achieved. The most prominent mechanism at the Supreme Court's disposal is the threat of review (by granting cert) and reversal. Whereas earlier examinations of the "interaction model" suggested that the Court reviewed too few cases to use this as an effective enforcement mechanism, later studies found that the threat of review, even if infrequently exercised, was a useful mechanism utilized by the Court to ensure compliance (see, e.g., Cameron, Segal and Songer 2000; Lax 2003).[15] In addition, the Court's control over the circuits appears to be enhanced by collegial politics within the circuits themselves (Cameron, Segal, and Spaeth 2000; Kastellec 2011). This can be attributed, at least in part, to the "fire alarm" effect.[16] According to this theory, circuit judges may act as a "fire alarm," alerting the Supreme Court through dissent to a decision that is ideologically distant from

[13] Additionally, Songer and Sheehan examined lower court reaction to *Miranda v. Arizona* (1966) and found a similarly high, if not higher, pattern of compliance in the lower courts (307–08).

[14] Federal administrative agencies have also been found to be compliant with the Court's decisions. Spriggs (1996, 1997) found that federal agencies implemented policy change in response to over 90% of the Court's decisions. In these studies, Spriggs examined whether the reasoning or form of the Court's opinions affected an agency's level of compliance. Spriggs found that some aspects of the opinion content, notably whether the opinion was based on administrative law or on statutory or constitutional interpretation, influenced the agencies' level of compliance. However, Spriggs found mixed results as to whether the specificity of the opinions influenced compliance. Notably, the presence of dissent did not reduce the likelihood of compliance.

[15] In particular, Lax notes that the threat of review alone is not enough to ensure compliance. The Court's other institutions, such as the "Rule of Four" (the rule by which the four members of the Court must wish to review a lower court decision to grant certiorari), contributes to compliance in the lower courts.

[16] See, however, Hettinger, Lindquist, and Martinek (2003; 2004), who fail to find evidence of this effect.

the Court.[17]

The "fire alarm" hypothesis emphasizes the importance of *lower court* dissent in triggering Supreme Court review. This cue, it is argued, is instrumental in altering the Supreme Court to deviant circuit decisions and, as a result, increasing the Supreme Court's control over the circuits. Some scholars have examined the hypothesis that dissent may decrease the incidence or rate of compliance in the lower courts with mixed results (Benesh and Reddick 2002; Johnson 1979; Klein 2002). Although some studies have found little support for this hypothesis (Johnson 1979), others have discovered that the presence of dissent increased the length of time between issuance of a rule and adoption of that rule by lower courts (Benesh and Reddick 2002). In fact, one study found that, at least among dissents issued by circuit court judges, "[a] dissent from the announcement of a rule is associated with a lower probability of adoption by other [circuit] courts" (Klein 2002, 134).

2.2.3 Other Institutional Considerations in Judicial Decision-Making

Beyond the hierarchy of the judiciary, the Supreme Court exists within a broader political system. This system, characterized by the separation of federal power between the executive, legislative, and judicial branches, allows each branch to place some limitations on the power of the others. For example, the Court relies on the executive branch to enforce its decisions, which may also be altered by Congress through legislative act or constitutional amendment.[18] Scholars examining the Court within this context employ what is commonly referred to as a separation-of-powers model. Proponents of this model argue that the Court has an incentive to strategically consider the preferences of the other branches in its own decision-making (see, e.g., Epstein and Knight 1998, 138–81). Evidence that the Court responds to these incentives, however, is mixed (see, e.g., Segal and Spaeth 2002,

[17]Findings of the circuit courts as faithful agents were confirmed by Benesh (2000). Unlike previous studies, which focused on the principal-agent relationship, Benesh emphasized that compliance was, in part, a function of legal factors, such as role perceptions, legal norms, and respect for precedent. However, like those adopting a principal-agent approach, Benesh concludes that circuit court judges are "forward-thinking" and seek to avoid reversal of their opinions. Similarly, while Cross (2007) attributes most circuit court decision-making to legal factors, he finds that the preferences of the contemporaneous Supreme Court are influential on decision-making in the circuit courts (94–122). These findings, however, are disputed by Klein (2002) who concludes, in a study combining both empirical analysis with interview data, that circuit court judges, while influenced by the relative prestige and expertise of an opinion's author when deciding whether to adopt opinions from other circuits, do not actively contemplate avoiding review by the Supreme Court (134).

[18]Constitutional amendments also require approval by three-fourths of the states. Art. V, U.S. Constitution.

326–51).

Compelling evidence suggests, however, the Court is responsive to public opinion *writ large*. In other words, the Supreme Court appears to heed public will in making policy decisions. However, given that judges are not popularly elected, the mechanism by which this occurs has been widely debated. Some argue that the connection is primarily a direct effect, meaning that judicial behavior tracks changes in the public mood (Mishler and Sheehan 1993, 1994, 1996; Link 1995; Flemming and Wood 1997; McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011).[19] Others argue that effect is primarily indirect, or institutional, in nature. in other words, Justices, while not directly elected, indirectly reflect public opinion due to their appointment by a popularly elected President and Senate (Dahl 1957; Norpoth and Segal 1994; but see also Mishler and Sheehan 1993).

Empirical evidence of a direct relationship between public opinion and the Court's policy decisions is not entirely surprising. The Court depends not only on the other branches, but also any number of local and state officials, as well as average citizens, to interpret and implement its rulings (Canon and Johnson 1999). Moreover, citizens—if they support the Court—may play an important role in pressuring local, state, and federal elected officials to both comply with the Court's decisions and preserve the independence and integrity of the institution.

Public support for the Court may be either *specific*, meaning that a citizen or citizens support a particular policy pronouncement, or *diffuse*, referring to "an institutional commitment," defined as an "unwillingness to make or accept fundamental changes in the institution"(Caldeira and Gibson 1992, 638). In short, when a high court has a great deal of diffuse public support, it is perceived as a legitimate institution and possesses a large degree of institutional strength. This allows the Court to function with a high level of independence from interference by the other branches and frees the court to rule against the other branches without fear of reprisal.[20]

[19] Additionally, even those scholars who agree that the connection between public opinion and Supreme Court decision-making is direct may disagree about the precise nature of that connection. For example, Giles, Blackstone, and Vining (2008) find evidence that, rather than strategically responding to public opinion, Justices are shaped by the same societal forces as the rest of the American public (see also Link 1995 and Mishler and Sheehan 1996). Others, such as Casillas, Enns and Wohlfarth (2011), find strategic behavior in response to public opinion, even after accounting for such social forces.

[20] Although this formulation of legitimacy depends on democratization as a prerequisite for judicial legit-

Most behavioralist and rational choice approaches discussed to this point examine strategic behavior as a function of institutional structure—not legitimacy, independence, or institutional strength. However, some have recently observed that the strategic behavior predicted by separations-of-powers models is most likely to operate in the *absence* of institutional strength (Vanberg 2001; Helmke 2002; Staton 2006; Staton and Vanberg 2008). Weak courts or courts facing institutional challenges may promulgate policies contrary to their own preferences to avoid sanction by a current or future ruling regime (Helmke 2002) or in the face of widespread challenges by another branch of government (Clark 2011). While strategic, courts with relatively low levels of judicial independence may be able to increase their own institutional strength by strategically ruling in favor of the current regime and receiving compliance. Over time, this creates the expectation among the public that the court's rulings should and will be obeyed. After endogenously generating increasing levels of institutional strength, a once-weak court may be able to more aggressively pursue its own policy preferences *contrary* to the preferences of the other branches (Carrubba 2009).

Even courts with relatively high levels of institutional strength may adopt a deferential posture towards the legislature or executive under certain conditions. For example, this may occur when the public has a low level of awareness about the content of the court's ruling and, as a result, is unable to support the Court in the face of legislative or executive resistance (Vanberg 2001, 2005). Building on this idea, a constitutional court may be able to increase the transparency of the political environment in which they operate by strategically publicizing decisions that challenge the ruling coalition (Staton 2006). Conversely, when non-compliance is expected, courts may seek to create less transparency in the political system by writing an especially vague opinion and, therefore, obscuring any potential non-compliance from the public's view. This would serve to protect the court from the in-

imacy and independence, this is not always the case. For example, Moustafa (2003) argues that the Egyptian Supreme Constitutional Court achieved high levels of independence and legitimacy despite the lack of a democratic system to provide requisite levels of public pressure on the Egyptian government. In the Egyptian context, the government created the Supreme Constitutional Court and guaranteed independence due to its need to promote credible signals that it would protect foreign investors' property rights. The Court reinforced this independence through its own actions and the development of citizen-based "judicial support structures." Legitimacy and independence arrived at by such means, however, may not be as durable as that induced by popular democratic support. Moustafa notes that the Supreme Constitutional Court's independence began to wane in the late 1990s, roughly 20 years after its creation.

stitutional damage that would ensue from any public awareness that other branches had failed to comply with the court's ruling (Staton and Vanberg 2008).

Given the macro-level focus on the interplay between major institutions in this literature, it is hardly surprising that dissents are rarely discussed. There is anecdotal evidence, however, at least in the American context, that when the Supreme Court is experiencing low levels of institutional strength or expecting a challenge to its authority, members of the Court will choose to write a unanimous opinion of the Court, as opposed to dissenting. By doing so, the Court may be able to project an image of institutional unity and strength and increase the probability of compliance with its decisions. Judge Learned Hand, for example, believed that a dissent "cancels the impact of monolithic solidarity upon which the authority of a bench of judges so largely depends" (Scalia 1998, 19). In the earliest period of the Court's history, Justices began to move away from the English model of writing *seriatim* opinions and adopted unanimous opinions. This practice began, albeit haltingly, with the Chief Justiceship of John Jay and was consolidated under the Chief Justiceship of John Marshall (Popkin 2007, 62–68). Justice Brennan described this development on the Court in the following way,

> At first, these opinions were always delivered by Chief Justice Marshall himself, and were virtually always unanimous. Unanimity was consciously pursued and disagreements were deliberately kept private. Indeed, Marshall delivered a number of opinions which, not only did he not write, but which were contrary to his own judgment and vote at conference. . . . This change in custom at the time consolidated the authority of the Court and aided in the general recognition of the Third Branch as co-equal partner with the other branches (Brennan 1986, 433).[21]

However, in times when the Court's institutional strength is not in question and the Court is able to act with more independence, dissent may perform an important social function by recognizing the validity of such views, even if the dissenting coalition's ideas did not win the day. Dissents thus "give expression to the grievances and concerns not only

[21] See also Scalia 1998, 18.

of the losing litigant, but also of the larger social groups for whom the decision is a defeat" (Mertz 1988, 373). By allowing various groups to perceive that they are represented by the Court, it may be able to continue to increase levels of diffuse support for the institution over time.

2.3 Conclusion

This chapter has explored various theories and models that have been proposed by political scientists and legal scholars to explain why judges make the decisions they do and, by implication, why judges may choose to dissent. These perspectives have evolved considerably since the early days of the legal realist movement. The application of empirical methods to study judicial decision-making was the primary achievement of the first studies of judicial behavior. These studies suggested that not only did judges behave in an empirically verifiable and systematic way but that they did so, at least in part, to pursue policy preferences.

From this beginning, the incorporation of economic theory into behavioralist understandings of judicial decision-making pushed attitudinalist theories to prominence. According to this framework, judges were assumed to pursue their policy goals in a relatively unconstrained environment. However, this perspective was soon challenged as an overly simplistic account of behavior that occurred in an environment characterized by multiple internal and external incentives and constraints.

In each of these accounts, dissents are regarded as anything from an anathema to all but irrelevant. From a formalist perspective, dissents were seen as an error in judgment. If the majority were right, the dissent must be wrong. As attitudinalist theories flourished following the birth of legal realism, dissents—though deemed useful in exposing the ideological proclivities of judges—were essentially viewed as externalities of the decision-making process. Dissents existed because different judges preferred different policy outcomes and voted according to their preferences. Dissents were assumed to have no effect on the way in which judges made decisions or on the law itself. Those who advocated for a more strategic view of judicial behavior viewed dissents less as a by-product of

judging and more as a tool that judges could use to extract policy concessions from their colleagues. Notably, none of these perspectives viewed dissent as having intrinsic policy or legal value.

Although positivist examinations of judicial decision-making and opinion formation have provided great insight into the determinants of the law, these perspectives have fallen under criticism that such a focus has not taken the law and legal institutions "seriously" (Friedman 2006, see also Cross 1997). These critiques suggest that positivist research emphasizing various attitudinalist or strategic theories of judicial behavior fail to adequately account for the "norms of the law"—in other words, how the law and legal institutions actually operate (Friedman 2006, 265–70). One particular failing of the positivist literature is that such studies in this tradition generally conceptualize the Court's work product as policy outcomes. However, one aspect of "taking law seriously" means that Justices' opinions need to be understood not simply by the ideological direction of the holding or the preferences of the Justices, but rather as a means of legal communication. This idea is not new. The primary question motivating the earliest studies of the Court—"Do judges make law or find it?"—expressly considered the importance of legal considerations in the Justices' decisions. However, as the field focused more intently on the influence of Justices' preferences, it neglected the simple fact that legal communication is the primary function of judging (Lax 2007, 3).

Whereas earlier studies pitted legal explanations for judicial behavior against attitudinalist theories as competing determinants of judicial decision-making (see, e.g., Segal and Spaeth 2000, 2002), more recent studies have made serious attempts to integrate legal aspects of law and judging with political perspectives. Among these are efforts to explain opinion content and structure, with an understanding that the composition of opinions—not merely the disposition of cases or the ideological directionality of the policy expressed—matters because legal rules and standards are important, even fundamental, components to the act of judging.

In the following chapter, I explore the practice of dissent in the early years of the Court and examine how the early shed its practice of seriatim opinions and adopted the practice of issuing an institutional "opinion of the Court." In particular, I assess how dissent be-

havior was shaped by the institutional strength of the Court and popular reaction to its decisions.

Chapter 3

An Institutional History of Dissent

During the 2013 term, the Supreme Court issued dissent in 34.2% (25/73) of cases decided on the merits.[1] As illustrated by Figure 3.1, the percentage of unanimous opinions was at its highest level since at least the 1953 term.[2] The pervasiveness of dissent is a relatively recent phenomena, however, beginning only in the late 1930s and early 1940s. Prior to this time, dissenting was a relatively uncommon occurrence.

As discussed in Chapter 2, the dominant focus of scholarship on Supreme Court decision-making has been on votes, as opposed to opinions. Through this lens, scholars have failed to provide a convincing explanation as to why judges dissent. A formalist approach, in which there is a right answer to legal questions and dissents are considered normatively bad, fails to understand dissents as anything other than error. This perspective is unable to explain why the frequency, content, or structure of dissent might vary over time. The jurisprudential sociological models of judicial decision-making that followed, as well as their successors—attitudinal models of judicial behavior—provided some explanations for fluctuations in dissent frequency over time but fail to address change in dissent *structure*. A strategic approach may provide an answer, but to do so, the theory must go beyond the assumption that the only purpose of dissent is as a bargaining chip. Viewing

[1] This information was collected from SCOTUSBlog's October Term 2013 StatPack (Bhatia 2014). The StatPack includes signed opinions after oral argument (equivalent to decisionTypes 1 (opinions of the Court) and and 7 (judgments of the Court) in the Supreme Court database), which comprise the majority of all merits cases, "most per curiam opinions released after oral arguments" (equivalent to decisionType = 6), and summary reversals (i.e., per curiam opinions affirming after no oral arguments, a subtype of decisionType = 2). The SCOTUSBlog StatPack also includes data from equally divided decisions (decisionType = 5).

[2] For a discussion of this, see Liptak (2014).

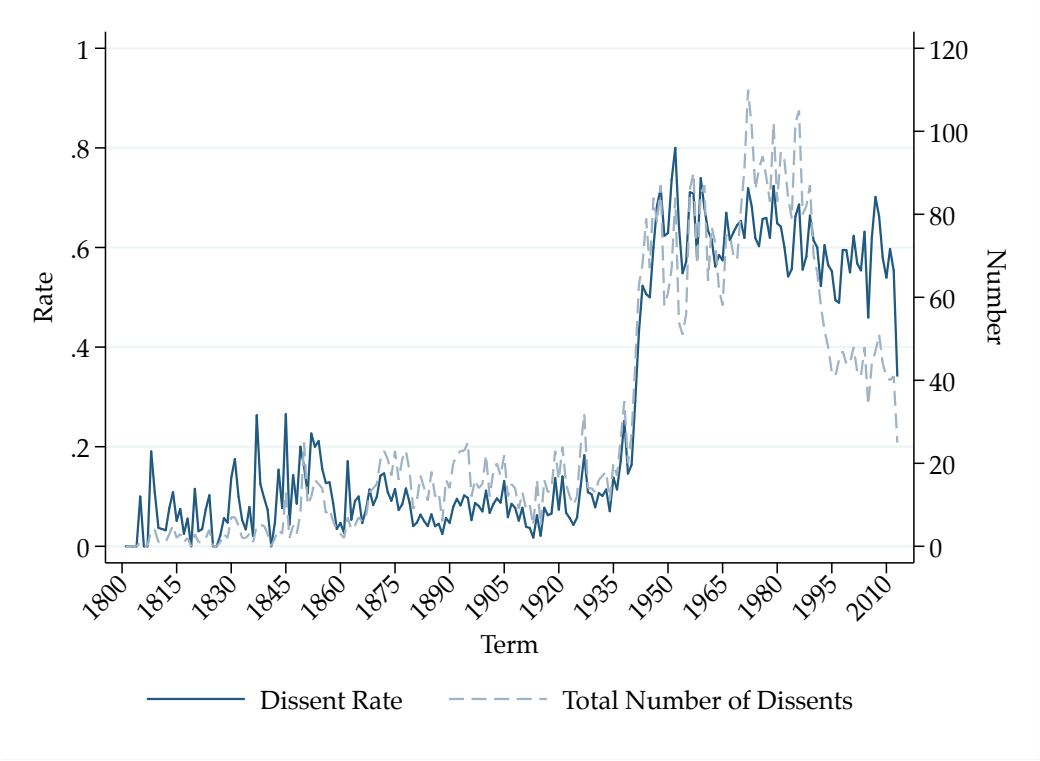


Figure 3.1: Dissent Rates and Frequency Over Time

Note: **Source**: SCDB, Compendium

dissents as purely the by-product of some other process fails to explain the complexity and richness of these minority opinions.

Only recently have political scientists began to examine the *content* of opinions (see, e.g., Corley 2008; Owens, Wedeking and Wohlfarth 2013) and doctrine/rule creation (see, e.g., Carrubba and Clark 2012; Lax 2007) to better explain judicial decision-making. This is an important development in the study of judicial behavior, as the presence of dissent is only one measure, and a rough one at that, of dissensus on the Court. Dissent can represent a minor division on the Court, such as when only one Justice dissents, or a major disagreement, such as when four Justices dissent. Moreover, the nature and intensity of these divisions is revealed through opinions themselves. Justices use opinions to not only express disagreement with their colleagues, which they could do (and have done) by dissenting without opinion, but also to justify their behavior to an audience beyond the bar and, potentially, provide a different legal path for the future. Writing opinions is the primary function of courts, and only through those opinions does the Court interact with the

broader political system. Understanding the nature of the divisions on the Court requires an understanding of the meaning of opinions.

Although the frequency, structure, and function of dissenting behavior has varied over time, almost all of the scholarship discussed in the previous chapter has been focused on judicial decision-making since the 1940s. This is no accident. Only since the late 1930s and early 1940s has the dissent rate been high enough to make measurement of judicial attitudes possible (in a mathematical sense). Before that time, the Court was dominated by a "norm of consensus," and the dissent rate hovered around 8.6% from 1801 through 1939. Since 1940, however, the average dissent rate has been 60.7%.

Prior scholarship tells us that division is the product of ideological dispute on the Court, but such lack of consensus is only a necessary condition; it is not sufficient to generate a formal expression of disagreement. A lack of strong policy conflict among the Justices prior to the 1940s seems unlikely; in fact, there is evidence that Justices regularly disagreed in conference prior to the turn of the 20th century but suppressed their dissent (Epstein, Segal and Spaeth 2001). Although the heavier workload pressures prior to the passage of the Judges' Bill of 1925 likely account to some extent for the low level of dissent, it cannot account for all (see, e.g., Walker, Epstein and Dixon 1988). For what reason were those policy disagreements suppressed and when they were expressed, how and why do they differ from dissents issued after the collapse of this consensual norm? There are few systematic investigations of why and how this norm developed in the first place. Fewer still have studied deviations from this norm in the form of early dissents. This is an unfortunate gap in our knowledge. Understanding how and when dissents were written in a regime of unanimity would shed light on the genesis of that norm, as well as why it collapsed.

The Justices' opinion-writing behavior, however, must also be placed in the broader institutional context in which the Court acted. In the Court's early years, it struggled to establish its own procedures and stand as a coequal branch with Congress and the President. Both sought to give the Court responsibilities beyond the internal operation of the judicial branch. The Court was able to escape from some of these responsibilities, such as playing an advisory role to the President, but not all. Moreover, many of the English practices and traditions adopted by the early Court were ill-suited to the American expe-

rience. Over time, however, the Court was able to achieve institutional distinctiveness and prestige. While this status is attributable, in part, to the Court's legal and policy positions, the internal practices adopted by the Court, such as a norm of consensus and the regular publishing of opinions, helped to establish and maintain the Court's institutional strength.

In this chapter, I examine changes in Justices' opinion-writing practices have changed over time, with a special focus on dissenting opinions. In particular, I explore how the issuance of minority opinions has evolved in response to the Court's institutional strength. I argue that institutional strength and prestige is a central determinant to the Court's opinion-writing behavior. First, I examine the Court's struggles with creating a unique institutional identity in the pre-Marshall years, as well as how its practices are shaped to reflect this reality. Following Popkin (2007), I argue that the "nascent" opinion of the Court is an attempt to engage in institution building within the positive law–based, democratically oriented American political structure. Next, I turn to the Marshall Court to determine how this practice was consolidated and examine when, why, and how departure from this norm occurred. I then turn to the Taney Court, using the Court's decision in *Dred Scott* as a structural break to evaluate how the Court's institutional strength shapes Justices' propensity to dissent, as well as the content and structure of those opinions. I conclude the chapter by examining the Court's responsiveness to perceived institutional threats from the post–Civil War period through the New Deal and find that, during this era, the Court is quite senstive to external pressure. In the face of congressional attacks on the Court, the Justices are less likely to dissent, holding all else equal.

3.1 Institutional Legitimacy and the Rise of the Norm of Consensus

A unanimous opinion is a powerful thing. "Justices realize that consensual decision on important and potentially divisive topics can carry more weight" (Corley, Steigerwalt, and Ward 2012, 7). For example, consider many of the Court's civil rights decisions during the Warren Court. Scholarly evidence suggests that Chief Justice Warren believed that writing a "single, unequivocating opinion" would make a stronger statement against the

"separate but equal" legal regime in the South than a divided one (Corley, Steigerwalt, and Ward 2012, 8, citing Kluger 1977, 683). By writing a unanimous opinion and writing the opinion himself, Warren was "plac[ing] the authority of the Court behind the opinion" (Balkin 2002, 34).[3] This approach was not a one-off event; this appears to be a general trend for all of the salient desegregation cases.[4] The Court ruled unanimously in many other desegregation cases, including *Shelley v. Kraemer*,[5] *Sweatt v. Painter*,[6] *Heart of Atlanta Motel v. U.S.*,[7] *Katzenbach v. McClung (Ollie's Barbecue)*,[8] and *Loving v. Virginia*.[9] Of the 54 total salient desegregation cases heard by the Court between 1946 and 2009, the Court ruled unanimously in 31 (57.4%).[10]

The Court has not taken this approach in all salient cases, however. Desgregation was an area in which the Court viewed itself as facing potentially widespread non-compliance in Southern states. As Balkin (2002) noted, "[Warren] thought it essential that the Court speak with one voice on this most important of issues. He believed that if there was a single dissent, especially from a Southerner on the Court, it might give the South license to disobey the opinion" (34). In areas where the Court would be expected to receive full compliance, the Court issued unanimous opinions at a much lower rate. For example, the Court was unanimous in 8 (35.4%) of salient antitrust cases.[11] Across all salient decisions from 1946–2009, the Court decided 1,060 salient cases, only 252 of which were unanimous (23.8%). Moreover, the Court has engaged in less unanimity in salient cases over time. As illustrated by Figure 3.2, the practice peaked in the middle of Vinson Court and has been decreasing over time. This suggests that the strategy of unanimity is useful only in certain

[3]The Court issued its decision only after rehearing. *Brown* was first argued under Chief Justice Vinson in 1952, and the Court was deeply divided following the first argument. Two months prior to the reargument, however, Chief Justice Vinson suffered a heart attack and died. Justice Frankfurter, who had delayed announcing an opinion, expressed privately that Vinson's death was "the first indication that I have ever had that there is a God" (Balkin 2002, 36–37).

[4]In this instance, salience was measured as whether the a story about the case appeared on the front page of the *New York Times*, following Epstein and Segal 2000*a*.

[5]334 U.S. 1 (1948).

[6]339 U.S. 629 (1950).

[7]379 U.S. 241 (1964).

[8]379 U.S. 294 (1964).

[9]386 U.S. 952 (1967).

[10]Data compiled from the Supreme Court Database (citation centered), issue codes 20050 (school desegregation) and 20040 (all other forms of desegregation). The first salient desgregation decision recorded in the database was announced during the 1947 term. The most recent in 1994. Salience data was available from 1946 through 2009.

[11]This figure does not include decisions regarding mergers or union antitrust disputes (issue code: 80010).

types of cases, perhaps where the Court is facing a severe external threat, as opposed to merely ruling on a controversial issue where compliance is expected.

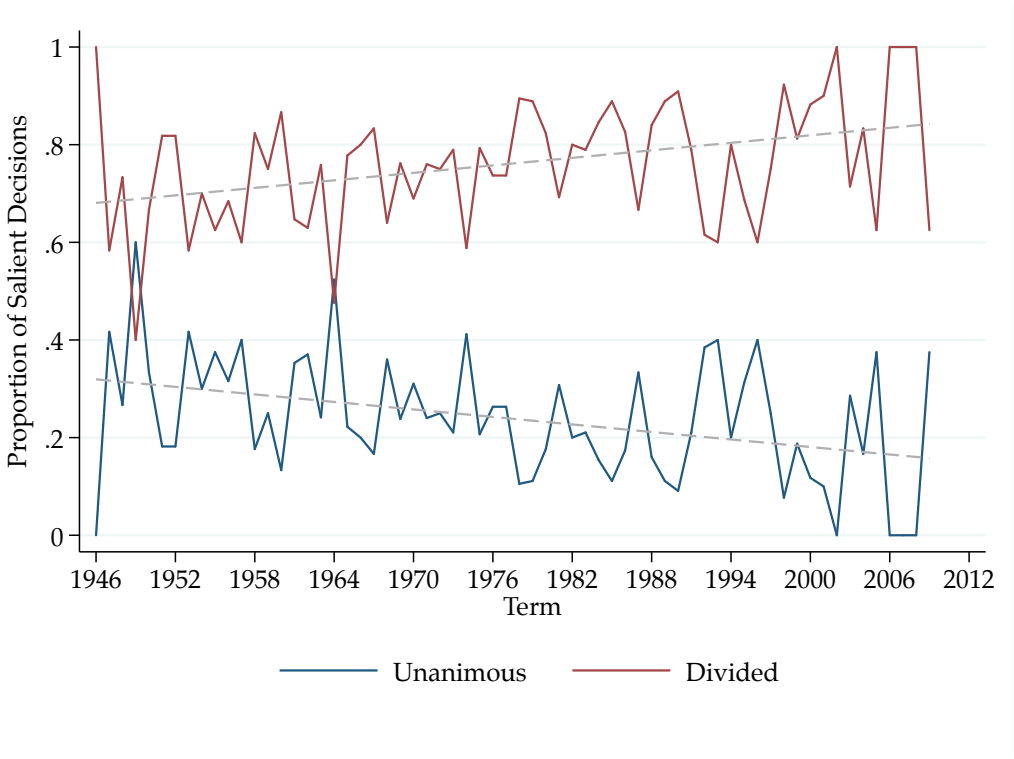


Figure 3.2: Proportion of Unanimous and Salient Divided Opinions

Note: **Note:** Salience coded as whether the case appeared on the front page of the *New York Times* (Epstein and Segal 2000*a*).

The Court's response to these issues illuminates the logic behind the "norm of consensus" observed during the first 140 years of its history. A young Court, faced with the constant threat of non-compliance or avoidance by the parties before it, chose to shore up its strength by speaking with a single voice. The development of this norm by the early Court has been attributed to many factors—not the least of which is the leadership of Chief Justice John Marshall. Historical accounts and scholarship suggest that Marshall was blessed with a great many natural gifts that made him particularly good at reining in discord. The Justices also lived at the same boarding house in the early years of the Court. This communal living arrangement, combined with the external political attacks, it is argued, allowed Marshall to create a cohesiveness that likely reduced dissensus among the Justices (Johnson 2000, 1067).

While the development of such a norm may have been facilitated by the confluence of internal factors, it was made necessary by the external threats faced by the Court. In its early years, the Court faced a variety of threats, such as court-curbing proposals by Congress, an often hostile President and the real possibility of impeachment by an unfriendly Congress. To be sure, the severity and gravity of these threats oscillated over the years, with the Court experiencing a great deal of pressure during some periods, such as during the earliest years of the Marshall Court (see, e.g., **?**),[12] but one pressure has remained present throughout its history: the nature of political authority in American society.

Although the early Court adopted many of the practices of its English predecessors, the American political landscape was vastly different. Unlike the American system, in which the Court was designed to be an independent and coequal branch of government, serving as a check on the power of the others, the English bench originally derived its authority from the Crown. From the 1300 onwards, English judges operated not only as the voice of the King but also, like the King, derived their power from the idea of fundamental, or natural, law. Thus, English judges were considered to be "oracles" of the common law and, prior to the 18th century, served as its dominant source (Popkin 2007, 8,10).[13] This is not to say that Parliament played no role in the creation of law, merely that for over 400 years the nexus of legal power was the King and his courts. There was no overriding imperative to justify decision-making based on a higher written law.

This view of the law lead to a distinctive mode of expression. English judges announced opinions seriatim, meaning that each judge gave his own reasons for the disposition of the case; there was no "institutional" opinion (Popkin 2007). Moreover, for much of its development, judicial decisions were not regularly reported; when reports were issued, whether in the form of Yearbooks, or reports of Law Lords or others, the accuracy of such

[12]Due to the variation in these threats over time, I only mention such external political pressures here. I provide more detail in each of the sections to follow.

[13]The British courts were, by no means, a unified entity, however. As noted by Popkin (2007), "In England, there was no single judicial branch of government. There was only a variety of courts, arising at different times, with different jurisdictions, and with different legal roles. The common law emerged originally from the Court of Common Pleas, later from the King's Bench, and was subsequently complemented by the Chancellor's equity courts to alleviate common law rigidities. In addition, there were Exchequer, Ecclesiatical, and Admiralty courts, and the Star Chamber. The House of Lords . . . acted as the final appeals tribunal, but it did not professionalize its legal work by relying only on the Law Lords until the 19th [c]entury" (9).

reports were highly questionable (Popkin 2007, 10–12). Thus, the bar exercised hegemony over the development of the common law through the cloistered nature of possessing sole knowledge of judicial decisions. Unlike the newly formed American bar, the English bar was a close-knit community "where an expert bench and bar collaborated to reach a decision based on their efforts to apply [the common law] to the individual case" (Popkin 2007, 10). The cohesive nature of the legal community stemmed in part from the fact that attorneys were educated through an apprenticeship system at the Inns of Courts. Although there were clearly local courts and law (Friedman 1985), the locus of legal activity was in London.

Despite this hegemony, there were periodic efforts to gain greater access to the law. For example, democratizing forces leading to a greater institutional role for Parliament during the Commonwealth period (1642–1660) and following the Glorious Revolution (1688) (Popkin 2007, 8). Over time, an emerging sense of *res publica*, which created a humanist imperative for knowledge of and participation in public life began to loosen the bar's hegemonic control over the law and encourage greater publication of the law (Ross 1998, 329). This phenomenon has been described as the "commoning" of the law, and one important aspect of this was the reporting of judicial decisions (Ross 1998). By providing public access through the publication of decision, common folk came to hold some ownership of the law and allowed the common law to become the *lingua franca* of governance and political debate (Ross 1998, 451). In some sense, by spreading legal knowledge, the law was no longer under the sole purview of the court and, by extension, the King. As Ross (1998) argued, "Printing, then, implied natural proprietorship over the law, as well as the weakening of the professional authority over the uses of legal knowledge" (450). The English bar's hegemony was further challenged in the 1750s as the institutional strength and prestige of Parliament grew in an "increasingly democratized political environment," which presented a major challenge to the supremacy of the courts (Popkin 2007, 15). However, until this time, English judges possessed a great deal of control over the development of the law, enjoyed a vast amount of legitimacy and authority, and developed a system of forming and communicating opinions that reinforced that power.

Unlike the English bar, the American legal community was widely disbursed over a

broad geographic area. Thus, where the British practice of seriatim opinions and irregular publishing was conducive to the collaboration within a cohesive, homogeneous community, it was a rather poor fit for the American experience. The Supreme Court was supposed to impose order—at least to a certain extent—over an unweildy federalist system. Colonial courts took myriad forms, although by the eighteenth century, each colony generally had a pyramidal structure with strong county courts at the bottom and a high court that "was almost always more than a court," comprising the colonial governor or executive council sitting as a "special high court" (Friedman 1985, 50). The influence of the county courts and the lay judges that occupied them persisted into Independence and statehood, entrenching diversity at the local level. This heterogeneity was augmented by a movement toward democratic political controls, which led some states to elect their judges by the early 1800s (Friedman 1985, 126–27). Only over time did states establish in their high courts "final judicial authority" (Friedman 1985, 139). Adding to this diversity was the myriad opinion-writing and publishing practices that varied from state to state (Popkin 2007, 93–100).

The emphasis on localism during this early period was also reflected in the comparative prestige of state bars and courts. During the first ten years of the Court, several Justices departed to pursue state government positions. John Jay was appointed by President George Washington to be the first Chief Justice; Jay subsequently jumped ship in 1795 to serve as the Governor of New York, considered a much more prestigious position at the time. Washington subsequently replaced Jay with John Rutledge through a recess appointment in June of that year. Rutledge originally had been appointed as an Associate Justice in in 1789 and left in 1791 (before deciding a single case) to be Chief Justice of the South Carolina Supreme Court—also considered a more prestigious position (Abraham 1992). The Senate rejected his nomination, however, and in December 1795, Rutledge resigned.[14]

These challenges pale in comparison, however, to the legal shift that had occurred with the American Revolution. The rejection of the King meant also the rejection of fundamental law as the highest law. Now, positive law—created by both the Constitution

[14]George Washington then nominated then-Senator Oliver Ellsworth to the chiefship, who received his commission in March 1796. Chief Justice Ellsworth's tenure and influence is discussed below.

and the democratically selected Congress—became the law's dominant source. Although natural law was still an important influence, political and legal authority was deemed to flow from the Constitution and the people (Friedman 1985). In *Marbury v. Madison*, Marshall himself acknowledged this reality by arguing that the people had the "original right to establish, for their future govenrment . . . . fundamental [principles]," a thought that "echo[ed] the Revolutionary generation's reliance on the social contract theory of John Locke" (Arthur E. Wilmarth 2003, 119). Thus, unlike English courts, the American Supreme Court could not rely on the natural law as a primary font of authority and legitimacy for institutional strength.

The Court had to solve what McCloskey and Levinson (2010) refer to as the Court's three role problems: establishing institutional prestige or strength, possessing independence, and engaging in meaningful judicial review (loc. 342). While there are no universally accepted definitions of what these terms mean,[15] institutional prestige (also called strength) allows the Court to "make a decision that the public may not like but will accept as legitimate" (Clark 2011, 4). This is related to but analytically distinct from judicial independence, which can be thought of as the Court's "ability to make decisions that are unaffected by political pressure from outside the judiciary" (Clark 2011, 5), including "retaliation measures by congress or the president" (Iaryczower, Spiller and Tommasi 2002).[16] The Constitution seeks to provide the Court with such independence by establishing tenure during "good Behaviour," specifying that removal may occur only through the impeachment process, and barring Congress from diminishing the Justices' salaries. However, independence also means that such paper protections are respected by the other branches. In other words, *de jure* guarantees of judicial independence are *de facto* enforced. When both institutional prestige and independence are established, the courts are able to engage in judicial review. This concept is generally defined as "any judicial action that

[15] *See* Helmke 2002, 291.

[16] Becker (1970) provides a useful definition of judicial independence:"Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of judicial role (in the interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matter, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court" (144, as cited by Herron and Randazzo 2003, 424.

involves the review of an inferior legal norm for conformity with a higher one, with the implicit possibility that the reviewing court may invalidate or suspend the inferior norm if necessary or desirable" (**?**, 209, citing Utter and Lundsgaard 1993, 561). Thus, the Court must be secure from external threats before it is able to rule against those that threaten it. These "role problems" stem from the fact that the Court has no meaningful mechanism to enforce its decisions. The Court controls neither guns, like the President, nor money, like Congress. Moreover, the Court remains only loosely tethered to the electorate through the appointment process. As a result, the Court is an "uncommonly vulnerable institution . . . [that] lacks an electoral connection" (Caldeira and Gibson 1992, 635). The only way to ensure compliance with its decisions is through public support (see, e.g., Caldeira and Gibson 1992, Friedman 2009, Carrubba 2009).

In the absence of such a direct connection, how can it build such support? One method is through the content of its opinions. For example, a court lacking institutional strength may act in a constrained manner to build public support that will allow it, over time, to exercise independence and pursue its own agenda more aggressively. In other words, the Court can endogenously create the ability to engage in meaningful judicial review by convincing the public that the exercise of this power is in its best interest. When the Court has established strong support, it can more effectively rule against another branch or, in the case of an international court, a litigant-state (Carrubba 2009). However, the institutional vulnerability of the Court (despite formal protections given the individual judges) means that even a strong Court will be "sensitive" to the preferences of other institutional actors (Carrubba 2009; Ferejohn and Kramer 2002). This dynamic of constrained or strategic judicial decision-making has been found in a variety of contexts.

The canonical case in the American context is *Marbury v. Madison*,[17] but this dynamic of deference is found in other examples, as well. Take, for example, the Court's approach to (most) national security cases. The President's position is normally quite popular. In the face of a national emergency, the President may be able to simply ignore the Court. Moreover, in such cases, the Court possesses comparatively less institutional competence to determine the appropriate national security response to, say, the threat of Japanese saboteurs

[17] See, e.g., Clark 2011, 30–33. This case is discussed more extensively in Section 3.3 *infra*.

on the West Coast during wartime than in other areas, such as ordinary criminal cases. This is due to the fact that the Court "has no machinery for systematic study of a problem" and that "[c]ases involving national security are only a tiny part of their [larger generalist] docket" (Posner 2006, 35).[18] Moreover, the Court—even if willing to speak truth to power by invalidating popularly supported executive actions or statues impinging on civil liberties—is most likely facing a popular President during a time of national crisis. When evaluating whether an executive's action violated the Constitution, the Court has taken an approach called "bilateral institutionalism," which is exemplified by Justice Robert Jackson's opinion in the Steel Seizure Cases (Issacharoff and Pildes 2004).[19] Basically, when Congress has approved of the President's action, then the Court will not rule against it. When Congress has expressly disapproved of the President's action, the Court will strike it down.[20] This provides the Court some political cover when ruling against the Executive and avoids loss of institutional prestige that would result from being outright ignored.

Similar types of constrained decisionmaking have also been observed by the judiciaries in developing countries or newly independent states following the collapse of communism. For example, unlike the modern U.S., in which the federal judiciary possesses a high level of independence both on paper and in practice, the Argentinian Supreme Court's paper protections (such as a guarantee of life tenure) have been ineffective due to "decades of political instability . . . from the 1930s through the 1980s[, which] resulted in the *de facto* norm of removing and replacing the members of the Supreme Court with each regime transition" (Helmke 2002, 292).[21] Moreover, this norm was facilitated by the fact that the executive was much more powerful than the legislature, such that even if democratically elected representative wanted to stop the removal of judges, they would have no power to do so. In response to this dynamic, Argentinian justices engaged in a type of "strategic

[18]Note, however, that some would disagree with Posner's conclusion. For example, Cole (2006) argues, among other things, that the Court is competent when it comes to defending civil liberties and it is simply a matter of whether "judges . . . are willing to stand up for principle against power."

[19]*Youngstown Sheet & Tube Co.*, 343 U.S. 579 (1952).

[20]Jackson also discussed a "zone of twilight" in which the Congress had not considered the President's action. Arguably, many—perhaps most—executive actions fall into this box, but the Court tends to find either that Congress has approved it or not.

[21]Unlike Helmke, who characterizes judicial institutions in Argentina as "dependent," Iaryczower, Spiller and Tommasi (2002) challenge this characterization, pointing to the frequency with which Argentinian justices have ruled against the government, among other things (700). Instead of being "dependent," Iaryczower et al. argue instead that the justices merely behaved strategically.

defection," upholding the action of strong executives while ruling against the actions of weak or outgoing regimes (Helmke 2002, 2003).

A comparatively strong executive is also related to a court's willingness to strike down legislation in post-communist states, as well (Herron and Randazzo 2003, 435). This may be due to the fact that many newly constituted judiciaries following the transition from communism lacked both institutional prestige as a result of "communist polic[ies] of marginalizing and politicizing the judiciary and its corresponding institutions" (Koslosky 2009, 204–05).[22] This has left courts in these countries without "any tradition or culture of an independent judiciary" and without "reservoirs of public and political support from which to draw when confronted with threats," although these courts have been gaining support over time" (Epstein, Knight and Shvetsova 2001, 127).

This brief survey suggests wide empirical support for the proposition that relative institutional weakness will lead a Court to act strategically—in other words, less than independently—when deciding whether to strike down an executive or legislative action. Courts may engage in negative actions (that is, *not* acting to curb an executive or legislature) when institutionally weak in an effort to build legitimacy over time (as predicted by Carrubba (2009) and suggested by the empirical studies discussed above).

This literature, however, suffers from a shortcoming; scholars tend to focus on only on the content of judicial opinions, as opposed to other actions a collegial court could take to build legitimacy in a time of relative institutional inferiority. In particular, I argue that courts may engage in positive forms of institution building to bolster public support and, over time, better achieve their policy objectives. "[A]t any given point in time, the justices may seek ideological objectives, sound law, or effective public policy (Baum 1997)—but changes in institutional arrangements have surely affected their ability to pursue those ends" (McGuire 2004, 129).

Institution building may take a variety of forms, although the Supreme Court's early efforts seem aimed towards developing a distinctive identity. Some of the early Court's struggles to establish an its identity are well-documented. For example, the Judiciary Bill

[22]Notably, the Estonian and Lithuanian high courts relied on international law to build the credibility of its own rulings (Koslosky 2009).

of 1789 mandated that Supreme Court Justices preside over circuit courts, which "blurred the Court's institutional identity" (McGuire 2004, 130). Unlike modern circuit courts, which are solely appellate affairs, the earliest circuit courts "served as the principal trial courts in the federal system and exercised limited appellate jurisdiction" (FJC 2014). The Justices hated circuit riding, which consumed roughly half of the year and involved sometimes difficult travel on horseback and stagecoach to far-flung areas of the country (McGuire 2004, citing White 1991, 157). Moreover, Justices were required to pay all of their own expenses. This was especially burdensome to the Justice assigned to ride circuit in the Southern states, which was "at least 1,000 miles more than the utmost [route] of the others" (Pfander 2008, 30 n.152, citing *Letter from James Iredell to Thomas Johnson (Mar. 15, 1792)*), leading those Justices bearing a less onerous circuit-riding burden to compensate the poor soul to ride in the Court out of their own salaries. The Justices were aware that if they let the practice continue for too long, it would become a permanent responsibility through "institutional ossification," as one Justice referred to it (Glick 2003, 1767). Chief Justice John Jay, petitioning President George Washington in 1790 to support the elimination of circuit riding, framed this objection in first terms of a constitutional issue,[23] then a pragmatic one.[24] In 1793, Congress responded by reducing the number of Supreme Court Justices required to sit on a circuit court panel from two to one. Later in the 1790s, Congress also acquiesced in reducing the number of locations Justices were required to hold court (Pfander 2008, 34). However, circuit riding persisted in force until 1869, when the Justices' responsibilities were "significantly reduced." The practice was eventually eliminated by the Evarts Act in 1891 (see, e.g., Vining, Zorn and Smelcer 2006, 200).

[23] Jay argued that "by instituting circuit riding, Congress had impermissibly extended the de facto original jurisdiction of the Supreme Court." Morevoer, he insisted, circuit riding pushed the Supreme Court beyond its original purpose as a court of last resort. The appointment of Justices, in his mind, did not equate to appointment to a circuit court judgeship (Glick 2003).

[24] As Pfander (2008) notes, "In their submission to Congress in 1792, [the Justices] noted that circuit riding required them to hold twenty-seven circuit courts each year, and that their duties as Justices required two additional sessions "in the two most severe seasons of the year." The combination of these duties required the Justices "to pass the greater part of their days on the road, and at Inns, and at a distance from their families." The Justices simply "[did] not enjoy health and strength of body [necessary] to undergo [their] toilsome Journies . . . nor [would] any set of Judges however robust . . . be able to support and punctually execute such severe duties for any length of time." Here was an argument based squarely on pragmatic considerations, and on the subtle message that the burdens of circuit riding had proven greater than anticipated. Congress could provide relief without feeling that it was giving the Justices an unwarranted financial windfall" (33) (footnotes and internal citations omitted).

The early Court also refused to produce binding, advisory opinions for the President. In 1793, after issuing his Neutrality Proclamation, which precluded American involvement in the conflict between France and England, President Washington requested "that the Supreme Court issue [a binding] opinion about the interpretation of various treaties with European nations" (Katyal 1998, 1744). Although Chief Justice Jay eventually spoke privately and informally with the President, the Justice sent the President a letter explaining that given "the lines of separation drawn by the Constitution between the three departments of the government . . . there were strong arguments against the propriety of [the Court's extra-judicial involvement], especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments" (Katyal 1998, 1744, citing *Letter from Chief Justice John Jay and Associate Justices of the Supreme Court to President George Washington (Aug. 8, 1793)*).

This does not mean that the Court did not see a role for itself in adjudicating real cases and controversies concerned with the very issues perplexing President Washington. At the same time the President was seeking advice, several prize cases dealing with the French seizure of American ships were in various stages of litigation in the district courts. In one case, *The Sloop Betsey*,[25] the Court "endorsed the view that the wartime capture of private property implicated not only sovereign rights, but also private rights, and that disputes about private rights were properly directed to the judiciary, not the Executive Branch" (Sloss 2008, 170). This resolution answered President Washington's concern regarding American ships and preserved the institutional distinctiveness of the Court. By taking this path, the Court was able to resolve "certain ticklish questions of international law . . . arising in connection with the Neutrality Proclamation of 1793" without establishing a long-term practice that placed the Court in a subordinate, as opposed to coequal, position as the President (McCloskey and Levinson 2010, loc. 367).

The same could be said for the Justices' refusal to resolve claims by disabled war veterans. In *Hayburn's Case* (1792),[26] two Justices sitting in the Eastern Circuit determined

[25] 3 U.S. 6 (1794).
[26] 2 U.S. 408.

that the Act assigning these responsibilities was unconstitutional because "the business directed by this act is not of a judicial nature" (McCloskey and Levinson 2010, loc. 367, citing *Hayburn's Case*; Pfander 2008, 34). The Justices explained in a letter to President Washington that "such 'revision and control . . . [was] radically inconsistent' with the judiciary's independence and with the separation of powers" (Pfander 2008, 34 citing Wilson et al 1834). As Neal Katyal (Katyal 1998, 1731) observed,

> The court was not upset by the Act's order that its judges perfrom executive tasks. Instead, the members of the court were concerned about being asked to perform these duties in their capacity as judges. In other words, they were saying that the hallmark of the judiciary is that it is not susceptible to second-guessing by another branch.

From these examples, it seems clear that the Court recognized its "position would ultimately depend on preserving its difference from the other branches of government" (McCloskey and Levinson 2010, loc. 367). Thus, even during a time when the Court was "traveling on horseback . . . from one United States Circuit Court to another" and "[h]olding brief sessions in taverns" (McGuire 2004, citing White 1991 and O'Brien 2000), the Court was struggling to establish its own institutional identity.

In addition to establishing the unique nature of their duties, the Court has engaged in *internal* institutionalization, defined as "a regularized system of policy making" (McGuire 2004, 129). As McGuire (2004, citing Selznick 1957) explains,

> [A] governmental organization may be given basic responsibilities—to legislate, to enforce laws, to adjudicate disputes, and so on. Simply having formal responsibility, however, is no assurance that it will be regarded by other actors as valuable and legitimate. To become an effective component part of government, it must develop procedures and informal norms that enable it to exercise powers that are not found elsewhere. Accordingly, a legislature, an administrative agency, or a court is institutionalized to the extent that it is an integrated part of the government system with an identity or mission seen as uniquely its own.

Even McGuire, who examined organizational (as opposed to doctrinal) development of the Court over time, focuses on structural changes made by external actors—primarily Congress. These structural factors include the number of law clerks the Court was empowered to employ; changes in the Justices' salaries, viewed as a "proxy for general fiscal commitment to the Court;" the nature of the Court's location; and the ability of the Court to control its own docket, among things. He finds that a "rising tide of institutional sophistication has increasingly enabled the justices to make their mark on national policy" (130). In other words, "[i]nstitutionalization lends both legitimacy and potency to [the Court's] decisions" (141).

Although Congress was the primary mover in each of these factors, this is not to say that the Justices did not have a hand in convincing Congress to pass these changes. For example, Chief Justice William Howard Taft vocally advocated for the passage of the 1925 Judges' Bill, which eliminated many mandatory appeals from the Court's docket (FJC 2014). Taft was also a major proponent of the construction of the Court's current home, which permanently moved the Court from the Old Senate Chamber in the Capitol building in 1935. This anecdote highlights the ways in which the Justices themselves can push external actors to create institutional change.

Advocacy is not the only means through which the Court can determine its own destiny; it can also do so through strategically publishing (or withholding) separate or minority opinions. By shifting scholarly focus from opinion content to opinion frquency and structure, we can better understand how courts can use nonpolicy tools to increase institutional strength over time. This perspective is analogous to Carrubba's (2009) theories of strategic policy deference. In other words, the Justices' ability (or desire) to publish minority opinions may be endogenous with its own institutional strength.

In order to establish the Court as an independent and coequal institution, the Justices had to produce opinions and orders held in the same regard as statutes, meaning that they would be respected and obeyed by the other branches, as well as the general public. Just as the Warren Court employed a strategy of unanimity to minimize Southern resistance to the Court's desegregation decisions, the early Court used unanimity to reinforce it own institutional legitimacy.

As suggested by the Court's response to *Brown*, unanimous majority opinions can be used to send a clear message to implementing populations. As Balkin (2002) explains, Chief Justice Warren viewed this as putting the institutional weight of the Court behind the opinion. But producing a unified message also speaks to the American orientation toward positive law and represents a response to congressional supremacy. Even when the Court's disposition of the case does not have unanimous support or the Justices differ on the correct reasoning, unanimous opinions may signal that the Court is speaking not as a collection of individuals but an institution—and one established by and charged with enforcing the "supreme will" of the American people, at that.[27]

Compare this with the practice of writing seriatim opinions, in which each Justice expresses his own view of the case. In that instance, although the Court has collectively determined the disposition of the case, each judge acts independently. Such behavior, especially when the Court has little ex ante popular support, attenuates the connection between the law as announced by the Court and positive statements of law produced by other federal institutions.

Although Justices possess strong opinions on constitutional meaning, the power to authoritatively interpret the Constitution was not endowed in individual Justices. Only by invoking the Court's constitutional authority—and, by implication, its supermajoritarian foundations—could the Justices hope to rival congressional and executive power. The act of producing an opinion of the Court assimilates the power of the Constitution much more fully than individually expounded rationales. As a result, opinions of courts are not only more legislative in form (Popkin 2007) but also better embody the political authority necessary for the Court to achieve its policy goals.

Dissenting opinions are an important element to this story. If the norm of consensus developed in response to external legal and political pressures on the Court, then deviations from that norm should reflect, in part, the Justices' growing sense of institutional strength. In other words, the frequency, structure, and function of minority opinions are conditional on the institutional strength of the Court. The institutional position of the Court and the historical context in which it acts must be accounted for in order to truly

[27] *Marbury v. Madison*, 5 U.S. 137 (1803).

understand why dissenting opinions occur and how they are used.

During periods of low prestige or when the Court seeks to shore up its strength, there should be fewer dissents. However, as public support for the Court increases, the practice should become more common. In this situation, the Court is more certain that its rulings will be respected and the Justices possess greater freedom to speak in an extra-institutional voice. Moreover, when institutional prestige is low, instances in which a simple statement of dissents (as opposed to a discussion of the Justices' reasoning) should be more common. While a Justice may feel as though he cannot in good faith join the majority opinion, he may believe—whether independently or as a result of pressure from his colleagues—that a full expression of dissent would only harm the Court; in response, he will suppress his disagreement. This logic suggests that such behavior might be case- or issue-specific, as was the case with the Court's desegregation decisions in the 1940s through 1960s. Finally, dissents may carry different meanings depending on the Court's institutional strength, although a full discussion of the various functions of dissent is reserved for the following chapter.

In the following sections, I explore the endogenous relationship between the Court's institutional strength and its opinion writing practices, with particular emphasis on how minority opinions were expressed and, at times, suppressed, in the service of augmenting the Court's legitimacy. First, I discuss the opinion writing norms and publishing practices of the English bar that influenced the Supreme Court. These practices, which developed over several hundred years and were well-suited to a close-knit and geographically compact bar with a deep well of institutional legitimacy, was poorly tailored to the new American Court. Throughout the remainder of the chapter, I examine how the Court strategically used the frequency and structure of its opinions in response to public support and, as a result, increase its institutional legitimacy over time.

3.2 The Pre-Marshall Court: Developing Opinion-Writing Norms

"[T]he development of an independent judiciary can be constrained by a weak institutional legacy, limited training and support for judges, and the strength of other political actors"

(Herron and Randazzo 2003, 422). Though offered to describe post-communist courts, this sentiment perfectly describes the situation faced by the early U.S. Supreme Court. As Klarman (2001) noted, "The rise in the Court's stature was not inevitable . . . . The Court's lowly stature [made it] anything but a sure bet that the Court would someday emerge as a powerful third branch of the national government" (1153–54). Although the Justices had been granted many "paper" protections, such as life tenure and protection from salary diminution, the Court lacked institutional prestige and reserve of public support enjoyed by the other branches, leaving it vulnerable to congressional will, in particular.[28] Although the Justices drew on rich English lineage of practice and procedure (Popkin 2007; Friedman 1985), many of these practices were poorly suited to the American context. These challenges forced the Justices to adopt various institutional changes that would, over time, boost the Court's prestige. During this period, this project was aided by the fact that, on many issues, the Court's most preferred legal or policy outcome was closely aligned with the dominant Federalist coalition in Congress and, of course, Presidents Washington and Adams (Casto 2009Casto 2009, 376). Thus, whereas Carrubba (2009) suggests that a judicial body in the early Court's position would act in a constrained manner, the high degree of policy alignment among the three branches permitted both deferential (though sincere) behavior and the ability to achieve the Court's policy goals.

In its earliest years, opinions were rarely written; rather they were announced by the Justice from the bench and and not publicly reported. Depending on the method of counting, the Court issued between 61 and 68 opinions and/or orders between appointment of Chief Justice John Jay in 1789 and that of Chief Justice John Marshall in 1801; scholars tend to record the total number as 63 (see, e.g., Kelsh 1999, 140; Popkin 2007, 62–68).[29]

[28]Despite this lack of *de facto* power, both delegates at the Constitutional Convention and the Senators who served on the committee that drafted the Judiciary Act of 1789 were quite concerned about the scope of judicial power (Casto 1995). Delegates generally agreed that (1) there should be a Supreme Court and (2) that Court should possess the ability to handle issues relating to national security and foreign affairs, which included prize cases and other aspects of admiralty law. However, there was a great deal of disagreement over the extent to which the federal judiciary should be able to touch the day-to-day affairs of the citizens of the several states. A variety of proposals were offered, ranging from the creation of a large number of federal trial courts with open-ended jurisdiction (Virginia plan) to establishing no federal trials courts and leaving such matters to the state courts with a right to appeal to the Supreme Court (South Carolina) (Casto 1995). James Madison (Virginia) and James Wilson (Pennsylvania) proposed a compromise to permit Congress to establish the lower federal courts, which was eventually adopted by the delegates.

[29]Popkin (2007) counts 63 opinions, excluding those establishing the Court's rules, such as *Hayburn's Case*, 2 U.S. 408 (1792). Popkin also double-counts two cases in which he identified two issues in the case: *Clarke*

It is widely accepted that the early Justices generally delivered their opinions *seriatim*, meaning that each Justice expressed the reasons for his vote without reference to an opinion of the Court. However, during this time, the Court additionally produced many "nascent opinion[s] of the Court," or in the absence of those, opinions that ordered a particular disposition from the Court as a unified body (Popkin 2007, 62). According to Popkin (2007), of the 63 total opinions, only 14 were delivered seriatim, 18 were framed as "by the Court" with no accompanying discussion as to the Court's reasoning, and 31 took some other form, which Popkin generally describes as "suggestive" of an opinion of the Court (6–5). Eighteen of these decisions (58.1%) identified some Justice as speaking for the Court. Of these, the Chief Justice spoke for the Court on 14 different occasions (Jay, 2 times; Ellsworth, 12 times). In the remaining 4 decisions, Chase and Wilson each spoke for the Court on one occasion, and Paterson spoke for the Court twice.[30] Notably, five of these 31 decisions were accompanied by statements of concurrence or dissent by one or more Justices. One such decision, *Georgia v. Brailsford*, 2 U.S. 415 (1793), was handed down during the Jay Court.[31] Justice Blair concurred in the reasoning; Justice Iredell dissented. Iredell noted, "It is my misfortune to dissent from the opinion entertained by the rest of the court upon the present occasion; but I am bound to decide, according to the dictates of my own judgment" (415).[32] The remaining five nascent opinions of the Court accompanied by separate concurring or dissenting opinions occurred under Chief Justice Ellsworth. In three cases, Ellsworth consciously delivers the opinion of the Court, whether identified by

v. Russel, 3 U.S. 415 (1799), and *Olney v. Arnold*, 3 U.S. 308 (1796). *Clarke* dealt with two distinct evidentiary issues. The first was concerned with whether bills of exchange, which were allegedly protested for non-payment, could be entered into evidence without evidence of that protest; the second issue was whether parol evidence could be used to explain a contract formed by writing. *Olney* concerned whether the the legislature of Rhode Island constituted a court. It is unclear how these cases are distinct from others in which multiple issues were presented during this time, and as a result, I would have coded them as one case. The differences may lie in the fact that the Court provided a reason for laying down a rule on one issue but not on another, which would otherwise complicate Popkin's coding of seriatim opinions, opinions "by the Court," and other opinions, the latter two categories of which may be coded as a "judgment of the Court" or an "opinion of the Court" (6–8). Kelsh (1999) also codes the number of opinions during this period as 63, although his counting methodology is unclear from the article.

[30] In one decision, *The Amelia*, 4 U.S. 33 (1800), Paterson announced only that the "cause was to be postponed for further argument," at which point the Court put off further arguments until the August 1801 term, wherein Chief Justice Marshall delivered the opinion of the Court.

[31] The issue in this case was whether the State of Georgia had a right to a debt originally owed to a British subject (Brailsford). An injunction on payment had been entered by the circuit court.

[32] Unlike Iredell's dissent, Blair's concurrence seemed almost impromptu; Blair begins his concurrence by noting, "My sentiments have coincided, 'till this moment, with the sentiments entertained by the majority of the Court; but a doubt has just occurred, which I think it my duty to declare" (41–8).

the reporter as doing so or stating it himself outright; in the remaining two cases, no Justice was announced as delivering the opinion of the Court. In these five cases, Chase concurred three times,[33] Paterson concurred once,[34] Iredell concurred once and dissented once,[35] and Wilson dissented on one occasion.[36] Justice Wilson was the lone dissenter mentioned by the reporter in *Wiscart v. D'Auchy*, 3 U.S. 321 (1796). However, in the following term in *The Brig Perseverance*, Justice Paterson noted, "Though I was silent on the occasion, I concurred in opinion with Judge Wilson upon the second rule laid down in *Wiscart v. D'Auchy* and, of course, the court were divided, four to two, upon the decision" (337). He explained that a majority of the Court believed the instant case was controlled by one of the rules laid down in *Wiscart*. He would prefer that the rule proposed by Justice Wilson that case would be applicable (and preferable), but "the decision of the Court precludes me" (337). Thus, not only are these two cases a compelling example of the incompleteness of the record of the Court's work and Justice's opinions during the Court's early years, but also a clear example of the norm of stare decisis at work in an environment where both the law of the new Republic and the Court as an institution were unsettled.

The language used to describe the degree of agreement between the Justices provides another way to think about unanimity (or lack thereof) on the early Court. For example, the words "unanimous" or "unanimously" were used to describe the opinion of the Court in 13 of 61 cases examined during this period. While this may seem inconsequential, there is some textual evidence to suggest that, in some circumstances, dissent may have been expressed privately among the Justices but was either not published by the Court's reporter or not publicly discussed by the Justices when announcing their decision. In 7 of the 13 cases in which "unanimous" or a variant was used, the opinion stated that the Justices were unanimous on the sole issue or each issue. In the other six, however, "unanimous" was used to describe the Justices' opinions on only one of two or more issues. For example, in *Wiscart v. D'Auchy*, 3 U.S. 321 (1796), Chief Justice Ellsworth announced two rules, one of which was described as "unanimously the opinion of the Court" and the other was

[33] *Huger v. South*, 3 U.S. 339 (1797); *Wilson v. Daniel*, 3 U.S. 401 (1798); and *Sims v. Irvine*, 3 U.S. 425 (1799).
[34] *The Brig Perseverance*, 3 U.S. 336 (1797).
[35] *Huger v. South*, 3 U.S. 339 (1797), and *Wilson v. Daniel*, 3 U.S. 401 (1798).
[36] *Wiscart v. D'Auchy*, 3 U.S. 321 (1796).

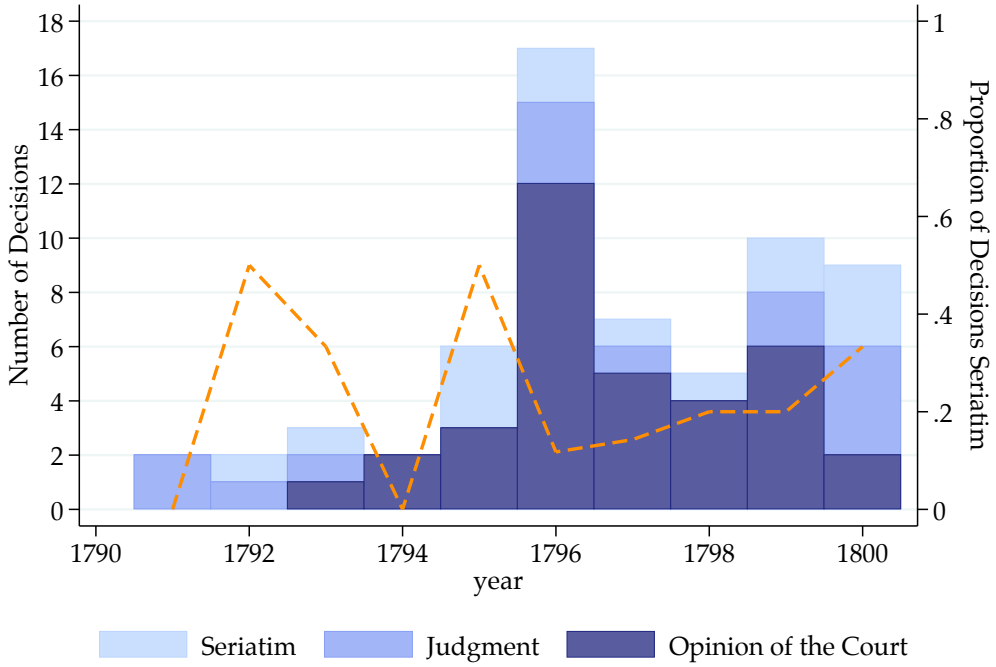
termed "the opinion of the court . . . but not unanimously" (324). A similar pattern can be seen in *Wilson v. Daniel*, 3 U.S. 401 (1798), in which Justice Ellsworth indicated, on the first issue, that the Justices were "unanimously of the opinion" that the judgment of the court below final but divided on the second issue regarding the calculation of the amount in controversy. Another (albeit less clear) example of this may be found in *McDonough v. Dannery*, 3 U.S. 188 (1796), in which the Court declared itself to be "unanimous" on the first issue but failed to use that term when discussing the second issue.[37] While inconclusive, this suggests that—for some cases—the language used by the Court majority or employed by the Court reporter may have been indicative of present, though otherwise unexpressed, dissensus.

The unsettled nature of the Court's mode of decision is fully revealed by the fact that, even while the Court was engaging in more unanimous decisions in some instances and issuing an opinion of the Court accompanied by separate opinions in others, it continued to promulgate a substantial proportion of its opinions seriatim (18/61, or 19.5% of all decisions from 1791 through 1800). Notably, as illustrated by Figure 3.3, the proportion of seriatim opinions has never risen above 50% of total opinions. Figure 3.3 displays a breakdown of pre-Marshall Court decisions by the structure of the decision by year, as coded by Popkin (2007). The lightest purple bars indicate the number of decisions issued by seriatim opinion. The medium and dark purple bars indicate opinions that are reported "By the Court" (whether delivered by a particular Justice or not) or are joint opinions that are otherwise unlabeled. The medium purple bars indicate the number of opinions that are structured like "judgments" of the Court, meaning that "[do] no more than peremptorily state what the [C]ourt did" (63). In other words, these opinions contain no argument or analysis of the issue at hand. The dark purple bars, however, represent the number of opinions that more closely resemble "opinions of the Court," meaning that they include a discussion of the Justices' reasoning they used to reach their decision. As Figure 3.3 indi-

[37] "By The Court: We are unanimously of opinion, that the District Court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining, to whom the residue of the property ought to be delivered. In determining the question of property, we think, that immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and, consequently, we cannot say, that the abandonment of the Mary Ford, under the circumstances of this case, revived and restored the interest of the original British proprietors" (197).

cates, although the Court issued seriatim opinions over the course of the 10-year period prior to the Marshall Court, seriatim opinions by no means dominated the type of opinion issued by the Court. At its apex, seriatim opinions comprised 50% of the Court's decisions. This occurred in only two terms: (1) the 1792 terms, in which the Court issued 2 decisions; and (2) the 1795 term, in which the Court issued six decisions.

Figure 3.3: Distribution of Pre-Marshall Court Decisions, by Type



Note: Source: Popkin (2007), Table 3.1: Pre-Marshall Court Cases with "Opinion of the Court." The dashed orange line plots the proportion of opinions issued seriatim.

A cautionary note is necessary, however. As discussed by Popkin (2007) in reference to his own analysis (but very applicable here), "[a] potential qualification to these conclusions is that we cannot be sure how much of the description in the reports is an artifact of how the reporter presented what the judges did, rather than an accurate description of the Court's behavior" (65). There is clear textual evidence that Dallas was paraphrasing the Justices' decisions, as well as some suggestion that Dallas omitted some seriatim opinions (Popkin 2007, 66–67). This, of course, would bias any analysis toward finding an opinion of the Court or joint decisionmaking where there may have been very little. On the other hand,

by omitting seriatim opinions, Dallas may be signaling that these opinions are so short or inconsequential that their printing is not worth the paper or ink. As a result, this could signal that the Court was moving toward an opinion of the Court, even if that movement is slightly overstated by the reporter.

If seriatim opinions are the not the baseline structure of opinions employed by the Court, then for what purpose were they used? Kelsh (1999, 140) points to Justice Chase's offhand comment in *Bas v. Tingy*,[38] to suggest that seriatim opinions were primarily used when dissent was present among the Justices. Justice Chase, in explaining why he had not prepared a "formal" argument on the issue commented, "The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president; and therefore, I have not prepared a formal argument on the occasion" (43). Kelsh additionally suggests that a "second possible determinant" of seriatim opinion authorship was the "presence of a constitutional issue" (140–41). To support this, he points to Currie's (1985, 3–54), who found that "in the 14 cases that dealt with constitution issues in the pre-Marshall era, the Court issued a seriatim opinion in 7 (50% seriatim rate). . . . The Court used the seriatim style in only eight of the forty-nine cases (17%) [that did not deal with constitutional issues]" (141). While compelling, it is also possible that the causal effect runs in the other direction. It could be that constitutional issues necessarily lead to seriatim opinions; rather, important (i.e., salient) issues lead to strong opinions and, potentially, disagreement, which then lead—under some conditions—to seriatim opinions.

As discussed above, however, dissent appeared in a greater number of cases than those delivered seriatim. The Justices' semi-regular use of the word "unanimous" or a variant thereof, as well as the comment made by Justice Paterson in *The Brig Perseverance* (indicating that he agreed with Justice Wilson's reasoning in *Wiscart v. D'Auchy* but did not bother to write himself) suggests that dissent was present more often than expressed. When the Justices delivered seriatim opinions, expressing such disagreement was expected. However, in most cases, the Justices did not offer such opinions.

Under what conditions, then, did the Justices decide to express dissent? In *Wiscart v. D'Auchy*, Justice Wilson noted

[38] 4 U.S. 37 (1800).

> I consider the rule established by the second proposition to be of such magnitude, that being in the minority of the decision, I am desirous of stating, as briefly as I can, the principles of my dissent. The decision must, indeed, very materially affect the jurisdiction of all the courts of the United States, particularly of the Supreme Court, as well as the general administration of justice. It becomes more highly important, as it respects the rights and pretensions of foreign nations, who are usually interested in causes of admiralty and maritime jurisdiction (324).

On this second point, Chase wrote a concurrence and Iredell dissented. Iredell explained why he felt compelled to dissent, indicating that "if the merits of the case had been involved, I should have declined expressing my sentiments. As, however, the question is a general question of construction, and is of great importance, I think it a duty, briefly, to assign the reasons of my dissent" (405) (emphasis added). The Justices' comments suggest, perhaps unsurprisingly, that issue salience is an important determinant of when the Justices chose to express dissent.

Such use of dissent and seriatim opinions would seem to contradict the theory that the Court used institutional opinions to increase its legitimacy. This criticism, however, may be ameliorated by two factors. First, in the early period, the Court had few settled practices. There were no clearly established norms on the Court, and the Justices' opinion-writing practices were visibly in flux. Second, the preferences of *all* Justices on the Court were aligned on most issues with the President and governing majority in Congress, as President Washington had appointed the first 11 Justices to sit on the bench (Abraham 1992, Appendix D). Thus, when Justice Paterson expressed his dissent in *The Brig Perseverance* and Justice Wilson his in *Wiscart v. D'Auchy*, the Court was doing so in the context of an ideologically friendly President and Congress. This was truly a unique moment in American history (Casto 2009, 376).

Such alignment did not preclude the Court from occasionally pushing beyond the wishes of the governing majority and facing a backlash. For example, in *Chisholm v. Geor-*

gia,[39] the Court interpreted the Constitution to permit resident of one state to sue another state without its consent. The opinion was issued seriatim with Chief Justice John Jay issuing the "major opinion" and Justice Iredell dissenting (Savage 2011, Appendix). In *Chisholm*, Jay relied heavily on democratic theory, arguing that the the words "controversies between States and citizens of another State"[40] means "suability is compatible with State sovereignty" (471). For, as Jay writes, "Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one citizen inferior to another" (472). Iredell, however, relied on common law notions of sovereignty take the opposite position. The Court's handling of this issue was so far beyond the public's view of the matter that "they were immediately slapped down by enormous majorities in both houses of Congress, which passed the Eleventh Amendment to overrule the decision" (Klarman 2001, 1153). The Court "in their ardor to establish an ultra-Federalist doctrine, . . . had spoken overplainly . . . . The united protest was too strong for the Court's nascent independence to withstand, and the justices' fingers were badly (though not fatally) singed" (McCloskey and Levinson 2010, loc. 405).

This was not the only issue to cause political controversy. The federal courts, as a system, had been used as "the Federalists' chosen engine of political repression" (Hoffer et al. 2014, 146). In particular, U.S. attorneys were charged with enforcing, among other things, the Seditious Libel Act of 1798. Passed during a time when the war with France seemed to be looming on the horizon, the Act mandated that

> "if any person shall write, print, utter or publish . . . any false, scandalous[,] and malicious writing . . . against the government of the United States, or either house fo the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States, or to excite any unlawful combinations therein . . . shall be punished by

[39] 2 U.S. (Dall.) 419 (1793).
[40] U.S. CONSTITUTION, Art. III, Sec. 2, Cl. 1.

> a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."

Armed with this law, Federalist-appointed U.S. attorneys and federal judges prosecuted at least 26 individuals between 1798 and 1801. As Bruce Ragsdale noted, "Federalists acknowledged that the act was aimed at the Republican printers who had been most critical of the Adams administration" (2005, 2). The law's—and the Federalists'—net was cast broadly, however, ensnaring critics of both the President and the Federalist Congress, including sitting Republican congressmen[41] and newspaper editors and columnists.[42]

One notable prosecution—that of Representative Matthew Lyon—highlights the important facilitating role the federal courts played in this exercise in political oppression. Lyon was indicted for publishing letters "with the 'intent and design' to defame the government and President Adams" (Ragsdale 2005, 3). Although the trial occurred in circuit court for the district of Vermont, Supreme Court Justice William Paterson (riding circuit) presided. In charging the grand jury on the indictment, Paterson indicated that "licentiousness" at home was more dangerous than "hosts of invading foes" from abroad. Even though one of these letters was written prior to the passage of the Sedition Act, and the letters did nothing more than criticize both the opulence of the White House and the Adams Administration's and the Senate's role in the French crisis, Lyon was convicted and subjected to four months in prison and a $1,000 fine. While in prison, he was re-elected to the House. When he eventually took his seat, Federalist representatives attempted (but failed) to remove him (Ragsdale 2005, 3–4). Thus, the federal courts generally and, in some cases, the Supreme Court Justices specifically participated in systematic oppression of its political enemies' speech, which would prove problematic when Jefferson and the Republicans took wholesale control of the other two branches in 1801.

Whether due to its splintered reasoning (either through the use of seriatim opinions or dissent throughout this period), its controversial actions, or the basic American political orientation toward democratic power, it is clear that the Court's institutional prestige ranked far below that of Congress and the Presidency. This reality is exemplified by the

[41] See Ragsdale 2005, 3.
[42] See Ragsdale 2005, 4–7.

frequent turnover in the Chief Justiceship over the first 10 years of the Court. As Henry Abraham (1992, 82) noted,

> [The first Chief Justice, John Jay, deemed to Court to be] an "inauspicious" body, characterized by little work, dissatisfied personnel, and a lack of popular esteem and understanding. Jay so thoroughly disliked his job as first chief justice that he not only spent one year of his brief six-year tenure in England on a diplomatic mission, but also twice ran for governor of New York. On the second try he won that post and happily resigned the Court.

However, even if the Court had uniformly adopted an institutional opinion, suppressed dissent, or avoided controversial decisions, it is unclear how much the Court could have used such opinions to enhance its reputation nationwide in those early years given the "irregular[ity]" with which its opinions were reported (Kelsh 1999, 139). The Court's decisions over the 11 years preceding the Chief Justice Marshall's appointment were published in three volumes. The first volume containing Supreme Court opinions (2 U.S., 2 Dallas) was published in 1798, though it contained opinions from 1791 to 1793. The second volume (3 U.S., 3 Dallas) in 1799, containing opinions from 1794 through part of 1799. The final volume covering this period (4 U.S., 4 Dallas), containing decisions from 1799 through 1800, was not published until 1807. Moreover, there is evidence that these reporters—Dallas, in particular—omitted decisions (Goebel 1973, 785, as cited by Kelsh 1999, 139 & n.9).

This irregularity was due in part to the fact that the Court did not have an official reporter. The Court's first two reporters, Alexander Dallas and William Cranch, reported the Court's opinion for their own profit as a side business. Dallas was an attorney in Philadelphia; when the Court moved from Philadelphia to the District of Columbia, Dallas did not follow suit. At this point, William Cranch, a judge in the District of Columbia, took over as the Court's unofficial reporter. Neither men were paid any stipend or compensation from the Court or government. All profits were derived from the sale of the reports, which was not a lucrative business (Popkin 2007).

The pre-Marshall court, although moving toward an opinion of the Court, was clearly

in a state of flux in its earliest years. While the Court seemed to speak with one voice in some cases, seriatim opinions were issued on particularly contentious issues. Writing separately to indicate disagreement with the otherwise unanimous opinion of the Court prevented the Court from speaking with a single voice to rival Congress or the Presidency.

3.3 The Marshall Court: Developing an Institutional Voice

During the pre-Marshall court, each of the Justices were appointed by Federalist presidents. Federalists held control of both chambers for four of the first six Congresses, although pro-Administration or Federalist forces controlled the Senate for the entire period.[43] This created a dynamic in which the earliest Court's preferences were closely aligned with those of the other branches. Although the Court's decisions occasionally pushed too far in the direction of national power, as was the case in *Chisholm v. Georgia*, the ideological similarities between the Court and the other two branches prevented the emergence of a major existential crisis during its first 10 years.

The political environment, however, did not remain friendly to the Court. When Thomas Jefferson assumed the presidency in 1801, other Republicans rode his coattails into Congress, increasing their number of seats by 47.8%, from 46 seats in the Sixth Congress (1799–1801) to 68 seats in the Seventh (1801–1803). House membership expanded from 106 seats to 142 seats in the Eighth Congress (1803–1805), 103 of which were Republican—a net gain of 35 seats. Contrast this with the rather dismal results for the Federalists, who experienced a net gain of only one seat. The Senate presented a similar story. In 1801, Republicans took control of the Senate by a narrow margin (17–15), and expanded the margin of control exponentially in the next election (25–29). By the Eighth Congress (1803–1805), Republicans were firmly in control of both chambers of Congress and the presidency.

The Jeffersonian Republicans were extremely suspicious of the federal judiciary. This distrust blossomed from the Republican disagreement with the Court's expressed view of

[43]For a four-year period between 1793 and 1797, anti-Administration/Republican Members of Congress controlled the House. When the number of representatives expanded from 69 to 109 between the Second and Third Congresses, the pro-Administration forces lost control of the House, although membership was still closely divided (54 anti-Administration members as compared with 51 pro-Administration members). The anti-Administration forces, now organized as Jeffersonian Republicans, increased their numbers to 59, as compared with the Federalists' 47 (*Party Divisions of the House of Representatives* 2014).

federal power in *Chisholm v. Georgia*, as well as "the Federalist Justices [perceived] partisan performances during the Sedition Act prosecutions of Republicans in the late 1790s" (Klarman 2001, 1154). This was exacerbated by the fact that Justice Samuel Chase—who was the "most controversial judge in the Sedition Act trials" (*Federal Judicial Center*, Sedition Act Trials)—not only supported but "had actively campaigned for Adams in 1800" (Klarman 2001, 1154).

The Republicans responded by taking steps to check the influence and power of the Federalist-leaning federal courts. Shortly before Adams left office, the Federalist Congress passed what has been referred to as the Midnight Judges Act of 1801. The Act, which sought to remove the Justices' circuit riding burdens by dividing the country into six circuits and authorizing the appointment of 16 circuit judges, achieved "a reform long advocated—the reorganization of the circuit courts" (Turner 1961, 494; *see also* Hoffer et al. 2014, 144–45). However, it also reduced the number of Justices on the Supreme Court from six to five "from and upon the next vacancy that shall happen" following the passage of the Act (*The Judiciary Act of 1801* 1801, §3). Jefferson would be thus denied the opportunity to place his imprimatur on the Court, at least for a bit longer than he expected. More fundamentally, Jefferson abhorred the Act, arguing that it allowed the Federalists to "retreat[] into into the judiciary as a stronghold" (Killenbeck 2009, 411, citing *Letter from Thomas Jefferson to Joel Barlow (Mar. 14, 1801)* 1904).

The Republican response to the Judiciary Act of 1801 was swift; they simply repealed it, despite the fact that 17 circuit judges had been appointed and received their commissions.[44] These judges, although given a commission to a lifetime appointment, lost their positions as a result. The Republicans were thus able to "unpack" the federal courts.

Jefferson, moreover, personally disliked the new Chief Justice, John Marshall, disparaging the Chief's "lax and lounging manners [which] have made him popular with the bulk of the people in Richmond, and a profound hypocrisy with many thinking men in our country," (Killenbeck 2009, 411, citing *Letter from Thomas Jefferson to Joel Barlow (Mar.*

[44]The actual number is unclear. Hoffer et al. 2014 indicate that 14 judges were appointed by Adams, and three were appointed by Jefferson. Hoffer et al. note, "Although Jefferson condemned the Judiciary Act as a Federalist ploy and urged its repeal, he understood the importance of patronage and did not hesitate to appoint Republicans to posts under it" (145). The Federal Judicial Center's Judicial Biographical Database, on the other hand indicates that only 12 judges were appointed under the Act.

14, 1801) 1904, 223), while at the same time acknowledging his skill. Jefferson admitted, "So great is his sophistry, you must never give him an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I'd reply, 'Sir, I do not know, I can't tell'" (Killenbeck 2009, 411, citing *Letter from Thomas Jefferson to James Madison (Nov. 26, 1795)* 1989, 134).

Given this animosity, it is unsurprising that the Marshall Court faced a "constant threat of impeachment" from a hostile Jeffersonian Republican Congress (Johnson 2000, 1067). Flush with success after the successful impeachment and removal of district judge John Pickering in 1804, the House impeached Justice Samuel Chase. Chase was targeted principally for his role in the Sedition Act Trials (*The Sedition Act Trials—Historical Background and Documents: Samuel Chase (1741-1811)* N.d.; *The Impeachment and Trial of Samuel Chase* N.d.). The framers of the Constitution had explicitly rejected impeachment for political reasons or maladministration, although it is unclear whether the real reason for his 1805 acquittal in the Senate was because Senators, on the whole, rejected such a political move or, whether, as Klarman (2001) argued, Chase was merely lucky that Republicans in the Senate split on convicting him due to "internal party squabbles" (1168–69).[45]

After Chase's acquittal, Congress seemed to lose its appetite for the practice. Although potentially fortuitous, the ramifications of Congress' attempt to impeach Chase were enormous. As Klarman (2001, 1168–69) noted:

> [W]ith the failure of the Chase impeachment, this particular weapon for restraining federal judges atrophied. President Jefferson, who had instigated the Chase impeachment, concluded after its failure that impeachment was 'not even a scare-crow' and that it was 'a bugbear which they (the judges) fear not

[45] In particular, Klarman (2001) argues,

> The most persuasive explanation for Justice Chase's acquittal has nothing to do with Republican qualms about evicting a Justice from office for possessing 'wrong' political opinions. Rather, at least six Republican senators voted against impeachment because of internal party squabbles that motivated them to sully the reputation of Speaker of the House John Randolph, who was a Republican and the leader of the prosecution team in Justice Chase's Senate trial. Thus, Justice Chase was the beneficiary of some extraordinary luck. Were it not for internal Republican Party schisms—which had nothing to do with the merits of the Chase impeachment—Justice Chase likely would have been removed from office, and John Marshall might have been next in line (1168–69).

> at all.' More generally, the idea of removing federal judges from office because they possessed erroneous political opinions—which many Republicans had explicitly endorsed before and during the Chase impeachment—gradually disappeared.

Both the repeal of the 1801 Act—which effectively increased the Justices' workload by reinstating circuit riding—and the impeachment of Justice Chase highlight the precarious institutional position occupied by the Court at the turn of the 19th century. Federalists' use of the courts as a weapon before the courts were strong enough to resist such curbing indicate generally low level of the Court's prestige and, by implication, the political constraints imposed by that low prestige.

Enter Chief Justice John Marshall. Marshall, known as the "Great Chief," is credited with setting the foundation for the future prestige and institutional successes of the Court. Many of Marshall's successes were substantive, and he is recognized as "transform[ing] public policy disputes into questions of constitutional interpretation that can be decided by texts, procedures, principles, and rules that are generally accepted as legal and not political" (Schwartz 2000, 5, as cited in Herron and Randazzo 2003, 424).

Marshall's approach to constitutional interpretation, while clearly favoring federal power, was not as plainspoken as that of his predecessors. Whereas Jay's Court may have spoken too bluntly about what they regarded as the expansive nature of federal power (with some bad consequences, as in *Chisholm*), Marshall was more strategic. The most prominent example of this is *Marbury v. Madison*, in which the Court subjugated its most preferred disposition to achieve a broader expansion of federal power.[46]

This case has been widely discussed and celebrated, so a lengthy exposition is unnecessary here. However, a short discussion may be helpful to further illuminate the contentious political environment in which the Marshall Court was operating. William Marbury was appointed by President Adams to a justice of the peace position in the District of Columbia in the final days of the Adams Administration. Adams's Secretary of State at the time was John Marshall, who—in his last days as Secretary of State—failed to

[46] For good discussions of this case, see Carrubba 2009 and Clark 2011.

deliver Marbury's commission. When Jefferson took office, his Secretary of State, James Madison, refused to deliver the commission, thus denying Marbury his position. Marbury petitioned the Court to issue a writ of mandamus to Madison to deliver the commission as an act under its original jurisdiction as delineated in the Judiciary Act of 1789. Marshall, speaking for the Court, ruled that Marbury was entitled to his commission and that Jefferson was basically a scoundrel for not delivering it. Regardless of how illegally the President may have acted, however, there was no remedy the Court could provide. Marshall determined that the Judiciary Act of 1789, which created the remedy of the writ of mandamus for which Marbury had petitioned, unconstitutionally expanded the Court's original jurisdiction. Although the Constitution permitted Congress to expand the Court's *appellate* jurisdiction, its original jurisdiction was fixed by Art. III, Sec. 2, Cl. 2. As a result, the Court could not compel Madison to deliver Marbury's commission.

This is generally recognized to be a brilliant political move (see, e.g., Carrubba 2009). With one hand, Marshall gives Jefferson his short-term objective and, with the other, lays a long-term foundation for the (Federalist) Court's power. Although there is no clear textual basis for Marshall's assumption of the power of judicial review, Marshall presents structural arguments that incorporate elements of constitutional text without being clearly dispositive. Marshall, in particular, argues that judicial review is a necessary inference from the fact of a written constitution. The very fact that a constitution is written means that some body needs to square the text of the Constitution with the actual legislation produced by Congress and actions of the executive. Otherwise, the Constitution would not be enforced. In addition, Marshall points to ordinary understandings of the judicial role and the broad grant of jurisdiction that extends the judicial power of the U.S. courts to "all cases arising under" the Constitution, as well as the oath taken by judges that specifically requires them to support the Constitution. This, argues Marshall, would be meaningless if the Court could not interpret it.

Although the Court gave Jefferson the disposition he wanted, Marshall assumed the mantle of a broad and (Jefferson would argue) dangerous power. The exercise of this power in a more consequential case may lead Jefferson to totally disregard the Court's orders. The question, then, is how could the Court ensure compliance with its orders?

This is a foundational question in constitutional law.

Unlike the Executive, the Court has little ability to compel its mandates by force. It has no guns and, unlike Congress, no purse strings. The Court, then, is left only with the consent of the people. But how exactly was this consent to be secured? The locus of political sovereignty in the new American republic was with the people; contrast this with political power under colonial rule, where sovereignty rested with the British monarch and, by extension, those who served him. The Court was, by design, inherently undemocratic and unaccountable. Thus, the Court lacked the substance of authority. The Court has tried to remedy this by invoking its role as the defender of the Constitution, as it did in *Marbury*, as well as demonstrating a responsiveness to prevailing political moods, even in the absence of membership change (Mishler and Sheehan 1993; Giles, Blackstone and Vining 2008; see generally Friedman 2009).

However, the *substance* of authority is influenced by the *style*. Political power stemmed from the people—not as individuals but collectively. Congress, for example, exercised power not through Members' individual statements of their view on policy, but rather collective pronouncement of law by the institution as a whole. Unlike Congress, the President acted as an individual; the administrative state as it exists today was wholly uncontemplated, and executive action was a function of individual prerogative. The President, however, acted to execute the laws passed by Congress—to carry out the will of the people. Thus, here—even if an individual—the President purports to speak for the people whose laws he is administering. No such linkage exists for the judiciary. As a result, the Court must derive its power by binding itself from that most democratic of documents, the Constitution itself. Moreover, the Court must appear to be more than men in doing so—they must be an institution to rival Congress.

Marshall is credited with three major institutional innovations in the Court's procedures and practices that helped the Court speak with authority, which over time would help ensure public compliance and confer democratic legitimacy. First, during Marshall's chief justiceship, the Court began consistently choosing a single Justice to speak for the Court (Kelsh 1999, 138). This justice was normally Marshall himself. Over the first decade

of Marshall's tenure, the Court handed down 204 decisions,[47] 164 of which constituted an "opinion of the Court" (although all were not explicitly stated as such). Of these 164, 135 explicitly named the Justice who delivered the opinion of the Court; in the remaining 16, the opinion of the Court was clearly delivered by the named Justice, although the reporter did not explicitly use the phrase "opinion of the Court." In the first 10 years of his tenure, Chief Justice Marshall overwhelmingly delivered the opinion of the Court, speaking for his brethren in 149 of 164 decisions (90.9% of all named, institutional decisions). Table 3.2 lists the frequency of other Justices' writing of opinions. No other Justice during this period comes anywhere close to Marshall (see Table 3.2).

The number of seriatim opinions also dropped precipitously during this time. Of the 204 opinions and orders published by the Court during this period, only six were issued seriatim. This alone suggests Marshall's great influence on the operation of the Court. More telling, however, is that Marshall did not sit in five of these six cases. In two of these cases, Marshall "conceiv[ed] himself to be in a remote degree interested in the stock" of one of the parties, and so recused himself.[48] In three others, Marshall had decided[49] or opposed[50] the case in the circuit court below and declined to participate upon appeal, or he was "formerly . . . of counsel for one of the parties."[51] In only one case did Marshall hear the cause, cast a vote, and permit a seriatim-style of opinion writing to prevail.[52]

Although "John Marshall did not introduce the practice of unitary opinions, he was responsible for expanding an earlier practice into a general procedure, and, under his leadership, 'Opinions of the Court' were firmly established as the standard format for future generations" (Johnson 2000, 1066). Marshall used his authority as the Chief to speak for the Court, thus leveraging his institutional position as head of the judicial branch to create an institutional voice. Over time, however, other Justices—especially Justice Story—began

[47] These data were collected from the U.S. Reports. This number is significantly higher than the number listed by the Supreme Court Compendium (152). This may be the case because I included decisions that may be considered "procedural," such as the decision to grant a habeas petition or determine whether the Court had jurisdiction in a particular case.

[48] *The Marine Insurance Company v. Wilson*, 7 U.S. 187 (1805); *The Marine Insurance Company of Alexandria v. John and James H. Tucker*, 7 U.S. 357 (1805).

[49] *Randolph v. Ware*, 7 U.S. 503 (1806).

[50] *United States v. Heth*, 7 U.S. 399 (1806).

[51] *Lambert's Lessee v. Paine*, 7 U.S. 97 (1805).

[52] See *Croudson v. Leonard*, 8 U.S. 434 (1808).

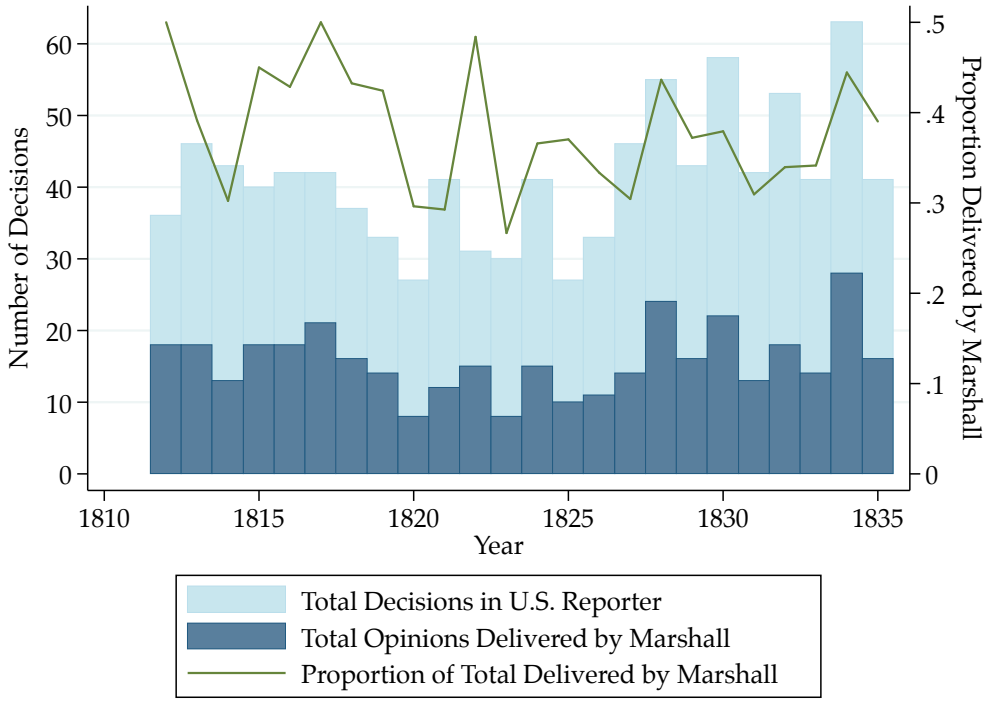
Table 3.1. Frequency of Majority Opinion Announcement, 1801–1810

Justice	Freq.	(%)
Marshall	149	(73.0%)
Chase	1	(0.5%)
Cushing	3	(1.5%)
Johnson	4	(2.0%)
Livingston	2	(1.0%)
Moore	0	(0.0%)
Paterson	1	(0.5%)
Todd	0	(0.0%)
Washington	4	(2.0%)
No Justice Listed / "By the Court"	34	(16.7%)
Seriatim	6	(2.9%)
Total	204	(100.0%)

Note. — A few Justices did not serve across the entire period. Alfred Moore, an Adams appointee, resigned from the Court in January 1804; William Johnson was appointed by President Jefferson to replace him in March of that year. William Paterson, who joined the Court in 1793, died in September 1806; he was replaced by Henry Livingston, who received his commission in January 1807, in time for the Court's February 1807 term. Finally, Thomas Todd was appointed to a new seat authorized by Judiciary Act of 1807 (2 Stat. 420), which expanded the size of the Supreme Court from six to seven. The remainder of the Justices served for the entire period.

to announce opinions with greater frequency (Johnson 2000, 1067). By 1817, the percentage of total opinions signed by Chief Justice Marshall dropped from 73.0% to 50.0% (21/42) of all opinions.

Figure 3.4: Proportion of Opinions Delivered by Chief Justice Marshall, 1812–1835



Note: Source: U.S. Reports, vols. 11–34

Not only did the Court begin to speak as an institution, the structure of these majority opinions changed in an obvious way. Prior to approximately 1812, the Court's (or in earlier periods, the Justices') opinions were reported after a synopsis of the oral argument before the Court. This pseudo-transcript comprised a summary of the procedural history, the facts of the case, and a record of the questions posed by the Justices and answers proffered by the litigants. For example, in *Faw v. Roberdeau's Executor*,[53] the Reporter (Cranch) first recounted the question involved and facts of the case,—which in this case concerned the construction of a Virginia statute dealing with suits against estate administrators. The record also contains a back-and-forth between the attorneys and the Justices. For example, Justice Washington asked Mr. Lee (who was representing the plaintiff in error, Faw), "Does

[53] 7 U.S. 174 (1805).

it not appear that Faw was in Virginia after the cause of action accrued?" To this, Cranch recorded Lee's response as,"Only as a traveller. . . ."[54]

The reporter's near-literal transcription of the proceedings slowly began to give way to the publishing of a more modern form of opinion beginning in approximately 1812. This trend is illustrated by the Court's decision in *U.S. v. Hudson and Goodwin*.[55] In this case, the reporter gave only the essentials in a proto-syllabus, which included the case's procedural history, the parties, and a brief statement of the question. In this case, the Court dealt with a pressing national issue, in which the U.S. government sued the publishers of the *Connecticut Currant*. The *Currant* had accused the President and Congress with "having in secret voted [to give] two million[] dollars as a present to Bonaparte . . . to make a treaty with Spain." The major question in this case was whether the federal courts "had a common law jurisdiction in cases of libel."[56]

This more modern structure, however, was not reserved only for issues of great public import. A similar structure was adopted by the Court in *Riggs v. Lindsay*.[57] Here, the Court considered an issue involving the joint liability of parties involved in a partnership in the recovery of a debt. Again, the reporter provided a proto-syllabus containing only minimal information about the plaintiff's argument before stating, "The facts of the case are stated in the opinion of the Court, which was delivered as follows, by L[ivingston], J."[58]

This method of providing facts, however, makes more sense when judges are individually discussing independent reasons for their decision; otherwise, unnecessary duplication and wasted ink would result. Integrating the facts of the case into the statement of the

[54]It is worth noting here that, when the Court was considering a procedural matter (in some instances), there was no oral argument on the issue. These cases, which are rarely signed or delivered by or attributed to a single Justice, do not have the facts separated out as "question and answer."

[55]11 U.S. 32 (1812).

[56]Johnson, who announced an opinion for the majority of the Court, argued that the courts did not have such power, stating, "[T]he power which [C]ongress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects . . . . Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of the crimes against the state is not among those powers."

[57]11 U.S. 500 (1813).

[58]For other examples of this, see *The Francis*, 12 U.S. 348 (1814) ("The material facts of the case, and the substance of the argument on both sides, are stated in the following opinion of the Court, delivered . . . by M[arshall], Ch. J."); *The Brig Alerta & Cargo v. Blas Moran*, 13 U.S. 359 (1815) ("The facts of the case were stated by W[ashington], J., in delivering the opinion of the Court, as follows[.]"); *Shipp v. Miller's*, 15 U.S. 316 (1817) (leaving the entire recital of facts to Justice Story in his opinion, while noting only "Justice Story delivered the opinion of the court").

majority's opinion, on the other hand—as opposed to permitting the Reporter to provide a pseudo-transcript of the proceedings—gives the Court greater control over the narrative of the case.

While these forms foreshadowed the direction the Court's decisions would take, I do not mean to overstate the frequency with which this occurred in 1812. As with the development of the institutional opinion in the pre-Marshall court, change in the structure of the Justices' opinions is reported haltingly and unevenly over time. Many cases retained the earlier, seriatim-oriented structure, although this became slightly less common after 1817; notably, the form persisted throughout the Marshall Court. The manner in which Cranch reported *Holker v. Parker*[59] illustrates this tension. The Reporter acknowledged the distinction between the Chief Justice's statement of facts and the Court's opinion itself, while at the same time indicating that the Chief Justice's statement of facts was an element of the opinion of the Court.[60]

Second, Justices began disagreeing with the "Opinion of the Court" through concurring or dissenting opinions, as opposed to issuing seriatim opinions (Kelsh 1999, 138).[61] Unlike more modern dissents, these opinions were largely solitary endeavors—with a few exceptions and maybe one caveat. Between 1801 and 1835, Justices issued 94 dissents in 83 different decisions, placing the total dissent rate for the Marshall Court at 7.1% (83 of 1,176 decisions). This rate accounts for all decisions produced by the early Marshall Court published in the U.S. Reports.[62] The denominator for this rate includes decisions that are procedural, not decided on the merits of the case, or decided without oral argument. Arguably, many of these cases—though not politically salient—methodically and incrementally shape the character of the Court. A Justice seeking to make his mark might very well seek to make it there. The Supreme Court Compendium ostensibly excludes such cases and records both fewer dissents (74) and fewer total decisions (1,081), yielding

[59] 11 U.S. 436 (1813).

[60] Specifically, Cranch noted, "The case, as state by M[arshall], Ch. J. in delivering the opinion of the Court, was as follows[.]" Cranch used similar language in reporting *U.S. v. Crosby*, 11 U.S. 115 (1812): "The case is fully stated in the following opinion of the Court, which was delivered by S[tory], Justice . . . ."

[61] The data discussed in this section were collected from U.S. Reports, vols. 5–34, via openjurist.org using python scripts written specifically for this project.

[62] These types of decisions encompass cases like *Hicks v. Rogers*, 8 U.S. 165 (1807). In this case, the Court issued an order that would permit a will to be used as evidence to support a petitioner's declaration.

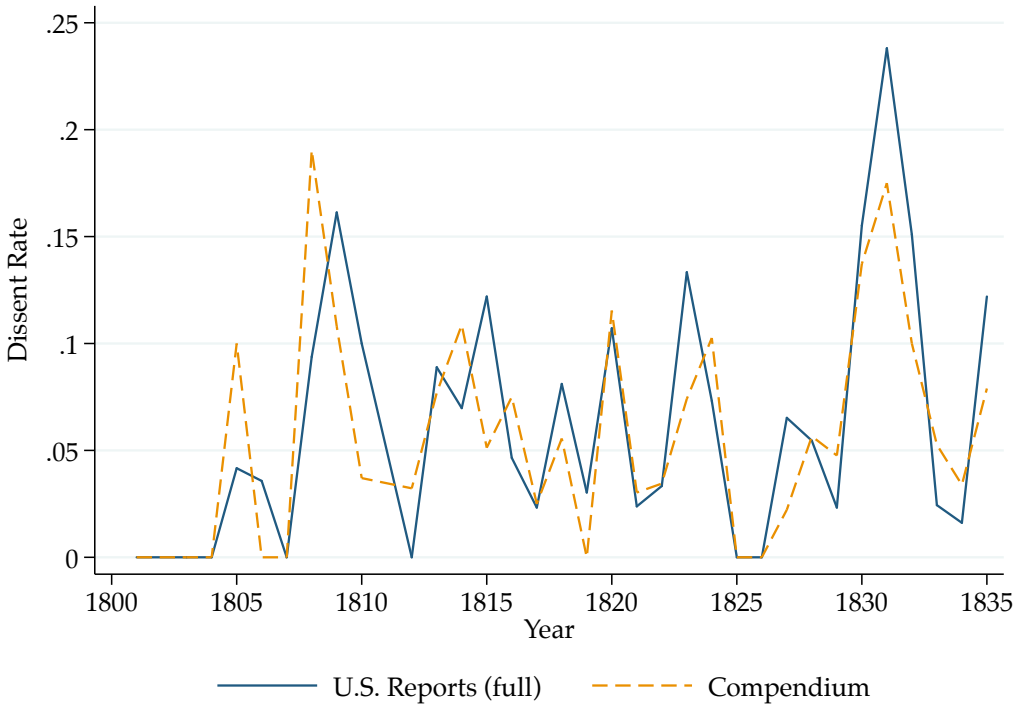
Table 3.2: Number of Dissenting Opinions, 1801–1835

Year	Dissents	Decisions
1801	0 (0.0%)	5
1802	—	—
1803	0 (0.0%)	19
1804	0 (0.0%)	14
1805	1 (4.2%)	24
1806	1 (3.6%)	28
1807	0 (0.0%)	19
1808	3 (9.4%)	32
1809	5 (16.1%)	31
1811	—	—
1810	1 (10.0%)	10
1812	0 (0.0%)	37
1813	4 (8.9%)	45
1814	3 (7.0%)	43
1815	5 (12.2%)	41
1816	2 (4.7%)	43
1817	1 (2.3%)	43
1818	3 (8.1%)	37
1819	1 (3.0%)	33
1820	3 (10.7%)	28
1821	1 (2.4%)	42
1822	1 (3.3%)	30
1823	4 (1.3%)	30
1824	3 (7.3%)	41
1825	0 (0.0%)	27
1826	0 (0.0%)	33
1827	3 (6.5%)	46
1828	3 (5.5%)	55
1829	1 (2.3%)	43
1830	9 (15.5%)	58
1831	10 (23.8%)	42
1832	8 (15.1%)	53
1833	1 (2.4%)	41
1834	1 (1.6%)	62
1835	5 (12.2%)	41
Total	83 (7.1%)	1,176

Note: Data collected from U.S. Reports, vols. 5–34. These numbers vary from those provided by the Supreme Court Compendium, which reports 70 dissents and 1,081 total cases.

a slightly *lower* overall dissent rate for the period: 6.8%. This suggests that Justices did, in fact, dissent from relatively mundane or routine orders, indicating that such decisions

Figure 3.5: Comparison of Dissent Rates, 1801–1835



are both (1) important and (2) should be included in any measure of dissent rate. Despite this methodological difference, the two rates are actually quite similar across the period. Figure 3.5 provides a visual comparison.

Of these 94 dissenting opinions, 81 (86.2%) were solitary endeavors; the vast majority of Justices dissenting during this time spoke only for themselves. Of the remaining 13, 9 (9.6%) were joined by one Justice, and 4 (4.3%) were joined by two Justices. In 7 of these 13 instances, the joining or co-authoring Justice was named. In the other six cases, however, the dissenting Justice noted only that one or two of his colleagues joined him in dissent. Five of these dissents were written by Justice Story;[63] one was written by Justice Johnson.[64] The fact that Justices joined dissents—yet remained unnamed—suggests there are probably instances in which the dissent was recorded as a solitary dissent but was joined by other Justices in discussion amongst themselves.

[63] Justice Story dissented and was joined by unnamed Justices in *United States v. 1960 Bags of Coffee*, 12 U.S. 398 (1814); *The Merrimack*, 12 U.S. 317 (1814); *The Brig Short Staple v. U.S.*, 13 U.S. 55 (1815); *The Nereide*, 13 U.S. 388 (1815); and *Houston v. Moore*, 18 U.S. 1 (1820).

[64] *The Amiable Isabella*, 19 U.S. 1 (1821).

This division, at times, affected the structure of the Court's opinion, leading multiple Justices to announce the "opinion of the Court" on various issues. For example, in *The Merrimack*,[65] the Court considered "several claims" involving the seizure of cargo during the War of 1812. The Court's unanimity in this case extended only to three of the four claims; this unanimous position was delivered, perhaps unsurprisingly, by Chief Justice Marshall. On the final claim, however, the Justices were divided. This portion of the opinion (for a "majority of the Court") was delivered by Johnson and subject to a "separate opinion" by Justice Story, who was joined by two (unnamed) Justices in his opinion. This, however, was relatively uncommon.

Finally, although Justices began to express their dissent through concurring and dissenting opinions, this practice was rare and almost all opinions were unanimously decided (Kelsh 1999, 138). This phenomenon speaks to the power Marshall held over the Court. The few occasions on which Justices engaged in dissent during Marshall's 35-year tenure were most often in important cases, such as those dealing with the distribution of power between the federal government and the states and the construction of treaties during wartime.

The most prolific dissenter of this period was Justice William Johnson. Johnson, a South Carolinian, was seen as the "first true contrarian" (Killenbeck 2009, 407), writing 34 dissenting opinions during his 31 years on the Marshall Court.[66] In comparison, Story and Marshall each wrote only 6.[67] Johnson was also a Jefferson appointee and admonished by the former President's severe disapproval of Marshall's practice of writing an opinion for the Court. In an letter to Johnson, Jefferson expressed his total abhorrence of the practice in the following way:

> The Judges holding their offices for life are under two responsibilities only. The Judges holding their offices for life are under two responsibilities only. 1. Impeachment 2. Individual reputation. But this practice compleatly withdraws them from both. For nobody knows what opinion any individual member gave

[65] 12 U.S. 317 (1814).
[66] These data were collected from U.S. Reports. Some sources set this number at 38. *See* Killenbeck 2009, 408.
[67] Some sources place Story's dissents as high as high as nine (Morgan 1953).

> in any case, not even that he who delivers the opinion, concurred in it himself. Be the opinion therefor ever so impeachable, having been done in the dark it can be proved on no one. As to the 2d guarantee, personal reputation, it is shielded compleatly. The practice is certainly convenient for the lazy, the modest & the incompetent. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all. That of seriatim argument shews whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve. It would certainly be right to abandon this practice in order to give to our citizens one and all, that confidence in their judges which must be so desirable to the judges themselves, and so important to the cement of the union (Morgan 1953, 356–57, citing Jefferson 1905, 249–50).

Johnson took as an affront the implication that his concessions to Marshall were bred out of laziness or incompetence and "in time resorted to action" (Morgan 1953, 356). Johnson issued his first dissent in 1807 and then began dissenting in earnest in 1808, producing 5 dissents, ranging from 73 words to 1,208 words in length. Johnson wrote his longest dissent (8,959 words) in the landmark case *Osborn v. Bank of U.S.* (1824),[68] in which the Court affirmed the Bank's ability to bring a suit against state officials in federal court (Savage 2011*c*). Johnson's extended response was most likely spurred by the fact that the case spoke directly to the distribution of power between the federal government and the states—an issue that was causing a good deal of popular backlash in some areas, especially the South and West, against the federal government general and the Court in particular.

Beyond Johnson, however, there were few who dissented on a relatively regular basis. Justice Baldwin seems to have been rather neglected in the literature, receiving little mention as a frequent dissident, despite dissenting 22 times from 1830 through 1835. This may be a result of the fact that he was neither the first consistent dissenter (Johnson took that ring) nor were his opinions comprehensive as Johnson's. In 9 of 22 dissents, Baldwin appeared to express no rationale at all; he merely stated his disagreement with the

[68] 22 U.S. 738.

Court's disposition. For all of Johnson's vigor, Baldwin seemed to find very little value in explaining his own thinking. In three instances, Baldwin apparently viewed his dissent as so inconsequential that he failed to give a copy of his dissent to the reporter.

Marshall's skill in reining in dissensus may have been due, in part, due to external factors. As discussed above, the Court was under siege from Thomas Jefferson and, during his presidency, "the constant threat of impeachment," when combined with the Justices communal living conditions, allowed Marshall to create a cohesiveness that likely reduced dissensus among the Justices ((Johnson 2000, 1067; see also McGuire 2004).

Others have cited internal factors, namely the relative homogeneity of preferences among the Justices. By 1811, for instance, all of the Justices present on the Court when Marshall was appointed in 1801 had been replaced. As Currie (1985) noted

> For most of the fifteen crucial years between 1810 and 1825, the Court was comprised of the same seven Justices: Marshall, Bushrod Washington, William Johnson, Brockholst Livingston, Thomas Todd, Joseph Story, and Gabriel Duvall. . . . Some part of the apparent unanimity was doubtless due to Marshall's policy of keeping disagreements within the Court; yet the opinions of William Johnson, his most independent colleague, suggests that all seven Justices shared a common view of the Constitution down to many matters of mere detail (646–47).

This created a situation, as in the pre-Marshall Court, where separate opinions were preserved for the most pressing issues. As noted by Kelsh (1999, 138), "Early Justices believed that separate opinions were appropriate only in important cases, importance being defined by the presence of a constitutional issue or public interest." This sentiment is aptly expressed by Justice Story in *The Nereide Bennett Master*.[69] In this case, the Court grappled again with the ownership of goods belonging to neutral parties seized from a British ship by American privateers during the war of 1812.[70] The importance of this case—and Justice

[69] 13 U.S. 388 (1815).

[70] The case is actually a great deal more complicated than this, although this description captures the gist of it. Foremost among the questions considered is whether the neutral party—a named Manuel Pinto—was actually neutral (as an Argentinian citizen) or British (potentially having established a domicile in London). These questions and others had important implications for other such seizures during the war, as well as the United States' treaty obligations.

Story's disapproval of the majority's position—compelled him to disagree with the Court's opinion in the following manner:

> On the whole, in every view which I have been able to take of this subject, I am satisfied that the claim of [the neutral party] must be rejected, and that his property is good prize to the captors. And in this opinion I am authorized to state that I have the concurrence of one of my brethren. It is matter of regret that in this conclusion I have the misfortune to differ from a majority of the Court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty not to surrender my own judgment, because a great weight of opinion in against me, a weight which no one can feel more sensibly than myself. Had this been an ordinary case I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights, suspended on it, are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident indeed of its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles.

Another liberal use of separate opinions is found in *Trustees of Dartmouth College v. Woodward*.[71] This case, considered a "landmark," affirmed the supremacy of the Constitution over state governments, with the Court finding that "[t]he Constitution's ban on state action impairing the obligation of contracts denie[d] . . . state[s] the power to alter or repeal private corporate charters, such as between New Hampshire and the trustees of Dartmouth College establishing that institution" (Savage 2011*c*). In a 5–1 decision, Marshall wrote for a majority, comprising himself, Johnson, Todd, and Livingston. Both Washington and Story wrote concurring opinions, with Livingston joining in both; Johnson also noted his concurrence (perhaps somewhat superfluously) with the Chief Justice's opinion. Duvall dissented. An extreme example of case salience prompting separate opinions may be found in *Ogden v. Saunders*.[72] At this point in the Court's history, giving a majority opinion of the Court and expressing disagreement through deviations from that majority

[71] 17 U.S. 518 (1819).
[72] 25 U.S. 213 (1826).

statement had been institutionalized as the normal operating procedure. However, in this case, which dealt with the reach of the Contract Clause, the Justices issued their opinions seriatim, being introduced by the statement "The learned judges delivered their opinions as follows[.]" Although this has been characterized as a 4–3 decision,[73] with Marshall, Story, and Duvall in dissent, each of the Justices—including Washington, the writer of the Court's "major" opinion (although Justice Johnson also authored an opinion in support of the majority disposition)—write not in the voice of the Court (i.e., using "we" or "this Court") but as an individual (using "I").

Kelsh (1999) seems to define important cases as those involving great policy issues of the day, but important cases can also be those involving issues deemed to be personally salient to individual Justice. In *United States v. Smith*,[74] all but Livingston join an opinion that would result in the imposition of capital punishment for piracy. Livingston, however, could not join and wrote in dissent, "In a case affecting life, no apology can be necessary for expressing my dissent from the opinion which has just been delivered."

Chief Justice Marshall's own statements suggest that dissent may have been routinely suppressed. For example, in *Speake v. U.S.*,[75] Marshall dissented from the opinion delivered by Story on one point, noting that he would not have dissented himself but for Story's dissent. His silence in the presence of a dissent, he reasoned, "might be construed into an assent to the entire opinion of the Court as it had been delivered," with which he did not agree (39, as paraphrased by the Reporter). Marshall would have refrained from dissent had Justice Story not dissented himself. In a different dissent, Marshall noted that his "custom, when [having] the misfortune to differ from [the] Court" was to "acquiesce silently in its opinion," and would have done in this case if not for the "general surprize (sic) . . . [and] condemn[ation]" of the circuit court's opinion.[76] In other words, when no one else dissents, Chief Justice Marshall suppresses his own dissent in the service of unanimity.

Starting from a baseline assumption that dissents were distributed according to a poisson distribution, these statements suggest that this process is also zero-inflated. In other

[73] Savage 2011*c*.
[74] 18 U.S. 153 (1820).
[75] 13 U.S. 28, (1815).
[76] *Bank of the United States v. Dandridge*, 25 U.S. 64 (1827).

words, the mean number of dissents per Justice is less than might other be expected given their latent propensity to dissent. This proposition, admittedly, is subject to dispute. As indicated by Currie (1985), it is entirely possible that early Justices' propensity to dissent was actually quite low in the first instance, in which case there would be no zero-inflation, merely a low mean. However, if this was the case, why would Marshall note that he was only dissenting because a Justice had already offered his own separate opinion? This suggests there was an internal norm of suppression above and beyond any naturally low propensity to dissent, suggesting zero-inflation. This propensity is confirmed, at least to some extent, by the words of the Associate Justices themselves. Justice Johnson—a man not shy about dissenting—admitted in one dissent that he had "submitted in silent deference to the decision of my brethren" but that he could no longer remain so.[77] In *Brown v. Maryland*,[78] Justice Thompson lamented,

> It is with some reluctance, and very considerable diffidence, that I have brought myself publicly to dissent from the opinion of the Court in this case; and did it not involve an important constitutional question relating to the relative powers of the general and State governments, I should silently acquiesce in the judgment of the Court, although my own opinion might not accord with theirs.

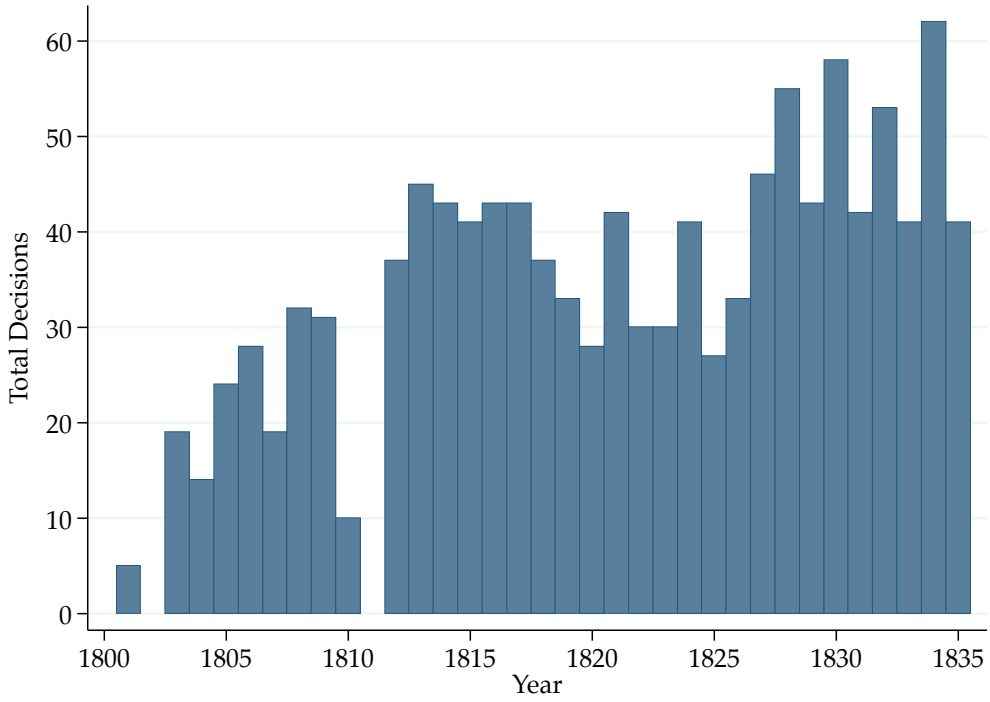
Finally, Marshall's comments suggest overdispersion of the data, meaning that multiple occurrences of dissent do not occur independently; rather, multiple dissents or concurrences occur in clusters. Marshall's comment in *Speake* demonstrates that the presence of a dissenting opinion by one suggests the agreement of the others with the full majority opinion. When this is not the case, Justices may decide to write separately to clarify their own positions. Otherwise, in the absence of such dissents, they may use the relative anonymity of the majority opinion as a shield.

Chief Justice Marshall's effect on the Court was profound, and many of the Court's modern practices are a function of the procedural and institutional innovations of the man who has come to be known as "the Great Chief." Given the thorny constitutional issues in-

[77] Johnson claims to have suppressed dissent in *Ex parte Burford*, 7 U.S. 448 (1806), which he revealed in *Ex parte Bollman*, 8 U.S. 75 (1807). For a discussion of this see Freedman 2000, 563 n.92, citing Currie 1985, 81 n.131.

[78] 25 U.S. 419 (1827).

Figure 3.6: Total Decisions by Year, 1801–1835



Note: Data collected from U.S. Reports, vols. –4.

volved in delineating state and federal power, and the level of state resistance they caused, it no wonder that a unified court opinion emerged in this environment. By structuring the opinion to represent a statement of the institution, the Justices—and Marshall in particular—may have been attempting to evade oversight by the political branches (Popkin 2007, 92). This technique, moreover, arguably allowed the Court to take on an ever-increasing workload and extend their reach. By streamlining the Court's work, the Court had more time and resources to play a role in more areas of the law. To be sure, over this period, the number of decisions handed down by the Court per term increased, although not monotonically (see Figure 3.6).

When Chief Justice Marshall died in 1835, the Court was still embattled in the foremost issue of the era: the balance between state rights and national power (*see, e.g.*, McCloskey and Levinson 2010, loc. 326). During Marshall's tenure, the Court had taken strong nationalist stances on the Court's ability to review state court decisions. This power

was specifically vested in the Court by Section 25 of the Judiciary Act of 1789. During this time, Representatives from Southern states, which protested Court's role in managing its relationships with Native American tribes (as it did in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*) and the congressional imposition of tariffs, tried to repeal Sec. 25 in 1831.[79] Such court-curbing would have effectively left the federal government no legal recourse over state laws that conflict with the Constitution. One observer noted that the repeal of Sec. 25 would have made the Constitution a "dead letter" (Friedman 2009, 88). Of course, the proposal was roundly defeated in both the House and Senate (Friedman 2009, 100), and President Jackson's threat to use military force to enforce federal law in South Carolina made many who had opposed the Court for overreaching see it in a much more rose-colored light (Friedman 2009, 10–3). Even those who thought the Court was usurping power found its decisions more preferable than the use of military might against states. As Marshall's successor would learn, however, this would not always be the case.

3.4 The Taney Court: Expanding Dissent Under the Weight of the Nation

"The Taney Court is not noted for its unanimity of opinion" (Dolan 1963, 282).

During the Marshall Court, the practice of slavery in the South simmered beneath the surface. The Court's involvement in mediating the relationship between the Cherokee nation and Georgia, as well as its support for the Bank of the United States at the expense of state sovereignty engendered, in many cases, outright defiance (Friedman 2009).

The resistance to the Marshall Court's decisions stemmed from the Court's staunch defense of national power over the states. Only slowly did Presidents supporting broader state power get their chance to change the composition of the Court (Abraham 1992). Even then, however, the Justices did not consistently oppose the exercise of national power, as Jefferson unhappily observed. Justice Story, for example, though a Madison appointee "had a record that out-Marshalled Marshall" (Abraham 1992, 100). Even Justice Johnson,

[79] For an entertaining discussion of this, see Friedman 2009, Chapter 3.

the "first dissenter," dissented rarely by modern standards.

This failure of states'-rights-leaning (later Democratic) Presidents to exert their preferences through the Court, however, began to change toward the end of the Marshall Court. President Andrew Jackson, a Democrat, made six appointments during his eight years in office—the most of any President since Washington, who appointed the first 10 Justices.[80] Just as the slavery issue was bubbling to the surface and consuming the national consciousness, more Democratic Justices were joining the Court (Abraham 1992). When Chief Justice Taney assumed Chief Justice Marshall's former position, many assumed that the Court would radically swing towards a states' rights position. Taney, after all, was Jackson's former Treasury Secretary. As a "staunch opponent of the Bank of the United States[, he] had . . . deprived the Bank of the federal deposits that were its lifeblood" (McCloskey and Levinson 2010, loc. 848). Under Jackson's appointees—John McLean (appointed 1829), Henry Baldwin (1830), James Wayne (1835), Philip Barbour (1836), John Catron (1837), and of course Chief Justice Roger Taney (1836)—the Court "unquestionably became states' rights and anti-incorporation in orientation."

Upon Taney's appointment, which was heavily contested in the Senate, his detractors entertained apocalyptic visions of the Court—and country—remade in a radical Democratic image. The first decisions of the new Taney Court, which then comprised five Jackson appointees in addition to the last two remaining members of the Marshall Court (Story and Thompson) seemed to confirm this fear. As McCloskey and Levinson (2010) explained, "Each of the cases had been heard by Marshall, but decision had been postponed; the holdings of the new Taney Court were in each case at variance with the position Marshall would have taken" (loc. 853).

Taking the opportunity to mark how the Court had changed in the short time since Marshall passed away, Justice Story invoked the the Great Chief's memory in his dissents in these cases, noting in one

> "I have the consolation to know, that I have the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Mar-

[80] This count is 11 if the recess appointment of Chief Justice Rutledge—whose nomination was rejected by the Senate—is included.

> shall. Having heard the former arguments, his deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in [*Gibbons v. Ogden* and *Brown v. Maryland*]."[81]

The Court, however, was "hardly a supine presidential instrument" (Abraham 1992, 96). Taney was skilled at political maneuvering and, like Marshall, sought to protect the legitimacy and institutional strength of the Court. During his tenure, Taney "guided his Court along pathways of conciliation virtually devoid of dogmatism and ploys" (Abraham 1992, 101). An example of this lack of dogmatism is found in the Taney Court's treatment of one pervasive issue: the distribution of power between the federal government and the states. In *New York v. Miln* (1837),[82] a majority of the Court found that a state possessed the power to require passenger ships to submit lists of their passengers, as a means of controlling the flow of poor immigrants into the city.[83] In upholding the validity of the state's power to require such lists, Justice Barbour (writing for a majority) explained that the power exercised by the state was not a regulation of commerce or immigration, but rather a police power designed to "protects its citizens from evil."[84] An outraged Story and Thompson dissented, invoking the specter of the Great Chief to protest a decision that seemed to chip away at the federal government's power to regulate commerce in contravention of earlier Marshall Court decisions. And maybe Story and Thompson had a right to be concerned about the direction of the Court, as—within the next decade—the general language of the opinion had been interpret to mean that the rule of *Miln* was that, "in all such cases of conflict the rule of the constitution was reversed, and that the law of Congress became subject to the law of the State, as to the supreme law of the land, and that the clause of the constitution asserting the supremacy of the constitution, and of the laws and treaties of the United States made under it, applied only to the case of concurrent

[81] *New York v. Miln*, 36 U.S. 102 (1837). Justice Story also invokes Marshall in his dissent in *Briscoe v. Bank of Kentucky*, 36 U.S. 257 (1837). He thundered, "Among that majority was the late Mr. Chief Justice Marshall[,] a name never to be pronounced without reverence."

[82] 36 U.S. 102.

[83] *Miln*, 36 U.S. at 141.

[84] *Miln*, 36 U.S. at 141.

powers."[85]

The Court rejected this interpretation, which would subjugate the power of the federal government to the states in the case of a conflict, in *Thurlow v. Massachusetts* ten years later.[86] Justice Wayne, in particular, emphatically disowned knowledge of any general language in *Miln* that would lead to such a conclusion. In *Thurlow*, the Court permitted a state licensing scheme for liquor sales as an appropriate exercise of state police power. In doing so, however, the Court construed the commerce power narrowly, following *Miln*. Story had died two years prior; Thompson, four. When the Court decided *Thurlow*, eight of the nine Justices were Democratic appointees.

Despite the perception that the federal government's power to regulate commerce was being cabined, Taney steered the Court back onto a moderate course in *The Passenger Cases*.[87] In these consolidated cases, the Court appeared to overturn its previous ruling in *Miln* by striking down a New York regulation imposing on the master of vessels arriving from a foreign port a 25-cent tax for each person on the vessel. This regulation was conceptualized as a public health ordinance by the state and therefore valid under its police powers, or so it argued. The Court found that Congress's power to regulate commerce was exclusive. Citing Justice Johnson's separate opinion in *Gibbons v. Ogden*,[88] Justice McLean, writing for the majority wrote, "The power to regulate commerce here meant to be granted was the power to regulate commerce which previously existed in the States. . . . The power to regulate is necessarily exclusive."

Arguably, Chief Justice Taney was able to move the Court toward the direction of states' rights while still maintaining the strength of federal government—including the Court—by relying on favorable Marshall Court precedent. Whereas the Marshall Court faced open defiance, however, Democratic partisans tended to react to the Taney Court's pro–federal power decisions with equanimity. This may have been, in part, the result of Marshall's passing. As McCloskey (McCloskey and Levinson 2010, loc. 869) explained

[85] *Thurlow v. Massachusetts*, 46 U.S. 504 (1847) (statement of John Whipple and Samuel Ames for the plaintiff in error (Thurlow)).

[86] 46 U.S. 504 (1847).

[87] *Smith v. Turner*, *Norris v. Boston*, 48 U.S. 283 (1849).

[88] 22 U.S. 1 (1824).

> Marshall's death diverted judicial partisanship, or rather turned it upside down. Though many Americans came to venerate Marshall, many other could never forget that he was a Federalist and a very opinionated one at that, and this a residue of animosity had always handicapped the Marshall Court. Now the Chief and a majority of associates were Jackson-approved, and this meant that the antijudicial tradition of the Democrats lost much of its edge.

Moreover, those who had been staunch supporters of the Marshall Court had a difficult time disowning and advocating disobedience to the Court in the face of a personnel change. This enduring support for the Court was both political and philosophical (McCloskey and Levinson 2010, loc. 874; *see also* Friedman 2009, 10–21). Although Taney had initially faced some resistance from Whigs (who had replaced the Federalists), they realized that Taney was not going to dismantle Marshall's legacy and "their natural propensity to support the Court . . . reassert[ed] itself" (McCloskey and Levinson 2010, loc. 874). Friedman (2009, 110) succinctly summarized the growth in support, noting, "[Taney's] relatively moderate course . . . brought Whigs and Democrats behind the Court: Whigs because they had long been supporters of the judiciary and were happily reassured; Democrats because the Court was now comprised of their appointees."

It was against this backdrop that the Court became the institution of last resort on the question of slavery. As one scholar put it, "Slavery was a coiled spring" (Friedman 1985, 229). Although the institution itself was hotly contested, the major political question subject to negotiation in the mid-1800s was how far the institution would be permitted to spread geographically. In other words, as states entered the Union, would slavery be permitted there or not? The first major compromise brokered in Congress was the Missouri Compromise of 1820, which paired Missouri's entrance as a slave state with Maine's entrance as a free state (Friedman 2009, 108); the Compromise also bisected the country at 36° 30′ latitude. New states entering the union north of the line would join as free states; those south, as slave states. This compromise lasted until the acquisition of former Mexican territories in the 1840s, requiring an additional compromise in 1850. The Missouri Compromise was "shattered" by the Kansas-Nebraska Compromise of 1854, in which res-

idents of the territories would decide for themselves whether to permit slavery or not. This new compromise, which consciously rendered the Missouri Compromise a nullity, did not set the mechanism by which entering *states* would deal with slavery(Friedman 2009, 109).

With political solutions to the slavery question failing, the nation looked to the Court to deal with the issue, and "[t]he justices obviously believed they could succeed where others had failed" (Friedman 2009, 110). Despite preserving federal power in other areas affecting the distribution of power between the national and state governments, the Taney Court's approach to to slavery was, at best, "reactionary" (Cushman 1995, 119). In *Dred Scott v. Sandford*,[89] the Court affirmed a Missouri Supreme Court ruling that Dred Scott, a slave suing for his freedom based on his residence in free states, was neither a citizen of Missouri, given the state supreme court's determination, nor a citizen of the United States. The Court, as a result, did not have jurisdiction. Had the opinion rested there, the nation's clamorous reaction to the opinion may have been a bit more muted. But Chief Justice Taney, speaking for a majority, proclaimed (arguably in dicta), that the role of the federal government was circumscribed to two responsibilities with respect to slaves: "treat them as property, and make it the duty of the Government to protect it; no other power, in relation of this race, is to be found in the Constitution; as as it is a Government of special, delegated powers, *no authority beyond those two provisions can be constitutionally exercised*" (42–6) (emphasis added).

Although the nation was highly critical of the Court's opinion—indeed, two scholars described it as a "tempest of malediction" (McCloskey and Levinson 2010, loc. 981)—"[t]aken in full, the public's reaction . . . reflects the evolution in the nation's commitment to judicial review" and the Court itself (Friedman 2009, 113). Democrats and other agrarian and commercial interests praised the decision.[90] This is hardly a surprise given these parties' substantive agreement with the Court's decision. The Southern/states' right interests had every incentive to tout the legitimacy of the Court's decision. The question was whether those philosophically inclined toward the Court based on their desire for a strong national

[89] 60 U.S. 393 (1857).

[90] For example, the *New York Journal of Commerce* (a Northern publication sympathetic to slavery) trumpeted, "It is now decided on authority which admits of no appeal or question, and which few will presume to dispute" (Friedman 2009, 113).

government—former Whigs, emerging Republicans, and the like—would stay behind the Court. As McCloskey (2010, loc. 1007) explains, "The judicial constituency had always been drawn from those who had a stake in nationalism, and in 1859 that meant the North." The traditional view suggests that, following *Dred Scott*, the Court had "forfeited Northern allegiance" (McCloskey and Levinson 2010, loc. 1007), but more recent scholarship has suggested that the actual response was more nuanced, if not less vociferous. Friedman (2009) argues the much of the Northern public criticism "amounted to claims that this particular decision—for one reason for another—lacked legal authority" (114). For those invested in maintaining national power, moreover, repudiating the Court's authority as an institution was equivalent to having no Court at all, which would seriously compromise national power.

Whether or not the Court was truly and completely abandoned by the North, it is clear that the Court's reputation had been severely damaged. But the blow was not fatal. As McCloskey and Levinson 2010 (loc. 1032–37) explained,

> The judges had maintained a clear line of connection between Marshall's doctrines and their own. This was wise because it preserved the essential idea of the fundamental law as a steady river of continuity in other capricious political seas. They had used the judicial veto, and this was important because it not only kept the notion of constitutional limit alone but reminded those who might forget that judicial sovereignty had not atrophied. But their discipleship to Marshall was discriminating; the veto had been handled discreetly; the Taney judges were aware that both the economic and the political world had changed since Marshall's time. They had managed to strike a middle ground that reconciled the American will for change with the desire for order and stability, the American's wish to have his way with his respect for the rule of law. Their reward had been the homage of the nation.
>
> The achievement had been endangered by the audacious assumption in *Dred Scott* that the judiciary could solve the major problem facing America. But the public habit of reverence was strongly ingrained by those years of painstaking

cultivation, and not even this calamity could stamp it out altogether.

3.4.1 Changes in the Writing and Reporting of Opinions

Unsurprisingly, the Court's ability to walk a middle path in a polarized political environment—a path some have called "nondoctrinaire" (McCloskey and Levinson 2010, loc. 885)—permitted the Court to increase its institutional prestige dramatically. During this time of growing strength, the Justices' opinion-writing behavior changed in important ways, as well.

One "minor" innovation of the Taney Court involved "the practice of declining to give an opinion when the vote was evenly split" (Kelsh 1999, 154). This happened on at least two occasions: *Ellis v. Jones*[91] and *Strout v. Foster*[92] When this occurred, as in the modern Court, the effect is that the lower court disposition remains in place.[93]

Following Marshall, Chief Justice Taney maintained the practice of writing an opinion of the Court. Majority and dissenting opinions, however, were presented in a more uniform fashion than in the Marshall Court, and this regularity increased over time. In other words, as dissents became more common, their reporting was also routinized. Like the modern Reports, the Reporter listed all of the dissenting judges—indicating that these judges were, in fact, disagreeing with the disposition of the issue, the order, or some other issue, such as a jurisdictional question.

During the Taney Court, the Reporter increasingly (although not universally) published the Court's decision not with a transcript of the argument or a recitation of the litigants' position, but rather a simple syllabus consisting of the procedural history and the attorneys arguing before the Court.[94] Although there were inklings of this more modern structure in Marshall Court decisions, this approach was used with much greater regularity during the Taney Court, especially in the later years. This development is important, because it reflects the institutional reality of the opinion of the Court. There need be no sep-

[91] 42 U.S. 197 (1843).

[92] 42 U.S. 89 (1843).

[93] For a short discussion of this, see Kelsh 1999, 154 nn.100–01.

[94] *See, e.g.*, *Sampson Tappan v. Peaslee*, 61 U.S. 571 (1857); *Allen v. Newberry*, 62 U.S. 244 (1859); *Lea v. Polk County Copper Co.*, 62 U.S. 493 (1859); *Barber v. Barber*, 62 U.S. 582 (1859); *Sun Mutual Insurance Co. v. Wright*, 64 U.S. 412 (1860).

arate statement of facts to inform multiple separate opinions. The Court's majority speaks with a single voice, and the facts and arguments of the litigant are offered in service of that institutional opinion.

This shift also reflects a change in the way American society thought about the nature of judges' roles and the development of law. The early British practice developed within a close-knit community of attorneys and judges, in which the bench and bar would engage in a conversation about the issue at hand and the rule to be promulgated (Popkin 2007). The collaborative (and, as a result, closed) nature of this process helped to maintain the legal community's prestige in some ways by giving direct access to the law by attorneys alone (Ross 1998). This collaborative heritage is seen in the extended length of oral arguments in the early Court, which would sometimes last for several days at a time, occasionally over multiple weeks.[95] However, a "commoning" of the law occurred as Supreme Court reports were more regularly published (*see* Ross 1998). Publishing a virtual transcript of these proceedings, as earlier reporters did, evokes the idea of a professional bench and bar working together to find a legal solution. The more modern structure of opinion reporting—in which such a transcript is not included and the facts are incorporated into the Court's opinion—suggests an institutional actor pronouncing the law. This approach reflects further movement toward shaping the Court into an institution to rival the other branches.

3.4.2 Institutional Prestige and the Rise and Fall of Dissent

The most noticeable change from the Marshall Court to the Taney Court was the rise in the number and rate of dissenting opinions.[96] Not only did the Taney Court Justices dissent at a higher rate than those on the Marshall Court, there were a greater number of Justices dissenting for any given divided opinion. In other words, for any given divided decision, a greater number of Justices were disagreeing with the majority opinion. Finally, Justices

[95]For example, the landmark case *Rose v. Himely*, 8 U.S. 241 (1808), was argued over nine days in 1808. During that same period, the Court spent two days each hearing argument in *Young v. Bank of Alexandria*, 8 U.S. 384 (1808), *Stead's Executors v. Course*, 8 U.S. 403 (1808), and *Pollard v. Dwight*, 8 U.S. 421 (1808), among others.

[96]The data discussed in this section were collected from U.S. Reports, vols. 5–34, via openjurist.org using python scripts written specifically for this project.

issued statements of dissent at a greater rate than their predecessors.

Between 1835 and 1864, Taney Court Justices dissented in 260 decisions published in the *U.S. Reports*, generating a dissent rate of 14.9% (249/1,667).[97] This rate varies between 10.0% (3/30 in 1841) and 31.7% (13/41 in 1838) (see Figure 3.7). Notably, the Taney Court rate is twice as large as the overall dissent rate of 7.1% (83/1,176) for the Marshall Court.

Figure 3.7: Dissent Rate in the Taney Court, 1836–1863 Terms

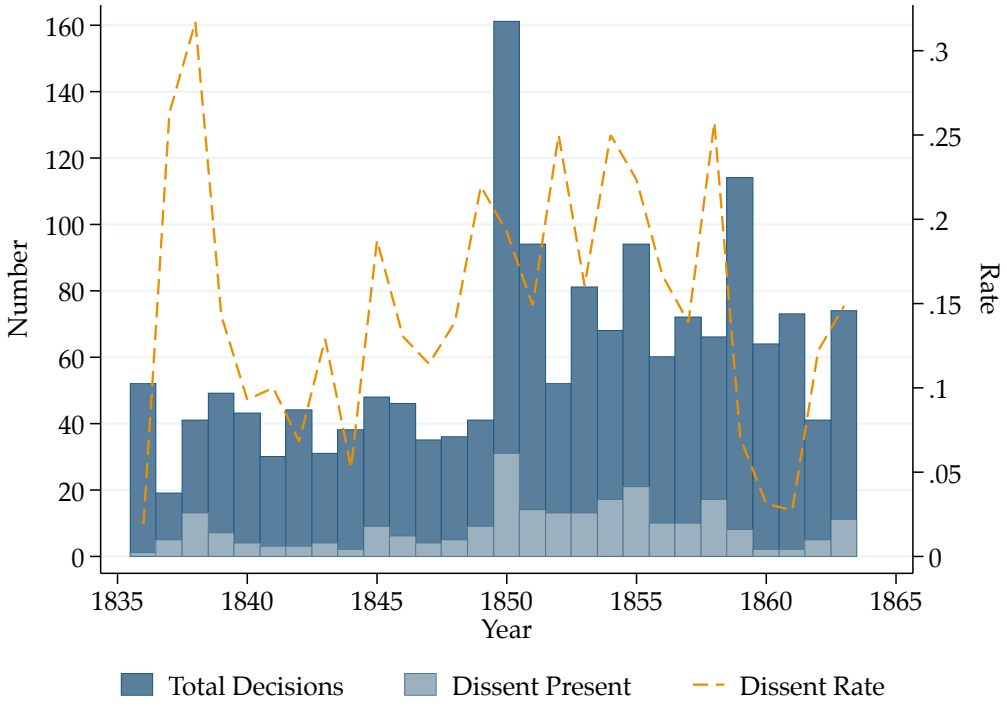


Figure 3.7 illustrates a few interesting points. First, the Court experienced a tremendous growth in caseload over the Taney Court. Before the 1850 term, the Court handed down, on average, 39.5 decision per term. The average number of decisions promulgated per term doubled in the second half of the Taney Court, when the Court decided 79.6 cases on average per term. This difference is statistically significant[98] and remains even when the 1850 term—arguably an outlier—is removed from the analysis.[99] Thus, by the end of

[97] This figure is a bit higher than both the overall rate calculated using data from the Supreme Court Compendium (194/1,657, 11.7%) but less than the rate calculated from dissent data offered in Dolan 1963 (252/1,502, 16.8%).

[98] t=4.82, df = 26, $p < 0.001$, two-tailed t-test.

[99] When the 1850 term is removed from the analysis, the the average number of decisions issued per term remains substantially higher than in the pre-1850 period (73.3 opinions as compared with 39.5 opinions). This

the Taney era, the Court was hearing substantially more cases than in 1835.

Perhaps this is unsurprising given the tremendous growth of the United States in the years preceding the Civil War. Between 1835 and the War's beginning in April 1861, ten states joined the Union.[100] In addition to legal disputes originating in these states, litigation arose from the great political questions of the day, as well. This meant a good deal of the Court's docket was concerned with interpreting the Commerce Clause. Dolan (1963, 288) notes that "[d]evelopment of business on a national level demanded governmental protection of commercial activities which the parochial state authorities would not and could not provide." As a result, business turned to the federal courts. The Court, moreover, also considered a great many commerce-related questions in the realm of admiralty law—an area in which the Court had played a major role since the Marshall Court. This, again, is perhaps not surprising since the federal courts have exclusive jurisdiction over this area.[101]

The second, more interesting point illustrated by Figure 3.7 is the uneven, but clearly upward, growth in dissent between 1843 and 1858, and the subsequent plummet of the dissent rate thereafter. This pattern can clearly be linked to the institutional strength of the Court. As discussed above, until the Court's decision in *Dred Scott*, through the philosophical commitment of Whigs/former Federalists to the Court and the Democratic approval of the Court's new membership, the Court enjoyed a major increase in prestige during this period (*see, e.g.*, Friedman 2009, McCloskey and Levinson 2010). During the Marshall Court, the Court struggled to assert its institutional position. To facilitate this, Marshall arguably enforced unanimity and often spoke for the Court. And, during this time, as we know, the Marshall Court faced major challenges with respect to state compliance with its decisions. Throughout, the dissent rate remained low. As the Court's prestige began to increase, however, the dissent rate also grew. The Taney Court maintained the opinion of the Court, facilitating both public knowledge of the Court's decisions and an institutional statement designed to meet the institutional power of the other branches, while at the

difference is also statistically significant (t= 5.95, df = 25, $p < 0.001$, two-tailed t-test).

[100] These states are Arkansas (1836), Michigan (1837), Florida (1845), Texas (1845), Iowa (1846), Wisconsin (1848), California (1850), Minnesota (1858), Oregon (1859), and Kansas (1861).

[101] Judiciary Act of 1789, §9; U.S. Constitution, Art. III, §2.

same time increasing the rate at which individual Justices expressed disagreement with that opinion.

This is buttressed by the fact that, during this time, the Justices began dissenting in less important cases and without opinion in many instances. The Justices continued to dissent at a higher rate in constitutional cases (Kelsh 1999, 156). As in the Marshall Court, the Justices often expressed the sentiment that they feel compelled to dissent given the importance of the case. For example, in *Cooley v. Board of Wardens*[102] Justice McLean wrote, "It is with regret that I feel myself obliged to dissent from the opinion of a majority of my brethren in this case." Chief Justice Taney, speaking for Justices Wayne, Grier, and Clifford in *Taylor v. Carryl*,[103] defended his position by noting, "The principle upon which the case is decided is so important, and will operate so widely, that I feel it my duty to show the grounds upon which I differ. "[104]

Kelsh (1999) also argues that the increase in dissent during the Taney Court resulted from the Justices' increasing desire to "maintain intellectual or ideological consistency[, which] was without precedent." As a result, this suggests that Justices perceived "their role more as an individual effort and less a part of a cohesive unit" (158). Kelsh points, for example, to Justice Daniel's dissenting opinion in *The Propeller Monticello v. Mollison*[105] in which he writes, "My purpose is simply to maintain my own consistency in adhering to conviction which are in nowise weakened" (158). He also points to Justice Grier's dissent in *U.S. v. Vallejo*,[106] in which Grier proclaims, "I cannot consent, by my silence, that an inference should be drawn that I concur in the opinion just delivered" (158). Justice Story was especially adamant about the consistency of his opinion. Again attempting to strengthen his claim consistency with the specter of Chief Justice Marshall, Story proclaimed in *Briscoe v. Bank of Kentucky*[107]

> A majority of my brethren, have now pronounced the act of Kentucky to be constitutional. I dissent from that opinion: and retaining the same opinion

[102] 53 U.S. 299 (1851).
[103] 61 U.S. 583 (1857).
[104] This case, though not directly a constitutional case, dealt with the jurisdictional reach of the federal courts.
[105] 58 U.S. 152, 156 (1854).
[106] 66 U.S. 541, 555 (1861).
[107] 36 U.S. 257 (1837).

> which I held at the first argument, in common with the [late] chief justice, I shall now proceed to state the reasons on which it is founded. I offer no apology for this apparent exception to the course which I have generally pursued, when I have had the misfortune to differ from my brethren, in maintaining silence; for, in truth, it is no exception at all, as upon constitutional questions I ever thought it my duty to give a public expression of my opinions, when they differed from that of the court.

While Kelsh is right to point out the dramatic increase in these types of opinions, to say it is without precedent is not wholly correct. While rare in the Marshall Court, Justices did occasionally feel compelled to dissent for the desire to demonstrate continuity in their own views. An early indicator of this can be seen in Justice Washington's dissenting opinion in *Mason v. Haile* (1827).[108] Prior to this, Washington had expressed dissent in only two other cases. One of these cases, *United States v. Fisher* (1805),[109] Washington did not actually participate in the case but felt compelled to express his disagreement with the Court due to the importance of the issue.[110] In other instances in which Washington expressed disagreement, he did not write his own opinion; with Chief Justice Marshall, he joined Justice Johnson's opinion. In *Mason v. Haile*, it was not only the importance of the constitutional question that compelled him to dissent, but also "[a] regard for my own consistency . . . that . . . compels me to record the reasons upon which my dissent is founded." In this instance, Justice Washington did not actually prepare a written opinion, noting in his monologue from the bench that his "object in declaring my dissent from that which has been delivered, being not so much to prove that opinion to be wrong, as to vindicate my own consistency." A similar earlier concern with consistency appears in Justice Johnson's writings. In his *Plowden Weston v. City Council of Charleston* dissent,[111] Johnson notes that he dissented because he "wish[ed] generally that [his] reasons for [his] opinions on constitutional questions should appear[] where they cannot be misunderstood or

[108] 25 U.S. 370.
[109] 6 U.S. 358.
[110] This case dealt with the ability of the United States assume as a preferred position among creditors in a bankruptcy.
[111] 27 U.S. 449 (1829).

misrepresented."

Kelsh, moreover, also fails to explain why or how the emphasis from cohesive whole to individual occurred. I argue that this transition may be attributed to the increasing prestige of the Court from the beginning of the Taney Court through its notorious decision in *Dred Scott*. The baseline level of Court's prestige freed the Justices to depart from the institutional opinion and worry about their own records. If the opinion of the Court has no meaning or is roundly ignored by other political actors, then there is room to dissent from the opinion in the first instance. Only when the Court has a sufficient reserve of institutional strength are Justices unconstrained in speaking against the Court's opinion.

A comparison of the Justices' dissent behavior both before and after the *Dred Scott* decision tends to support this interpretation. First, the Justices simply dissented less in the terms following *Dred Scott* than in the terms preceding. From the 1836 term through the 1857 term, the Court an average of 14.71 dissents per term. This average dropped to 11.14 in the 7 terms following the decision through the end of the Taney Court in 1864. This difference, while notable, is not statistically significant however.[112]

This method does not control for the sheer increase in the number of cases heard by the Court after 1850. One might argue that, if institutional strength is damaged by dissent, then why would it matter how many cases they heard? Justices should not dissent at all if they are trying to protect the institution. This response, however, is overly simplistic and flies in the face of the experience of the Marshall Court. Even the early Justices—who faced non-compliance by states with the Court's decisions—dissented in the most important constitutional cases. (The dissent rate during the Marshall Court was, in fact, 7.1%.) The institutional strength theory does not require for the Justices to stop dissenting entirely; rather, the theory suggests that Justices would stop dissenting in lower salience cases. As a result, if the number of cases heard by the Court increases, then one would expect the number of constitutional issues heard by the Court to go up, as well. If constitutional cases increase—even in the face of constraints on behavior due to lagging institutional strength—Justices should continue to dissent in those cases. As a result, the difference in average number of dissents per term my simply be the result of an increase in workload.

[112] $t = 0.6327$, df = 26, $p = 0.5324$, two-tailed t-test).

The important comparison, then, is the *rate* of dissent before and after the *Dred Scott* decision. Prior to this decision, the Court's Justices dissented in 16.0% of all cases; after, this rate dropped to 11.4%. Unlike the difference in average dissents, this difference is statistically significant.[113] Thus, when the increase in workload is taken into account, preliminary evidence suggests that dissent rates are influenced by legitimacy.

This hypothesis is further supported by an examination of the ratio of *statements* of dissent to numbers of divided opinions. By "statements of dissent," I mean the Justices' individual declarations of dissent for any given divided decision. This is not always the same thing as the number of Justices in dissent. For example, in *Waring v. Clarke* (1847)[114] the Court considered considered an admiralty suit in which the owner of the steamboat *Luda* sued the owner the steamboat *De Soto* for damages after the *De Soto* collided with and destroyed the *Luda*. This case, though seemingly mundane, contained an important question about the scope of the federal courts' power to hear admiralty and maritime cases stemming for incidents that occur in navigable waters, as opposed to the open sea (which is clearly within the Court's jurisdiction).[115] In this particular instance, the accident occurred in what was described as "the heart of Louisiana."[116] Once again, the Taney Court was determining the distribution of power between national and state governments. The majority opinion in this case, which found that the Judiciary Act of 1789 created jurisdiction, prompted three Justices to dissent. One Justice, Catron, wrote alone. Justice Grier however, spoke for both himself and Justice Daniel. Thus, although the Court split 6–3 on this issue, only two *statements* of dissent were produced. Thus, the most splintered opinions would take on a ratio of 4 (i.e., 4 statements of dissent to every divided decision = 4/1 = 4); the lowest value, 1.

In total, Taney Court Justices produced 387 total statements of dissent.[117] The overall

[113]Note, however, that it is only statistically significant in a one-tailed t-test. Such as test is appropriate here, as the hypothesis is directional in nature. ($t = 1.3972$, df = 26, $p < 0.087$, one-tailed t-test.)

[114]46 U.S. 441.

[115]The issue is slightly more complex than the jurisdictional question, although this appears to be the most important issue in the case. The court was also considering important tort issues, such as liability and the amount of recovery, as well as the weight of English precedent in this area.

[116]*Waring*, 46 U.S. at 467 (Woodbury, J., dissenting).

[117]Of these, 161 (41.6%) of the statements were simple statements, expressing no reasoning for the opinion; the remaining 226 (58.4%) of statement were accompanied by some form of rationale. Statements in which Justices joined another's written opinion were treated as joiners (as opposed to independent statement of dissents). Both are treated in more detail below.

ratio for the entire Taney Court era was 1.49. Prior to the Court's decision in *Dred Scott*, 309 statements of dissent were issued across 194 divided decisions, producing a ratio of 1.59—higher than the overall ratio for the 28-term period. (For purposes of comparison, this was an increase from the Marshall Court's ratio of 94/84, or 1.13. In other words, as the prestige of the Court increased during the early Taney era, the number of dissenting opinions increased, as well.) Following *Dred Scott*, however, this ratio decreased to 1.42 (78 opinions over 55 dissents)—falling *below* the era average. Although the difference between these two figures is not statistically significant, the decrease after this decision is, in and of itself, telling.

This comparison, however, does not accurately capture the phenomenon of Justices self-censoring on less salient cases during times of lower institutional prestige. A better approach may be to examine changes in the rate at which Justices issue simple statements of dissent—that is, statements of disagreement with the majority's disposition that were unaccompanied by an opinion. Arguably, these dissents serve no other purpose but to protect the record of the judge who makes them. They are expressive and focused on the individual's views as opposed to the institution of the Court as whole. Indeed, they cannot even seek to create legal change, because they give future litigants to reasoning on which to rely. Nor can they meaningfully spur legislative change, as legislators have no opposing position to adopt. These can be seen quintessentially ego-centric opinions. If the Taney Court was become more ego-centric over time—without an underlying concern with institutional strength—then the number of simple statements of dissent should continue to grow over time. However, if they are dependent on the institutional strength of the Court to make them possible in the first instance, then they should wax and wane in response to changes in the Court's prestige. Specifically, the number of these simple statements should drop after the Court's reputation is severely damaged by the *Dred Scott* decision in 1857.

Of the 387 total statements of dissent, 177 were simple statements. In some of these cases, Justices may have given his reasons orally but did not transmit them to the reporter. This occurred in the Marshall Court on at least three occasions, with at least one case having enormous institutional and political significance.[118] One could argue that the fact

[118]The reporter noted that Justice Baldwin dissented but did not provide a written version of his opinion in

that Richard Peters, the reporter, mentioned this omission at all indicates that this did not occur when the reporter did not add such a caveat. However, the Court had several reporters through this period and the standards of reporting were still in flux (*see e.g.*, Popkin 2007), which presents the possibility that this occurred more frequently than was indicated in the record. Even so, the absence of dissenting Justices' reasoning suggests that either the dissenting opinion was too inconsequential for the Justice to bother writing it down or, alternatively, was so unimportant that the Justice did not bother to give it to the reporter. Either way, the reasoning of the Justice's dissent appears to be secondary to the act itself. This suggests that the dissent was done for consistency purposes, as suggested by Kelsh (1999) or for otherwise expressive purposes.

To correct for this, I also calculated an adjusted ratio by removing all simple statements of dissent. As a result, any ratio below one indicates that there are more simple statements of dissent than those accompanied by an opinion. Comparing the adjusted and unadjusted ratio thus captures the marginal difference in division on the Court resulting solely from simple statements of dissent (see Table 3.3). The average adjusted ratio of dissent statements to divided opinions is 0.99, indicating that—over the course of the Taney era—there were slightly more simple statements of dissent than dissent accompanied by opinion. Prior to the Court's decision in *Dred Scott*, the ratio was slightly below the overall average at 0.95. In other words, there are fewer statements of dissent accompanied by opinion than there were simple statements. After *Dred Scott*, the ratio increases to 1.09. This alone indicates that the presence of comparatively fewer simple statements of dissent after the Court's 1856 term, supporting the hypothesis, although the difference is not statistically significant.[119]

The adjusted and unadjusted ratios are plotted in Figure 3.8. The solid blue line represents the unadjusted ratio; the dashed orange line, the adjusted ratio. When the dashed line and the solid line overlap, this indicates that the only dissents in that term were accompanied by an opinion. The large gaps between these two lines in the pre-*Dred Scott* period indicate a greater number of simple statements of dissent than dissents with opin-

the following cases: *Worcester v. Georgia*, 31 U.S. 515 (1832); *Kelly v. Jackson*, 31 U.S. 622 (1832); and *Lindsey v. Miller's Lessee*, 31 U.S. 666 (1832).

[119] $t = -0.8992$, df = 26, $p = 0.1884$, one-tailed t-test.

Table 3.3: Average Ratio of Dissent Statements to Divided Opinions

	Unadjusted	**Adjusted**
Full Period	1.49	0.99
(1836–1863)	(0.37)	(0.35)
Pre-*Dred Scott*	1.47	0.95
(1836–1856)	(0.39)	(0.25)
Post-*Dred Scott*	1.55	1.09
(1857–1863)	(0.32)	(0.57)

Note: Standard error in parentheses. Time periods refer to terms of the Court, not years.

ion. The gap narrows after the Court begins to narrow after the decision is handed down in the 1856 term. Although this measure is noisy, it does give a different perspective on how the Justices' dissent behavior changed after *Dred Scott*.

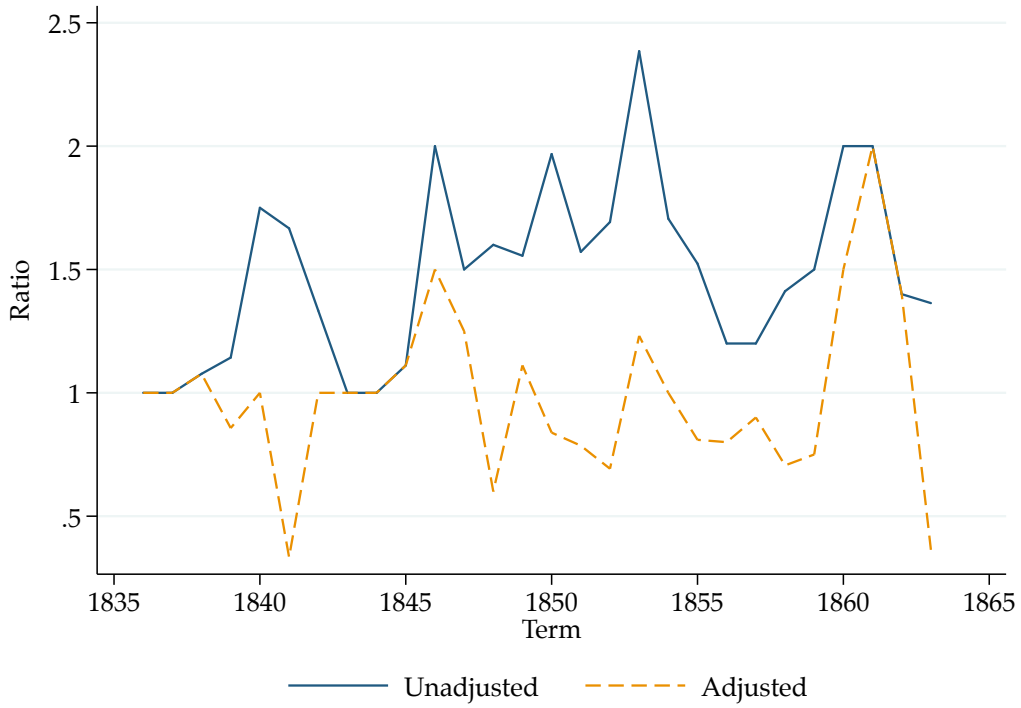
The effect of and Court's response to *Dred Scott* can also be seen in patterns of dissent coalition formation. This, like the notable increase in simple statements of dissent, is a notable innovation of the Taney Court (*see* Dolan 1963, 285–87). Whereas only 15.3% of the Marshall Court's divided opinions involved dissenting blocs, such coalitions were present in 21.7% of the Taney Court's divided decisions (see Table 3.4). Of the 387 total statements of dissent, 226 were accompanied by a rationale. Of these, 25 (11.1%) were joined by one Justice, 18 (8.0%) were joined by two Justices, and 6 (2.7%) were joined by three Justices. Compare this with the number of joiners during the Marshall Court. A higher percentage of Marshall Court dissents were solitary (84.6% as compared with 78.3%), although similar percentages of dissents were joined by one Justice.

Table 3.4: Joiners to Dissents Accompanied by a Rationale

Total Joiners	**Marshall Court**	**Taney Court**
0	66 (84.6%)	177 (78.3%)
1	8 (10.2%)	25 (11.1%)
2	4 (5.1%)	18 (8.0%)
3	0 (0.0%)	6 (2.7%)
Total	78 (100.0%)	226 (100.0%)

Note: Opinions in which no rationale was expressed were not included because they could not be joined.

Figure 3.8: Ratio of Statements to Dissents



Like the issuance of dissent generally and simple statements specifically, joining behavior may also be a product of the Court's perception of its own institutional legitimacy. As discussed earlier in this chapter, there are good reasons to believe that Chief Justice Marshall shaped the Court's opinion-writing, voting, and publishing norms in response to the hostile political environment that, at times, posed an existential danger. Not the least of these included the constant threat of impeachment, the political dominance of the democratically elected branches at the state and federal level, and non-compliance by actors of all political stripes. In response, Marshall enforced a regime of institutional opinions and suppressed dissent.[120]

In contrast, the Taney Court enjoyed growing prestige, at least during the early period. As a result, although the Taney Court retained the institutional opinion, the norms regarding dissent were loosened somewhat; Justices were more free to pursue expressive ends to dissent in cases that earlier may not have warranted dissent. This is obvious through the extensive use of simple statements of dissent. As discussed above, however, the radical

[120] *See* supra Section 3.3.

loss of prestige following the *Dred Scott* decision altered the Court's dissenting behavior.

If this effect is present in other forms of voting behavior, it should also be true with respect to the Justices' decision to join a dissenting opinion. If the Justices perceive the Court's legitimacy to be especially fragile, then joining in a coalition against the institutional opinion may be especially damaging. During the Taney Court, one would expect this to be the case following the *Dred Scott* decision. When the prestige of the Court is robust or growing, forming dissent blocs may look more attractive to the Justices; in this context, such bloc formation seems more likely prior to *Dred Scott*.

Figure 3.9 illustrates joining behavior across the entire Taney Court. Each bar represents the average proportion of dissenting opinions joined by zero, one, two, or three Justices during a particular term. A solitary opinion (i.e., zero joiners) is indicated by the darkest shade of blue, with increasingly lighter shades of blue representing greater numbers of joiners. The term in which the Court decided *Dred Scott* is indicated by the red, dashed line. Simple statements of dissent were excluded from this analysis because, by definition, Justices cannot choose to join them.

A quick look at Figure 3.9 reveals that the period immediately preceding the Court *Dred Scott* decision is lighter than the period following the decision (indicating larger dissenting blocs). Although not conclusive, the joining pattern illustrated in Figure 3.9 is supportive of the the hypothesis that legitimacy affects joining behavior.

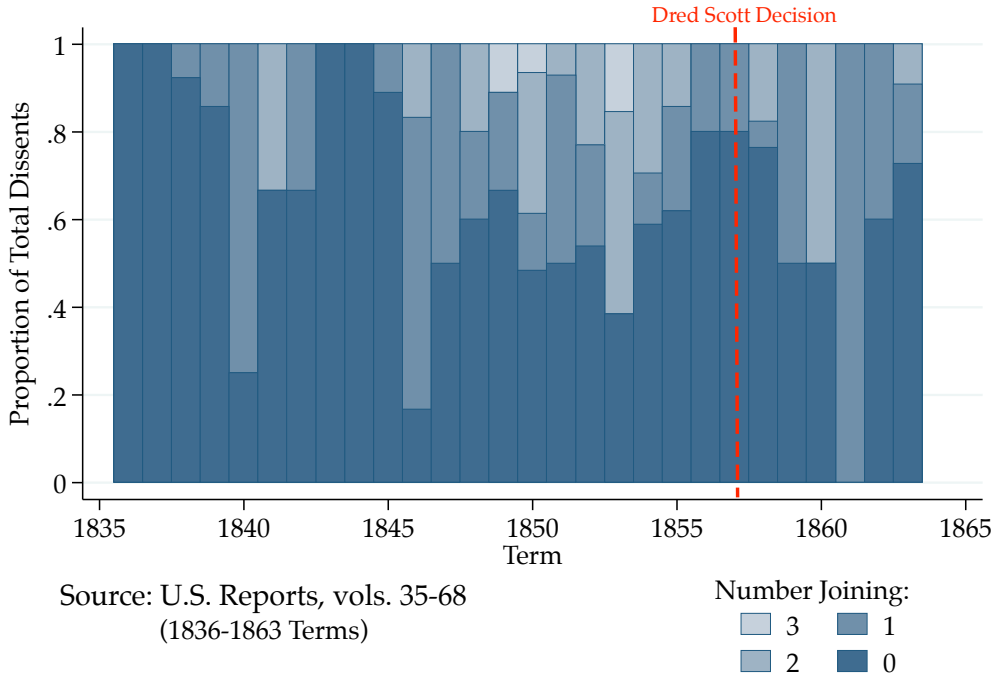
This hypothesis is further supported by a comparison of the average number of three- and four-Justice voting blocs per term before and after the *Dred Scott* decision. Prior to this decision, there were, on average, 1.71 three- or four-Justice dissents per term; following *Dred Scott*, this average dropped to 0.71.[121]

One might argue, however, that this is merely the product of a drop in dissent following *Scott v. Sandford*. However, a comparison of the average *rate* of three- or four-Justice dissents confirms this difference, if less convincingly. The rate prior to *Dred Scott* is 0.12; after, it drops to 0.11.[122]

[121] The difference between these two averages was not statistically significant according to a two-tailed t-test ($t = 0.8226$, df = 26, $p = 0.7909$).

[122] As might be expected, this was not statistically significant either ($t = 0.1579$, df = 26, $p = 0.8758$).

Figure 3.9: Proportion of Dissenting Opinions Joined



3.4.3 Discussion

When taken together, patterns of dissent behavior during the Taney Court suggest that the Justices were sensitive to changes in the Court's prestige. As the its institutional standing grew between 1836 and 1857, the Justices dissented more frequently, and for more reasons, than they had during the Marshall Court. Justices, moreover, were willing to present stronger challenges to the institutional opinion of the Court through the creation of multi-Justice voting blocs.

The Court's prestige, however, was heavily damaged by the *Dred Scott* decision. Although scholars disagree about the extent of the damage,[123] that the Court's reputation had been damaged was clear to the Justices. Following this decision, the data demonstrate that the Justices were less likely to dissent, and when they did, they were less likely to do so for purely expressive reasons. Moreover, there is some suggestion that the post-*Dred*

[123] *Compare* Friedman 2009 (noting that, even in the Court's darkest hour, even its detractors conceded that the decision was legitimate) *with* McCloskey and Levinson 2010 (observing that, through its decision in *Dred Scott*, the Court had "forfeited Northern allegiance").

Scott Justices were less willing to present a strong challenge to the Court's institutional opinions by joining large dissenting blocs.

3.5 From Chase to Hughes: Using Opinions to Rebuild the Court's Legitimacy, 1864–1937

In this section, I examine the work of the Court from the Civil War through the Court's conflict with President Franklin D. Roosevelt over the New Deal. During this period, the Court worked hard to overcome the damage it had incurred with its 1857 decision in *Dred Scott*. The Court capitalized on the nation's fatigue over Reconstruction and jettisoned the responsibility of protecting the rights of freedmen in the South to the states. At the same time, the Court became the champion of private property rights, which often led it to invalidate states' social legislation. Over time, the Court came to protect large, interstate companies seeking to circumvent state regulation. The Justices walked a fine line between the increasingly powerful progressive and populist movements and the business interests that formed the Court's primary constituency.

I assess the Court's response to these tensions through the lens of the Justices' willingness to dissent in the face of souring public mood. Following Clark (2009, 2011), I do so by leveraging court-curbing measures introduced by Congress as proxies for the public opinion of the Court. As Clark (2011, 162) notes, "Congressional hostility toward the Court, and Court-curbing in particular, are important in this respect because they serve as *signals* to the Court about public support for the judiciary."[124] As in previous periods, I generally find that the Court is less likely to issue divided opinions when facing a challenge by Congress, although the evidence is not as clear as it was in the context of the Taney Court.

[124] In addition, Clark (2011, 182) notes, "Court-curbing is a mechanism by which Congress can (possibly, credibly) communicate information to the Court about the Court's standing with the public." This sentiment was confirmed by a Supreme Court Justice interviewed by Clark, identified as "Justice C," who noted, "Congress, especially the House, they really have their finger on the pulse of the public" (193).

3.5.1 The Waxing and Waning of the Court's Prestige

Following the *Dred Scott* decision, the Court's prestige was severely wounded, and it sought to rebuild institutional strength during and in the years following the Civil War. In general, the Court had a difficult time distancing itself from that opinion and "a substantial proportion of Union opinion associated the Court with the Confederate cause, unfairly but nonetheless stubbornly" (McCloskey and Levinson 2010, loc. 1013). The Court's challenge to President Lincoln's suspension of the writ of habeas corpus in *Ex parte Merryman* revealed the fragility of the Court's position with respect to the President during wartime. In May 1861, a friend of Chief Justice Taney's and prominent Maryland planation owner John Merryman, was arrested and detained "on suspicion that Merryman was an officer in a 'secession company' that possessed federal arms and intended to use them against the government" (Ragsdale 2007, 2). Merryman's attorneys submitted a writ of habeas corpus directly to Taney, who granted the writ himself while sitting on the circuit court in Maryland. Taney's opinion, which was delivered directly to Lincoln, argued, "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress."[125] President Lincoln ignored Taney's order, however, and offered no explanation. In July, he reassured Congress that his suspension of the writ had "purposely been exercised but very sparingly" (Ragsdale 2007, 5), but Lincoln argued, contrary to Taney, that he did, in fact, have the legal authority under the Constitution to suspend the Great Writ.

The conflict in *Ex parte Merryman* was not the last between the Court and the other branches during the War or in the period immediately following. Combined with natural pressures on the Court during wartime,[126] "any chance that the Court might play the role of a moderating force . . . had been squandered in 1857. And the Court majority knew it."

[125]This quote is taken from an excerpt of Taney's opinion included in Ragsdale 2007, 34.

[126]For a discussion of the expansive nature of Executive power during wartime, and the Court's general approach to resolving disputes over the limit of that power, see Issacharoff and Pildes 2004. As to the particular difficulties of the situation in *Ex parte Merryman*, Justice Robert H. Jackson acutely observed, "Had Mr. Lincoln scrupulously observed the Taney policy, I do not know whether we would have had any liberty, and had the Chief Justice adopted Mr. Lincoln's philosophy as the philosophy of law, I again do not know whether we would have had any liberty" (Abraham 1992, 117).

(McCloskey and Levinson 2010, loc. 1024). The Court's decision in *Dred Scott* had led its detractors to label it a "hoary apologist for treason" (McCloskey and Levinson 2010, loc. 1020), a perception that was further encouraged by the Court's 1866 decision in *Ex parte Milligan*.

This skepticism of whether the Court would support the President's efforts during the Civil War and Congress's Reconstruction after—paired with strong, but inconclusive, evidence (i.e., the Justices' behavior in *Ex parte Merryman* and *Ex parte Milligan* (in which the Court had ruled that the President did not have the power to authorize military tribunals in areas where the civilian courts were operational)—prompted Congress to attempt to curb the power and reach of the Court.[127] Congress voted to alter the size three times during the Civil War and throughout Reconstruction "to ensure a sound majority in important cases" (Friedman 2009, 133).[128]

Beyond altering the size of the Court, Congress attempted on several occasions to curb its power. Congressional response to the *McCardle* case is illustrative. The controversy began with the political debate surrounding the ratification of the Fourteenth Amendment. Southern states were required by Congress to ratify the proposed Amendment before they could rejoin the Union. Until that occurred, however, the Southern states remained under military control (Friedman 2009, 120–30). This plan, as might be expected, met with great resistance from Southerners, including William H. McCardle. McCardle, the editor of a newspaper in Mississippi, was arrested by the military for "disturbing the peace, inciting insurrection and disorder, libel and impeding reconstruction solely on the basis of several

[127] That such dramatic action was taken is all the more surprising given that Lincoln immediately appointed three Associate Justices by 1862—Noah Swayne, Samuel F. Miller, and David Davis—all of whom possessed impeccable Republican *bone fides* (Abraham 1992, 110–11). Lincoln then appointed another staunch Republican—Stephen Field—a year later. One year after that, Lincoln had the opportunity to appoint a Chief Justice after Roger Taney's death in 1864. Although not his first choice, Lincoln selected Samuel Chase, his own Treasury Secretary—a man of strength, ambition, and unwavering loyalty to the Union cause (Abraham 1992, 120–23). Contrast this with the political response to Jackson's appointment of Democratic/states' rights proponets, such as Taney and McLean, which bolstered the reputation of the Court among a skeptical Democratic population. For a discussion of this, see Section 3.4 *supra*.

[128] In 1863, Congress voted to enlarge the Supreme Court from nine Justices to ten after "one of California's leading jurists, Stephen J. Field, informed the state's U.S. senators that he had no interest in the circuit judgeship but would accept a seat on the Supreme Court" (Center N.d.*a*). *See also* Act of Mar. 3, 1863, 12 Stat. 794. Then, in an effort to deny President Johnson—whose relationship with Radical Republicans had totally deteriorated —the ability to appoint a Justice, Congress passed a bill that "provided for the gradual elimination of seats on the Supreme Court until there would be seven Justices rather than the ten authorized in 1863" (Center N.d.*b*). *See* Act of Jul. 23, 1866, 14 Stat. 209. The third and final alteration of the Court's size shifted the Court back from seven to nine. *See* Act of Apr. 10, 1869, 16 Stat. 44.

vituperative, anti-reconstructionist editorials he had authored and published in the [*Vicksburg*] *Times*" (Van Alstyne 1973, 236). As a part of the Reconstruction Acts, Congress had recently passed expanding the jurisdiction of the Court to grant a writ of habeas corpus to state prisoners,[129] and McCardle exploited it to challenge the constitutionality of the Reconstruction itself (Friedman 2009, 130).

The Supreme Court heard arguments in *Ex parte McCardle* in December 1867. Congress acted quickly in response, stripping the Court of their power to consider habeas petitions under the 1867 Act. The Court waited until after the 1868 election before handing down a decision that acknowledged the Congress had specifically revoked their authority to rule on the issue (McCloskey and Levinson 2010, loc. 1138). As Friedman (2009) observed, "The consequence was that a Supreme Court unable to comprehend the limits of its own authority repeatedly found itself humbled and made the subject of derision" (133).

After Reconstruction, the Court again experienced a growth in prestige. In the *Slaughterhouse Cases* (1873), the Court considered the constitutionality of a Louisiana statute granting a monopoly to a single slaughterhouse in New Orleans while subjecting it to state-regulated process. The Court rejected a strong reading of the Privileges and Immunities Clause, arguing that that particular section of the 14th Amendment was only concerned with *national* rights, like the right to travel, and not substantive rights that would have provided federal remedies for free blacks in the South. In essence, the Court recategorized all important rights as states rights.[130] This decision, as a result, "helped to consign the redoubtable problem of Negro rights to a rather trivial place in the judicial agenda and thus removed an incumbrance that might have been most troublesome" (McCloskey and Levinson 2010, loc. 1233).

A major element of the growth in the Court's prestige in the early 1870s and through the end of the century stemmed from popular fatigue with Reconstruction and Court's seeming willingness to unravel it (Friedman 2009, 138). In the face of the economic collapse of 1873 and the great expense of Reconstruction, the nation was ready to leave the protection of black Americans to the states. As the *New York Times* proclaimed in 1873,

[129] Act of Feb. 5, 1867, ch. 28, §1, 14 Stat. 386.

[130] This discussion draws on Daryl Levinson's lectures on this topic.

"Law has done all it can for the negroes, and the sooner they set about securing their future for themselves the better it will be for them and their descendants" (Friedman 2009, 148). Throughout the 1870s and 1880s, the Court rejected responsibility for the protection of black Americans from private racial discrimination from groups such as the Ku Klux Klan by requiring a "state action" for the conduct to fall under Congress's purview.[131] Having gutted the Civil Rights Act of 1875, the Court was thus content to "leave to the states the problem of Negro rights" (McCloskey and Levinson 2010, loc. 1281).[132]

The irony here is in the dichotomy of the Court's treatment of state power with respect to the rights of black citizens versus state power exercised in the regulation of industry (*see, e.g.*, Stephenson 2003, 488). The separate opinions in the *Slaughterhouse Cases* foreshadowed the Court's concern with what a majority would come to see as the creeping paternalism of the state (McCloskey and Levinson 2010, loc. 1256–61). Here, as opposed to on questions of race, the Court was much more successful enhancing its institutional position. Friedman (2009) explains,

> [E]ven as it was casting out the freedmen, the Supreme Court took corporate America under its wing, offering interstate businesses a refuge from the hostile action of state governments and state courts. By abandoning blacks and embracing corporations, the Court rose to the pinnacle of power. For its work dismantling Reconstruction, the Court received widespread plaudits from an American populace fatigued by the effort to guarantee African-Americans their security, political rights, and some measure of equality. And while many grumbled about the Court's pro-corporate decisions, they amply served the purposes of the dominant Republican Party and its chief patrons, the tycoons of

[131] *Civil Rights Cases*, 109 U.S. 3 (1883). *See also U.S. v. Cruikshank*, 92 U.S. 542 (1875) (reversing the convictions of KKK members under the theory that the 14th Amendment does not apply to the actions of private citizens against each other); *U.S. v. Harris*, 106 U.S. 629 (1883) (finding that the 14th Amendment does not reach private conduct and, as a result, Congress lacked the power to punish members of a lynch mob). *But see Ex parte Yarborough*, 110 U. S. 653 (1884) (sustaining the conviction of an individual under the KKK Act for using violence against black voting in an election because the right to vote was a privilege of national citizenship).

[132] The view expressed here appears to be the standard view among students of the Court's jurisprudence in this era (*see, e.g.*, McCloskey and Levinson 2010, locs. 1178–1243; Friedman 2009, Ch. 4). At least one scholar, however, argues that the modern approach to the Court's state action doctrine is "anachronistic," and the dominant reading of these cases overstates the Court's desire to jettison federal responsibility with respect to racial relations in the South (Brandwein 2007); *cf.* Stephenson 2003 (noting that "as questionable as some of the Waite Court's civil rights rulings might be, none of them threatened paralysis of the national government").

America's flourishing big businesses (138).

This shift was signaled by the Court's 1877 decision in *Munn v. Illinois*[133] In this case, the Court considered whether the state of Illinois had the power to regulate rates charged by grain elevator operators. This challenge appeared to be foreclosed by the Court's decision in the *Slaughterhouse Cases*, but the Court found that a state's exercise of its police power were subject to judicial review although the state had more discretion where private goods were used in the public interest. Although Field disagreed with the Court's decision, the movement toward review of state decisions was broadly reflective of Field's own opinion in the *Slaughterhouse Cases* (Friedman 2009 156), which set the foundation the adoption of laissez-faire jurisprudence to come (Siegel 1991, 92).[134]

Although the Court's decision signaled some skepticism of the state police powers—certainly more than had been present following the *Slaughterhouse Cases*—"[t]he anti-business result in *Munn* undoubtedly satisfied that part of the American public deeply troubled by corporate power in hard economic times" (Friedman 2009, 156). Thus, although the business interests lost in that case, the Court had set the groundwork for the jurisprudence that would later prove to be so helpful to large "combinations" and monopolies that would later seek shelter in the Court.

Beginning in the 1880s, the Court's jurisprudence was marked by the "ebb and flow of nationalism" (McCloskey and Levinson 2010, loc. 1281 (internal quotations omitted)). In many instances, when the regulation of commerce was at issue, "[n]early anything the national government wanted to do, the Waite Court seemed to prepared to accept as constitutionally permissible" (Stephenson 2003, 488). The Court, for example, upheld congressional acts barring Chinese aliens from entering the United States[135] and indirect taxation[136] (Savage 2011*c*, 210–17). At the same time, the Court also curtailed Congress's

[133] 94 U.S. 113.

[134] Obviously, Field's dissenting opinion was not literally adopted. Field argued in the *Slaughterhouse Cases* that the Privileges and Immunities Clause (as opposed to the Due Process Clause specifically) protects the "natural and inalienable right which belong to all citizens" from deprivation by state legislation. He also draws on Adam Smith's *Wealth of Nations*, which he cites for the proposition that the property men have in their own labor is inviolable. This concept underlies the notion of substantive due process and the "freedom of contract" widely applied by the Court during the *Lochner*-era.

[135] *Chinese Exclusion Cases*, 130 U.S. 581 (1889).

[136] *Head Money Cases*, 112 U.S. 580 (1884)

power to investigate private citizens[137] In addition, despite its previous decisions regarding the protection of civil rights, the Court upheld federal laws creating criminal liability for state officers who commit election fraud[138] and prevent interference with voting[139] (Savage 2011*c*, 217).

The flip side of a generally nationalist orientation is a propensity to strike down state laws in the name of federal power. This development was especially distressing to congressional Democrats, who tended to be liberal-leaning on economic and regulation issues. In response, between 1882 and 1887, congressional Democrats threatened the Court with the introduction of 34 court-curbing bills over six years. Most of these bills (20, or 59%) would have altered the procedures of the Court (Clark 2011, 50–51).[140] During this period, the Democrats' control of Congress was split.[141] Despite failing to control both chambers, these bills "tended to make it very far through the legislative process, perhaps due in part to the low profile of procedure-oriented Court curbing" (Clark 2011, 42).

The contradictions continued into the Fuller Court. From 1888 to 1910, the Court—led by Waite's successor, Melville Fuller—invalidated 14 congressional acts either in part or in full, including denying the Congress the power to impose an income tax (*Pollock v. Farmers' Loan & Trust Co.*),[142] and prevented Congress from supporting labor unions (*Adair v. U.S.*),[143] (Stephenson 2003, 491). In addition, the Court also limited the reach of other federal laws, such as distinguishing "manufacturing" from "commerce" and preventing the application of the Sherman Act (*United States v. E.C. Knight Co.*)[144] At the same time, in *Knowlton v. Moore*,[145], the Court upheld the constitutionality of the War Revenue Act,[146]

[137] *Kilbourn v. Thompson*, 103 U.S. 168 (1881).
[138] *Ex parte Siebold*, 100 U.S. 371 (1880)
[139] *Ex Parte Yarborough*, 110 U.S. 651 (1884).
[140] Clark describes procedural bills as seeking to "set rules for constituting a quorum on the Court, requir[ing] recusal under certain circumstances, or providing procedures for following stare decisis" (41).
[141] In the House of Representatives, Democrats were in the minority during the 47th Congress (1881–1883), but the 1882 election produced heavy Democratic victories, perhaps in part due to the expansion of the number of seats in the House from 293 to 325. Democrats maintained control over the House through the remainder of the period discussed here. The Senate, however, is a different story. During the 47th Congress, the chamber was evenly split between Democrats and Republicans. The 1882 election delivered control of the Senate to the Republicans, who controlled the chamber from 1883 through 1892.
[142] 158 U.S. 601 (1895).
[143] 208 U.S. 161 (1908).
[144] 156 U.S. 1. (1895).
[145] 178 U.S. 41 (1900).
[146] 20 Stat. 448, June 13, 1898.

which imposed a death tax as well as "various stamp duties and other taxes" (43).

In addition to finding Congressional power wanting, the Court inconsistently (although perhaps increasingly) offered continued resistance to the exercise of state power. The laissez-faire economics notion of "freedom of contract" —embodied in the doctrine of substantive due process —was given voice by a majority of the Court for the first time in *Allgeyer v. Louisiana* (1897).[147]

The inconsistency in the Court's jurisprudence is illustrated by contrasting the foregoing discussion with Currie's (1985) description of the era:

> In a series of decisions during the ensuing eight years, the Court emphasized the distinction by upholding a great variety of state and federal laws despite the argument that they unduly restrict the newly minted freedom of contract: limitations on the hours to be worked by miners and by employees of public contractors, prohibitions of various contracts in restraint of trade, of charging more for shorter than for longer rail journeys, of speculation in grain futures and of margin sales, and of paying sailors wages in advance of service. A few relatively trivial state actions, to be sure, were struck down on what were unmistakably substantive due process grounds; but as late as 1905 that doctrine seemed to pose no great threat to state or federal legislation (378–79).

The incongruence of these decisions reflect the tensions between the desire of business to remain unregulated and "powerful new social movements [that] formed around and took up the cause of the working poor and bereft" —the populists and the progressives (Friedman 2009, 169). These groups sought social legislation to address issues related to "monopolistic trade practices, . . . the working conditions and wages of common laborers, and . . . [the] enact[ment] of 'social legislation,' including the reform of child labor rules and health and safety laws" (Friedman 2001, 1391–92).

The lack of an administrative state meant that the responsibility to police corporate behavior fell to judicial enforcement of federal and state social legislation. Following the Court's 1877 decision in *Munn*, businesses saw the danger of a permissive Court and used

[147] 165 U.S. 578.

their money to secure "sound courts." As Friedman (2009) explains, "Following *Munn*, moneyed interests withheld contributions to the Republican Party desperately needed to ensure Garfield's victory in the 1880 election until they were assured that Garfield would put the right sort of men on the Court" (159). Despite this push for political influence, adherents to the populist and progressive political movements often wielded power and produced policy at the state level. Perhaps, then, it is unsurprising that "this is where judicial activism was disproportionately felt" (Gardbaum 1997, 487).

The most famous decision of this era illustrates these tensions. In *Lochner v. New York* (1905),[148] the Court found unconstitutional a New York law setting a maximum of 60 hours a week for bakers. Although this decision was nominally a health and safety law, the Court viewed it as the product of a corrupted political process in which unionized workers had pushed for and received a law to even the playing field between nonunionized, immigrant bakers and members of the bakers' union. In short, the Court viewed the law as a manner in which to redistribute property contrary to fundamental principles of liberty. The Court's response was to strike down the New York law in the name of liberty and freedom of contract.

The general principle of *Lochner* was used as a cudgel against other state laws that sought to restrict what a majority of the Court saw as everyman's right to contract his labor freely. In response, members of Congress engaged in "a distinct attack on the Court's jurisdiction and its capacity to intervene in labor disputes" (Clark 2011, 51). In addition to these specific forms of court-curbing bills, Congress additionally sought to "limit the use of judicial review, alter the Court's composition, and otherwise curtail the independence of the federal judiciary" (Clark 2011, 51). Indeed, between 1906 and 1911, members of Congress introduced 92 bills. At an average rate of 15.3 bills a year —2.7 times as many as during the last large Court-curbing period from 1882–87. The largest single group of bills introduced would have altered the remedies the Court was able to administer (30, or 33%). The next largest group of bills (26, or 28%) would have contracted or otherwise changed the Court's jurisdiction (Clark 2011, 45).

The next period of dense congressional attacks on the Court occurred in response to

[148] 198 U.S. 45.

the Court's attack on President Franklin D. Roosevelt's New Deal programs during the Great Depression. Since *Lochner*, the Court had steadily applied its principles to a variety of state and federal legislation, including federal laws which sought to accomplish the following: prohibit the shipment of goods made with child labor in interstate commerce,[149] set minimum hours and wages for women in the District of Columbia,[150] impose additional taxes on owners of factories employing child labor,[151] and permit seamen injured on the job the ability to seek (more favorable) remedies under their state workers' compensation laws (Savage 2011*c*).

The Court's continued attack on state and federal social legislation continued well into the Great Depression. The most famous conflict involves the Court's rejection of President Franklin Roosevelt's New Deal programs, which sought to radically expand the size and scope of the powers exercised by the federal government. The remainder of this story is well-known. The Court proceeded to strike down major elements of the President's plan, including the Agricultural Adjustment Act, the National Industrial Recovery Act, and the Home Owners' Loan Act of 1933 (Savage 2011*c*). The *Lochner* Era thus continued through the New Deal until the Court changed course in 1937 with its decisions in *West Coast Hotel v. Parrish*[152] (upholding state wage and hours laws for women) and *NLRB v. Jones & Laughlin Steel Co.*[153] (confirming the constitutionality of the National Labor Relations Act).

The Court's decisions—which struck down hundred of pieces of legislation between the late 1800s and the late 1930s—spurred national fervor, and the problem of the Court was widely debated in Congress (Friedman 2009, 182–87). From 1932 through 1937, members of Congress proposed 57 bills that would curb the power of the Court, averaging 9.5 bills per year. Of these, 28 (49%) proposed to alter the Court's powers of judicial review, 23 (40%) would have changed the composition of the Court —among these was the President's court-packing plan —2 (4%) would have modified the Court's procedures, and 4 (7%) proposed to restrict its jurisdiction (Clark 2011, 45).

[149] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
[150] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
[151] *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922).
[152] 300 U.S. 379 (1937)
[153] 301 U.S. 1 (1937).

3.5.2 Responding to Institutional Attacks through Changing Dissent Behavior

In 1864, the Court's prestige was at its nadir. Still recovering from the misstep of *Dred Scott* in 1857 and challenging Lincoln's war efforts in *Ex parte Merryman* (1861) (although this was Taney's action alone) and *Ex parte Milligan* (1866), the Court was little trusted and often disdained by Congress and the public at large. Between the end of Reconstruction and into the 20th Century, the Court's prestige was once again on the rise, as its application of laissez-faire economics to the law made it the champion of interstate business. The Court continued in this role, drawing increasing ire from progressive and populist groups. In response, members of Congress became channels for this hostility and, during three different periods in the 1864–1937 era, introduced large numbers of court-curbing bills.

Following Clark (2009, 2011), I argue that such legislation may be seen as a proxy for public disapproval for the Court. As Clark argues, "Congressional hostility toward the Court, and Court-curbing in particular, are important in this respect because they serve as *signals* to the Court about public support for the judiciary" (2011, 162). In other words, the introduction of court-curbing legislation, regardless of probability of passage, is capable of altering the Court to the public mood. Of course, there are other ways that the Court would be aware of public hostility, but Court-curbing legislation has the benefit of being well-documented and available across time.

To assess the validity of this measure, Clark (2011) examines the possibility that court-curbing bills represent a more specific—and credible—institutional threat. If this were true, then the Court would also be responsive to the *seriousness* of the threat posed by Court-curbing bills; Clark, however, fails to find such an effect (2011, 169).[154] Although the Supreme Court may indeed be sensitive to institutional threats, expressing such threats does not serve as the only function of Court-curbing bills. Able to dismiss this concern, Clark notes, "Congressional behavior, and position-taking by members of Congress in particular, serves as a useful and informative cue about public support" (2011, 193).

Using Court-curbing bills as a proxy, in this section, I evaluate the Court's responsive-

[154]When limiting the analysis to bills given committee hearings or the "number of bills reported out of committee," Clark found no substantive difference in the effect of Court-curbing legislation on the number of federal acts struck down by the Court (180–82). *Compare* Clark's (2011) Table 5.1 (all Court-curbing bills) with Table 5.2 ("serious" Court-curbing bills).

ness to perceptions of its own legitimacy as indicated by public support. Clark (2009, 2011) examines this phenomenon in terms of the Court's *substantive* policy response to introduction of Court-curbing legislation in Congress, finding that "an increase in the introduction of Court-curbing bills is associated with a decrease in the number of laws held unconstitutional by the Supreme Court" (Clark 2011, 176). Such responsiveness, when combined with evidence that the Court altered its substantive policy decisions in the face of such legislation, suggests that the Court may also react to a hostile political environment by modifying its *institutional* practices, as well.

3.5.2.1 Hypotheses

As suggested by evidence in previous sections, I hypothesize that the Justices will curtail their dissent behavior in response to court-curbing legislation proposed in Congress. In particular, I argue that the Court will respond to this legislation by engaging in lower levels of dissent—both in terms of absolute numbers and rate of dissent—as a means to protect the integrity of the institution.

Hypothesis 1. *As the lagged number of court-curbing bills increases, the number of opinions issued with dissent will decrease,* ceteris paribus*.*

The threats observed by the Court in the previous period are more convincing if credible. In other words, the current Congress must actually have the will to carry out the threats observed by the Court in the previous period. As a result, the effect of court-curbing bills may be conditional on Congress's willingness to carry them out (Clark 2009).

Hypothesis 2. *Higher lagged numbers of court-curbing bills will result in fewer dissents if and only if the current Congress is opposed to the Court.*

This proposition rests on some specific assumptions about the nature of court-curbing bills. If court-curbing bills are seen as *directly* threatening because their passage could constrain or damage the Court, then the ideological position of Congress with respect to the Court is of paramount importance. If, however, these bills are *symbolically* or *indirectly* threatening—meaning that these bills are seen as signaling public mood—then whether Congress was friendly to the Court would be irrelevant.

Although the focus of this chapter has been on the Justices' opinion writing responses to institutional challenges, salience has also emerged as another important determinant of dissent. Throughout the Marshall Court, for example, when the Chief Justice actively suppressed dissent, dissents generally occurred only in constitutionally important or otherwise salient cases. This rationale for dissenting continued into the Taney Court (Kelsh 1999).

Hypothesis 3. *The number of divided decisions will increase as the number of salient cases heard by the Court increases.*

In addition to case salience and institutional strength, the distribution of ideology among the Justices would be expected to play a major role in whether a Justice will dissent. After all, if all Justices agree on an issue, there is little reason to invest the time and energy to write your own opinion and even fewer reasons to deviate from the disposition of the Court. However, the fact that dissent can be and was suppressed by Chief Justices Marshall and, to a lesser extent, Taney depending on the institution strength of the Court suggests that the effect of ideology may be conditional on institutional strength (in this instance, court-curbing bills).

Hypothesis 4. *As the ideological distance between Justices on the Court increases, the number of dissenting opinions will increase.*

3.5.2.2 Data and Methods

To examine the Court's response to institutional challenges in the period following Reconstruction, I use a negative binomial regression to estimate the effect of court-curbing bills—used as a proxy for the institutional strength of the Court—on the Court's dissent behavior. The primary dependent variable, number of dissenting opinions, is a count variable. Ordinarily, a Poisson model may be appropriate, but there are good reasons to believe that these counts are over-dispersed. The issues that come before the Court arise from the major social and political issues of the day. For example, Friedman (2009, 164) noted how, during this period, social legislation in states pushed corporations to seek relief in federal courts. This would presumably create a clustering or herding effect in litigation. Justices

who differ from the majority in one cases is likely, then, to disagree in similar cases. This difficulty is compounded by the fact that the Court had very little control over its agenda until the passage of the Judges' Bill of 1925, which removed much of the Court's mandatory jurisdiction.[155]

To estimate the changes in the Court's institutional prestige, I use Clark's (2009, 2011) court-curbing data. To collect these data for this particular period, Clark use the indices of the House and Senate Journals and "identified all bills introduced in Congress indexed under an extensive set of terms" (2011, 36). He then categorized bills introduced into one of six categories: judicial review, composition, procedural, jurisdiction, remedy, or other. Although the preceding discussion began with the assumption of Chief Justice Chase and continued until the 1937, data on the introduction of court-curbing bills is unavailable for the entire period. Clark's data begins in 1877, however, providing 61 years of data on which to estimate this model of dissent promulgation.

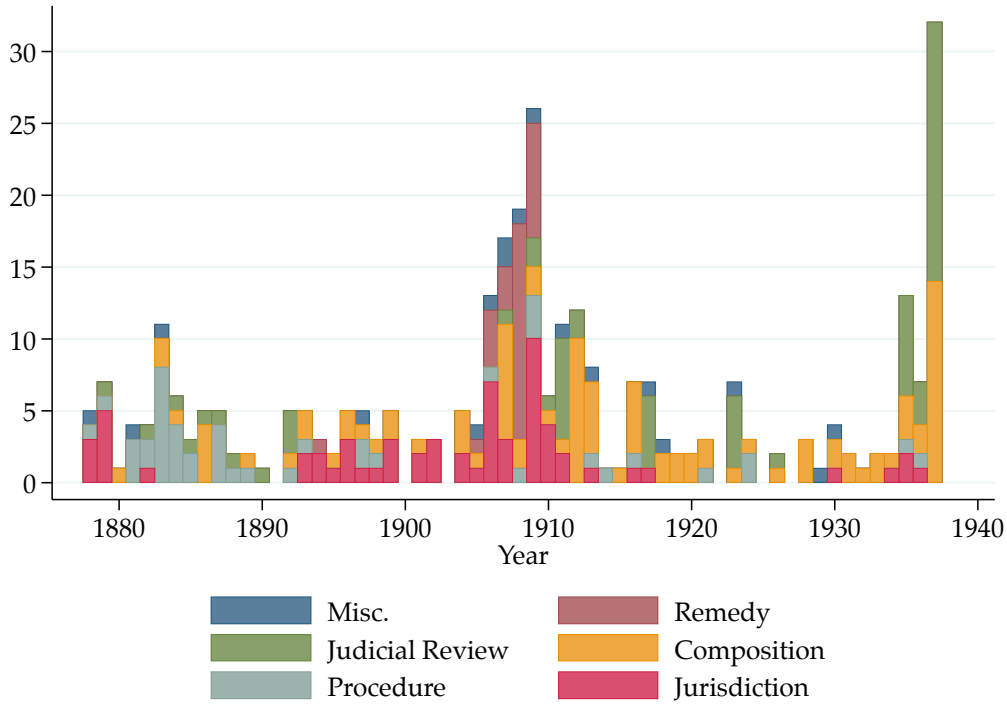
As Clark (2011) discusses, the heaviest periods of court-curbing this era occur from 1882–1887, 1906–1911, and 1932–1937. Figure 3.10 indicates that these measures proposed different methods of curbing the Court's power, however. In the 1882–1887 period, Members of Congress seemed most concerned with altering the Court's procedures (bluish-grey bar), as compared with the 1906–1911 period, where jurisdiction-stripping and remedy-based reforms seem to dominate the measures. Finally, from 1932 through 1937, most of the measures appear to be concerned with the composition of the Court or judicial review.

Members of Congress introduced both statutory measures and constitutional amendments to accomplish these purposes. As illustrated in Figure 3.11, the introduction of Court-curbing statutes was the most common method during the 1882–1887 and 1906–1911 period (plotted in green). Constitutional amendments became more common during the 1932–1937 period, although these continued to be introduced at a lower lower rate than statutes.

Scholars have used a variety of proxies for issue salience, including whether the case involved a constitutional issue, whether the Court's decision appeared on the front page of

[155] "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes," 43 Stat. 936 (1925).

Figure 3.10: Purpose of Court-Curbing Legislation, 1877–1937



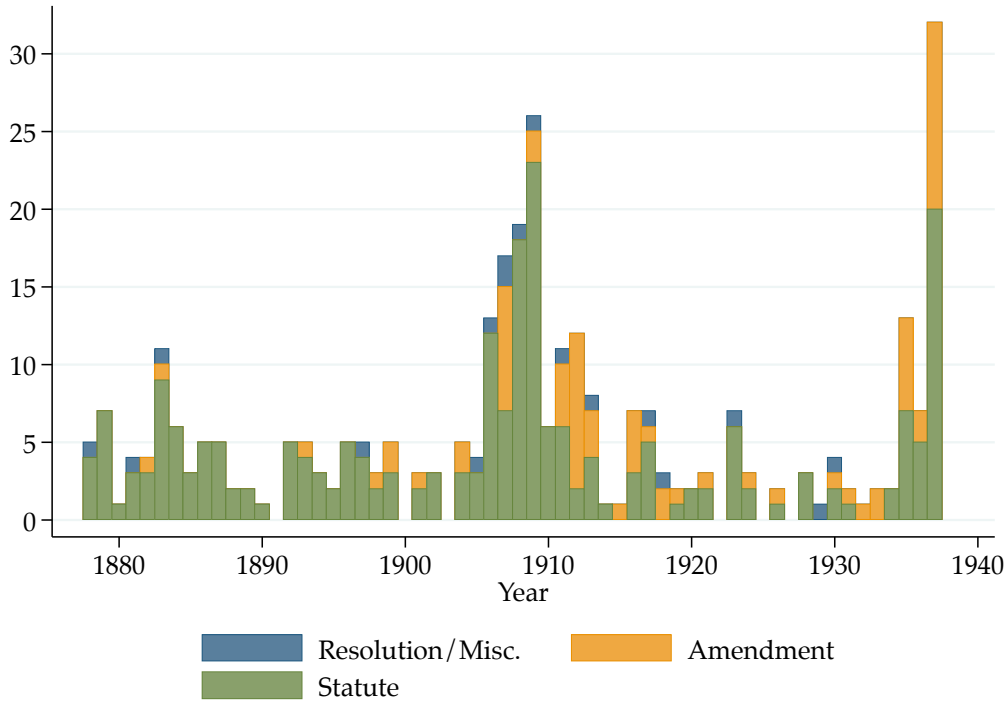
Source: Clark (2011), Appendix B: Court-Curbing Bills, 1877–2008

the *New York Times* (Epstein and Segal 2000*b*), and whether it appears in the Congressional Quarterly's list of landmark Supreme Court cases. The CQ list has its shortcomings when used as a proxy for the Court's perception of a case; a decision's "larger significance" is almost surely measured by its importance over time, creating a glaring anachronism (Savage 2011*c*). On the other hand, one might argue that Justices should, on average, be able to see the importance or implications of the issues involved in the case when deciding. The *New York Times* measure ameliorates this issue, as it captures current thought on the importance of an issue. The number of salient decisions promulgated by the Court per year are plotted in Figure 3.12.

Estimating ideology, however, presents some challenges. Martin-Quinn scores are available beginning in only in 1946 (Martin and Quinn 2002).[156] Even if these scores were available for the time period under examination, they would be inappropriate, because

[156]This is because Martin-Quinn Scores are calculated using voting information provided in the Supreme Court Database.

Figure 3.11: Type of Court-Curbing Measures Introduced, 1877–1937

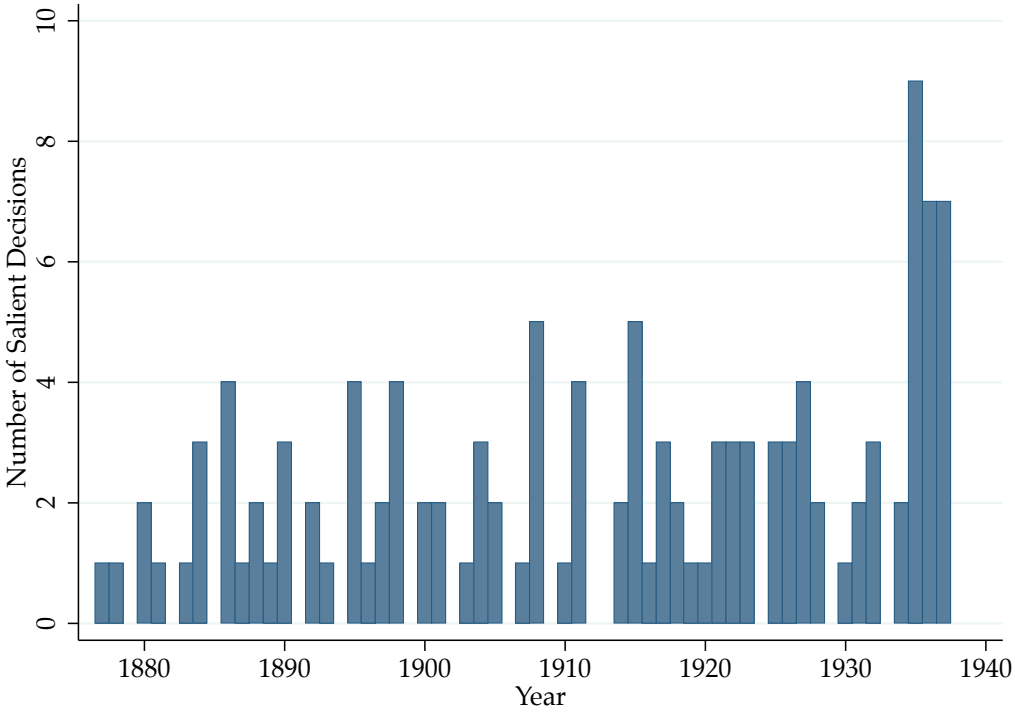


Source: Clark (2011), Appendix B: Court-Curbing Bills, 1877–2008

they use Justices' votes to produce the measure itself. Segal-Cover scores offer a measure of ideology exogenous to the Justices' decision-making process by exploiting accounts of Supreme Court nominees in four newspapers' editorials (Segal and Cover 1989). Among other issues (some of which are discussed in the next section), the earliest Justice for whom this score is available is Hugo Black, who was appointed by President Roosevelt in 1937—the final year of the period examined in this section. Given these issues, I will rely on a simple count of Republican appointees as a proxy. Where the natural court is split across a year, I will use the weighted average of the number of Republican appointees.[157] Throughout this period, Democratic appointees never held more than three seats on the Court. Republicans, as may be expected, totally dominated the Court. Summary statistics

[157] I recognize that this measure is of dubious validity given the era. One notable example that demonstrates its shortcomings is the classification of Justice David Davis, a Lincoln appointee commissioned in December 1862. Though "once . . . a staunch Republican (and also Lincoln's campaign manager in the election of 1860," David Davis's "recent vacillation [around the 1876 presidential election] left all unsure about his party loyalties" (Stephenson 2003, 468). As a result, he was chosen to be the "independent" on the commission to resolve the 1876 presidential election.

Figure 3.12: Salient Decisions by Year, 1877–1937



Source: CQ's *Guide to the Supreme Court* (Savage 2011*c*)

for this variable are displayed in Table 3.5.

To estimate the frequency of the primary dependent variable, I will use a negative binomial regression model. Given that frequency constitutes count data, one might assume that a Poisson model would suffice. However, there are reasons to believe that the number of dissents promulgated is actually a bit over-dispersed. During this period, the Court is naturally passive in its agenda setting. It has little control over the cases it hears.[158] As

[158]However, one could argue that the Court, through its decisions, encourages certain types of cases to be filed (Baird 2004).

Table 3.5: Summary Statistics for Party of Appointing President

	Mean	Median	Min	Max
Democrats	1.87	2	0	3
Republican	7.10	7	6	9
Prop. Republican	0.79	0.78	0.67	1

Source: Federal Judicial Biographical Database

a result, the Court's agenda would be driven by exogenous social trends that may produce waves of certain types of legislation at the state or federal level, provoking similar types of responses. This external factor—which may be thought of as unobserved heterogeneity—may cause clumping in dissent behavior, violating the Poisson distributional assumption that Var($y||\mathbf{x}$)=E($y||\mathbf{x}$).[159] Under these conditions, the Poisson model would no longer be efficient. Using a negative binomial regression corrects for this inefficiency by estimating an over-dispersion parameter, defined in this analysis as α, which represents the variance of the unobserved heterogeneity. The variance of the negative binomial model is calculated as: Var($y||\mathbf{x}$) = $\mu_i(1 + \alpha\mu_i)$.[160]

The negative binomial regression takes the following form:

$$dissent_t = \alpha + \beta_1(court - curbing_{t-1}) + \beta_2(opposing\ congress_t) + \beta_3(Courtcurbing_{t-1} * opposing\ congress_t) + \beta_4(total\ decisions_t) + \beta_5(number\ salient_t) + \beta_6(ideology_t) + \beta_{7-10}Chief + \epsilon$$

3.5.2.3 Analysis

A preliminary cut of the Court-curbing data suggests that greater numbers of court-curbing bills in the previous year is negatively correlated with both the total numbers and rate of dissent throughout this period. In other words, as the Court observes greater numbers of court-curbing legislation, there is less dissent.[161]

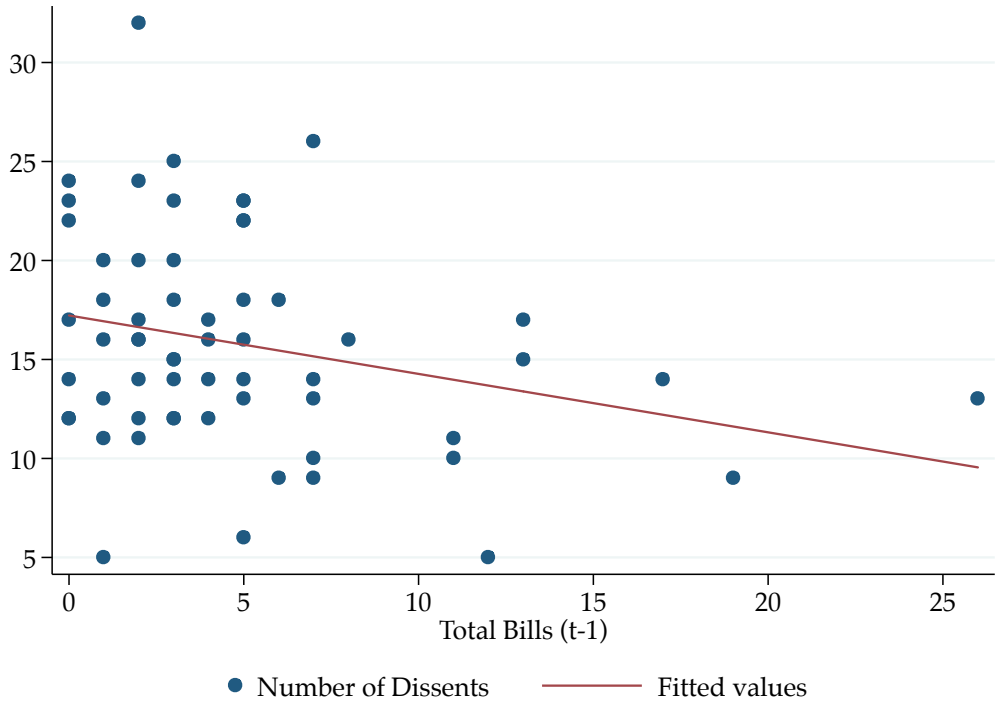
These initial findings are confirmed by the results of the negative binomial regression of number of dissents on Court-curbing bills. I used four different measures of court-curbing behavior as a proxy for the institutional prestige of the Court. The results of the models are presented in Table A.2. The results of the primary analysis is found in the first column. Here, the number of dissents is regressed over the total number of Court-curbing

[159] For a discussion of this, see *Econometric Analysis of Cross Section and Panel Data* N.d., 725.

[160] For a discussion of this, see *Econometric Analysis of Cross Section and Panel Data* N.d., 737. The unobserved heterogeneity is assumed to be independent from the observations and distributed according to a gamma distribution with variance α, referred to by Wooldridge as η^2. The conditional mean remains the same as in the Poisson model: E($y_i||\mathbf{x_i}$) = $m(\mathbf{x_i}, \mathbf{fi})$. The conditional variance, however, is offset by the variance of the unobserved heterogeneity, α, as described above.

[161] This relationship is confirmed when plotting dissent *rates* against the number of Court-curbing bills. See Appendix A.

Figure 3.13: Relationship between Total Number of Dissents and Total Court-Curbing Bills, 1877–1937 (per year)



Source: Clark (2011), Appendix B: Court-Curbing Bills, 1877–2008; Supreme Court Compendium

bills in the preceding year (*Total Bills*$_{t-1}$). The lagged number of bills is used to account for the fact that the Justices must first observe congressional behavior before reacting to it. The second column uses a dummy variable for whether the previous year is located in a period when many court-curbing bills are introduced. In other words, an observation is coded as 1 if the *previous* year was a period of high Court-curbing activity. The lagged nature of this variable accounts for the fact that the Court would likely not be able to determine whether or not it is still in a period of heavy Court-curbing but knows whether or not the *previous* year was one characterized by a lot of congressional activity. Clark (2011) defines these periods as 1882–1887, 1906–1911, and 1932–1937. The third column considers the effect of only the statutory changes proposed in the preceding year. The fourth and final column uses the the proposed number of court-curbing constitutional amendments as a proxy. For each of these measures, a lagged value is used. The Court must have time to both observe

and respond to congressional cues for the test to be meaningful (Clark 2009).[162]

The introduction of Court-curbing bills—the proxy for the Court's institutional strength—is statistically significant in three of the four regressions. These models were also estimated using OLS with dissent rate as the dependent variable. The results confirm the findings of these four models, and these auxiliary analyses are reproduced in Appendix A. This result, generally speaking, supports the theory that, when the Court sees its institutional prestige threatened, it begins to favor institutional power over the expressive benefit that dissents may provide to individual justices. Arguably, dissents can serve little purpose if the Court as an institution has been discredited.

The pattern of significance across these four regressions, however, can tell us much more than this about the Court's institutional response to external threats. The results in Column (1) provide evidence supporting the general point that greater levels of external threat result in lower levels of dissent. That $statutes_{t-1}$ also exhibits this effect is unsurprising; $statutes_{t-1}$ is correlated with $total\ bills_{t-1}$ at $\rho = 0.927$. Taking the results in column (1) together with those in column (4)—regressing number of dissents over the number of constitutional amendments introduced in the previous year ($amendments_{t-1}$)—suggests that the Court is not simply response to any threat; rather, the Court is responsive to more immediate threats. A high number of statutory proposals may pose of signal a more immediate threat than constitutional amendments which are both much less likely to pass and, even if successful, would take much longer to do so. Thus, there is some evidence that the Court is sensitive to the *form* that some congressional threats take and what that signals about the broader political environment. The predicted number of dissents from

[162]Clark (2011) uses a logistic transformation of the number of Court-curbing bills in his estimates, although he finds no difference between the models using the transformed and untransformed variables. Clark explains,

> [T]he raw number of Court-curbing bills introduced each year is a less than ideal measure for several reasons. The first difficulty is that it seems unlikely that each additional Court-curbing bill introduced has a similar effect on the Court. Rather, it is most likely the case that the first few Court-curbing bills have little impact; further increases, however, will likely have a larger impact. Finally, once a given threshold has been met, it is unlikely that additional Court-curbing should not increase linearly in the number of Court-curbing bills; rather, there should be a difference between judicial decision making when there is little or no Court-curbing and judicial decisions making when there is a lot of Court-curbing. This type of relationship describes the *logistic* function, which has an 'S' shape (171).

Table 3.6: Negative Binomial Regression Estimates for Total Number of Dissents, 1877–1937

	(1)	(2)	(3)	(4)
	Total Bills$_{t-1}$	High Density Period$_{t-1}$	Statutes$_{t-1}$	Amendments$_{t-1}$
Court-curbing$_{t-1}$	-0.025**	-0.369**	-0.034**	-0.004
	(0.008)	(0.069)	(0.010)	(0.025)
Opposing Congress	0.042	-0.040	-0.067	0.163
	(0.142)	(0.122)	(0.149)	(0.118)
Court-curbing$_{t-1}$	0.011	0.467**	0.047	-0.055
X opposing Congress	(0.022)	(0.126)	(0.031)	(0.035)
Total Cases	-0.002	-0.001	-0.002†	-0.001
	(0.001)	(0.001)	(0.001)	(0.001)
Number Salient	0.025	0.025	0.016	0.024
	(0.025)	(0.025)	(0.023)	(0.024)
Prop. Republican	0.055	0.216	0.202	-0.369
	(0.633)	(0.561)	(0.608)	(0.636)
$ln(\alpha)$	-3.581	-3.63	-3.645	-3.39
	(0.500)	(0.531)	(0.509)	(0.447)
α	0.028	0.026	0.026	0.034
	(0.014)	(0.014)	(0.013)	(0.015)

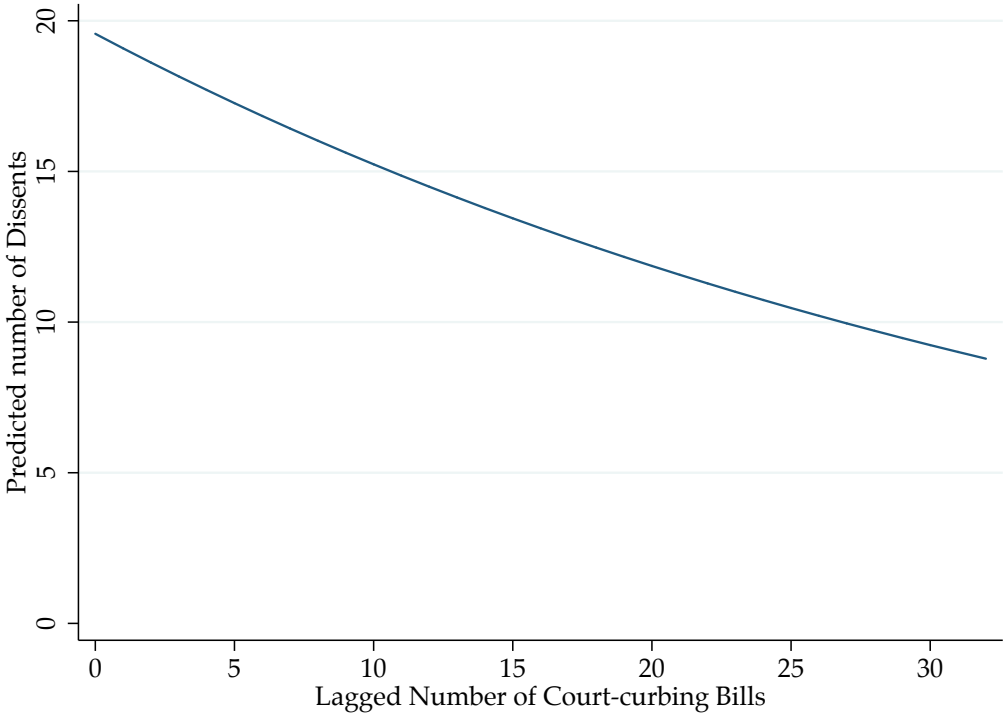
Notes: $N = 60$, $^{**} = p < 0.01$, $^{*} = p < 0.05$, $^{\dagger} = p < 0.1$ (two-tailed test). Estimates for Chief Justices (not significant) and the constant term (significant at $p < 0.001$) are omitted from the table. Errors are clustered on natural court.

Sources: *Court-curbing legislation* and measure of *opposing Congress* from Clark (2009, 2011); *total cases* and *total number of dissents per term* from the Supreme Court Compendium; number of salient cases per term from Savage (Savage 2011*c*); and *proportion Republican* calculated using natural court data from the Supreme Court Compendium and presidential appointment information from the Federal Judicial Biographical Database (FJC website).

model (1) is plotted in Figure 3.14.

Notably, neither *opposing Congress* nor the interaction term *Court-curbing*$_{t-1}$*xOpposing Congress* is significant in three of the four models (1,3, and 4). This suggests that Court-curbing bills should be seen as channeling or signaling public mood, as opposed to constituting a concrete threat by Congress that the Court is trying to avoid. The notable excep-

Figure 3.14: Predicted Number of Dissents, 1877–1937 (per year)



Note: All continuous variables held at their means; dichotomous variables held at their modes.

tion here is the model in column (2). In this model, the number of divided decisions was regressed over a dummy variable indicating that the prior year was situated in one of the three periods of heavy court-curbing activity (1882–1887, 1906–1911, or 1932–1937). Both *high density period*$_{t-1}$ and the interaction term (*high density period*$_{t-1}$ *x opposing Congress*) were significant. While the directionality of *high density period*$_{t-1}$ was negative (the expected direction), the interaction term was not.

This finding—not reproduced in any other estimation—runs contrary to the hypotheses suggested in the previous section. The results of model (3) indicate that the marginal effect of observing a *high density period* in the previous year and having a opposing Congress in the current year increases the number of divided decisions from 17.97 to 19.82 (or by about 1.85 dissents). If, however, Congress is friendly, then the marginal effect of observing a *high density period* is to *decrease* the number of dissents from 18.71 to 12.94 (or by 5.77).

Neither number of salient cases nor the number of Republican appointees was statistically significant. This is, perhaps, not surprising given the noise inherent in these measures. These findings are robust to alternative specifications, such as using the dissent rate as opposed to absolute numbers.

Finally, the confidence intervals for the α over-dispersion parameter in each of the four regressions indicate $\alpha \neq 1$. This allows the rejection of the null hypothesis that each divided opinion is independent from the others (or, $\sigma_i^2 = 1$). In other words, it confirms that the generating process for divided decisions is lumpy; when divided decisions occur, they tend of occur in groups. The probability of seeing one divided opinion is related to the probability of seeing other divided decisions.

3.6 Conclusion

Throughout its early history, the Court struggled to assert its place in the federal system. Whereas Congress and the President derived institutional legitimacy from a popular mandate, the Supreme Court had no such luxury. The English model of judicial decisionmaking, in which judges delivered their opinions seriatim, was particularly poorly suited to the American experience. These practices, combined with inconsistent or lagged publication of opinions, left the Court inaccessible to the public. Moreover, the traditional source from which the English courts derived their legitimacy—the King—was absent by design. The Court was on its own, it would seem, to use its wiles to build institutional strength in the face of the often hostile Congress, President, and state governments.

Some of the Court's institution building was necessarily substantive in nature. As chronicled by many, the early Court appeared to strategically assess the political environment and promulgate decisions falling within acceptable bounds, while seeking to augment its own institutional strength. *Marbury v. Madison* is the most famous example of this (see, e.g., Carrubba 2009). This is not to say that the Court did not push beyond these politically acceptable bounds; the Jay Court's decision in *Chisholm v. Georgia* was a particularly glaring example of the Court's institutional frailty. But, over time, the Court managed to build credibility and strength. Under Chief Justice Marshall's guidance, the Court became

a symbol of strong national power. Gradually, as Republicans began to replace outgoing Federalists appointed by Washington and Adams—especially Jackson's appointment of Chief Justice Taney—even states' rights proponents came around to accept and support the Court. In some ways, though, this perceived institutional strength was illusory. In acts that may be best characterized as hubris—or maybe desperation—the Court began to weigh in on the issue of slavery in decisions that cut close to the core the uneasy compromise that gave birth to the Union. The Court's decision in *Dred Scott* is both zenith and nadir, representing one of the Court's most sweeping assumptions of power and the cause of its most precipitous fall.

Following *Dred Scott*, the Court labored to rebuild its reputation through both deferring to the power of the federal government in the years following the Civil War and, later, soliciting a new power base—business—in its embrace of laissez-faire economics as a legal principle. Although the Court's jurisprudence throughout the *Lochner* Era, as this period became known, was more doctrinally complex than many accounts admit (Friedman 2009), the tensions between progressive state legislators and the social Darwinist tendencies of the Court were pronounced, and the Court struck down many state and federal efforts to protect workers' health and safety and spur economic recovery. The conflict, which reached its apogee during the New Deal, fizzled in 1937, as the Court's about face in *NLRB v. Jones & Laughlin Steel* and *West Coast Hotel v. Parrish* affirmed the constitutionality of federal and state regulation, permitting governments to regulate broad swaths of social and economic conduct.

This terse discussion of the Court's doctrinal and political history is most commonly told when examining the Court's efforts to build its legitimacy through the content of its decision. This story—while important—often overshadows more subtle efforts undertaken by the Court to build strength through the creation of institutional norms, such as what as been called the norm of consensus or, perhaps, acquiescence. Throughout this chapter, I have offered a variety of evidence—both qualitative and quantitative—that the Court consciously spoke with an institutional voice to bolster its standing as an important and independent institution, especially in the face of a strong Congress, which spoke with a unified voice through legislation.

Contrary to the popular telling, this norm was first employed during the Jay and Ellsworth Courts. During this time, the Court began to issue a nascent opinion of the Court, albeit in fits and starts. Although evidence of this early institutional opinion is complicated by the reporting practices of the time (Kelsh 1999, Popkin 2007), evidence of such a norm is compelling. In the ten years prior to Marshall's tenure, 13 of the 61 decisions (21%) issued by the Court were reported as unanimous, with seriatim opinions written in roughly the same percentage of cases (20%). Moreover, seriatim opinions tended to be reserved for more salient decisions invoking constitutional issues.

Chief Justice Marshall solidified this practice, often writing the opinion himself. Although many scholars attribute this fact to Marshall's natural leadership abilities—he is called the "Great Chief" after all—many internal and external forces conspired to aid Marshall in this task. Internal factors included the relative homogeneity in the preferences of the Justices, namely a desire for a strong federal government. The strong external factors pushing the Court to coalesce into a unified Court, as opposed to a collection of judges, were arguably much more important to the development of the norm of consensus than a confluence of Justices' opinions during this time. Especially in the early years of Jefferson's presidency, the Court was under constant attack, including the threat of noncompliance by state actors and of impeachment by Congress. By suppressing dissent and speaking with an institutional voice, the Court could use its opinion to shield the Justices from a political assault, while also building public support by making the Court's opinions more accessible to a lay audience. This would have been impossible had the Justices issued primarily seriatim opinions.

As the Court matured and its standing increased, the Justices began to feel more comfortable breaking away from this norm and increasingly began to issue separate opinions. During the 1840s and 1850s, in particular, Justices began dissenting more frequently and joining each others' opinions in blocs, with the practice reaching its apex in the years before the *Dred Scott* decision. Following *Dred Scott*, however, the Court's popular support bottomed out and dissenting became less prevalent in terms of both simple division on the Court and number of dissenting opinions issued per decision. In response to dipping institutional strength, the Court adopted a veneer of consensus to again shield itself from

external attack, in terms of both noncompliance and popular disapproval of its decision.

This pattern of invoking unanimity to bolster institutional strength and protect the Court from external attack continued well into the 20th century. As discussed in Section 3.5, the Court issued fewer dissents when it perceived that its popular support was wavering, suggesting that, just like the early Court, the Supreme Court continued to use not only substantive tools (i.e., the policy direction of its decisions), but its institutional tools, as well—such as opinion writing behavior, to shape public opinion and protect itself from external attack. The results of the negative binomial regressions presented in Section 3.5 support the hypothesis that, as the Court perceived public opinion dipping, the Court responded by dissenting less. This finding is robust to transformations of the main independent variable of interest (i.e., Court-curbing bills), as well as alternative specifications of the dependent variable.[163]

At the end of the period examined in this chapter, Americans' understanding of the law was rapidly changing. Dire economic conditions produced by the Great Depression, and the rise of legal realism created ripe conditions for a shift in the public's understanding of the Court and its role in American society. This shift in public perception also resulted in changes not only in how the Justices dissent, but also the nature of dissent itself. In the following chapters, I explore how dissents have changed in the post-New Deal period, illustrating that Justices no longer responded to institutional threats and drops in public approval by altering dissent behavior. Rather, dissents began to be used in an effort to both shape the implementation of the Court's decisions and *validate* the Court's place in our deliberative democracy.

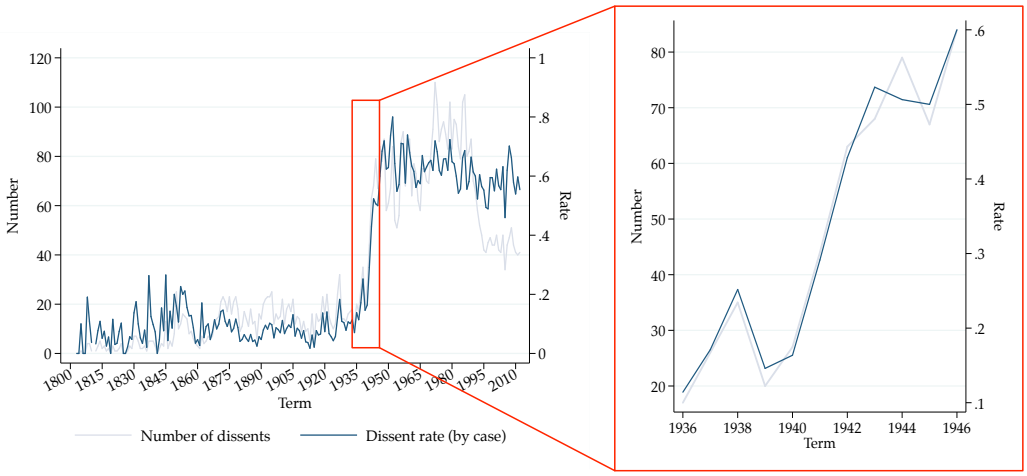
[163]See Appendix A.

Chapter 4

Dissent in the Modern Era, 1937–Present

The rise in divided decisions since the 1940s has been well-documented. As illustrated in Figure 4.1, the dissent rate on the Court shifted in a dramatic and permanent way. But the decision to dissent is distinct from deciding what *type* of dissent to write or whether to *join*. In the Marshall Court, Justices' dissents were normally solitary affiars. As the Court's prestige grew throughout the Taney era, the Justices demonstrated a willingness to create voting blocs to rival the institutional decision of the Court.

Figure 4.1: Change in Supreme Court Dissent Rate, 1936–1946



Source: Supreme Court Compendium

This section provides an overview of the conflict over President Roosevelt's New Deal programs, which lead to the President's Court-packing plan and Justice Roberts' "switch in time that saved nine." I then examine the literature analyzing the dramatic change in dissent rate that followed the Court's policy reversals and decision to uphold central economic regulations during the New Deal.

After examining that transition, I evaluate the nature of dissent in the modern era, defined as 1937 through the present. I find, among other things, the frequency and structure of the modern dissenting opinion—defined as dissents delivered since 1940—have changed over time. Unlike previous periods of the Court's history, however, this change does not appear to be the product of the Court's institutional prestige. Between the beginning of the Vinson era, dissent behavior has shifted toward more closely divided (5–4) decisions, more cohesive dissenting coalitions, and a smaller number of minority opinions speaking for a larger number of Justices. At the same time, opinions appear to have become more complex over time. Some preliminary evidence additionally suggests that these changes cannot be attributed entirely to the distribution of preferences on the Court.

4.1 The Rise of Dissent in the Modern Era

The modern dissent was born in the crucible of the old Court's conflict with President Roosevelt's New Deal. Looking backward toward *Lochner* Era precedents defending the due process liberty rights, property rights, and the freedom to contract, the Supreme Court began to bind the country in an ever-tightening jurisprudential straitjacket (Mason 1979). Some of the Court's decisions earlier in President Roosevelt's tenure, such as *Nebbia v. New York*[1] (upholding a New York law setting minimum prices for milk) and *Home Bldg. & Loan Assoc. v. Blaisdell*[2] (approving of a Minnesota law permitting a grace period from foreclosure), suggested that the Court might cast a friendly eye upon the New Deal programs (Friedman 2009, 199–200).

By the winter of 1935, however, the Court began striking down important New Deal

[1] 291 U.S. 502 (1934).
[2] 290 U.S. 398 (1934).

legislation, such as the National Industrial Recovery Act,[3] the Bituminous Coal Conservation Act,[4] and the Agricultural Adjustment Act (Friedman 2009, 198–205).[5] In doing so, the Court foreclosed the federal government's ability to address the crisis, defining many embodiments of commerce out of the Commerce Clause. Its decision in *Nebbia*—a bright spot—suggested that states retained the power to use economic legislation to address the Great Depression. This hope, however, was dashed in *Tilpado v. Morehead*.[6] Here, the Court struck down New York's minimum wage law for women—a law that had been specifically designed to overcome the what the Court perceived as shortcomings in a similar law in *Adkins v. Children's Hospital*[7]

Roosevelt was at his wits' end. Under the Court's conception of the Commerce Clause, the federal government had little power to act in response to the New Deal, shifting the responsibility to the states. The states, however, lacked the capacity to act because social legislation would interfere with property and contract rights. Roosevelt needed the Court to see the Constitution in a different light. To Roosevelt, the Constitution should not be a "barrier to progress[, but rather] the broad highway through which alone true progress may be enjoyed" (Shesol 2010, loc. 886) (citing Roosevelt's approval of Chief Justice Edward Douglass White's 1914 statement). In January 1937, Roosevelt announced his plan to "aid" the Court in its work by appointing an additional Justice for each Justice over the age of 70, up to 6 additional Justices. Then, in 1937, the Court abruptly changed course. By upholding Washington state wage and hour laws for women in *West Coast Hotel v. Parrish*[8] (*contra Tilpado*) and the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Co.*[9] (*contra Carter Coal*), the Court signaled its acquiescence to the popular will.

Whether the Court changed in response to Roosevelt's plan is unclear. The traditional story is that the Court bowed to Roosevelt's threat. But there are reasons to think that the truth is more complicated. First, Roosevelt's plan was widely criticized as "disingenuous" and an assault on the independence of the judiciary (Friedman 2009, 217). Following the

[3] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[4] *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).
[5] *United States v. Butler*, 297 U.S. 1 (1936).
[6] 298 U.S. 587 (1936).
[7] 261 U.S. 525 (1923).
[8] 300 U.S. 379 (1937)
[9] 301 U.S. 1 (1937)

1936 elections, moreover, "the Court had started issuing a series of opinions that indicated it might be yielding to the popular will" (Shesol 2010, loc. 4736). Justice Roberts had begun to show skepticism about economic liberty theories as early as *Nebbia*, suggesting that the switch was not quite as predicated by FDR's Court-packing plan so much as his own conscience.

Following the Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*,[10] "the Justices were somewhat less concerned than formerly to avoid any action that might remove the protective coloration disguising their power" (Mason 1979, 123). At the same time, the dissent rate on the Court rose erratically before skyrocketing from 29.1% in 1941 to 42.9% in 1942. As Walker, Epstein and Dixon (1988) describe, "[C]onsensus norms did not gradually erode, but were abruptly shattered" (363). This spike in dissent behavior is has been traditionally attributed to the leadership of Chief Justice Harlan Fiske Stone (Walker, Epstein and Dixon 1988). As one scholar noted, "The bench Stone headed was the most frequently divided, the most openly quarrelsome in history. If the Chief's ability to maintain the *appearance* of harmony, he was certainly a failure" (Mason 1979, 169–70).

Prior to assuming the position of Chief Justice, Stone himself dissented frequently and reportedly chafed at the manner in which Chief Justice Charles Evans Hughes conducted conference. One commentator declared himself

> shocked by the decisional process in the Supreme Court of the United States as it proceeded under Hughes. . . . [Given the short period of time Hughes budgeted for the conference,] [f]ew of the judges made any extensive notes about the cases they heard; few of them made any careful study of the records or briefs or the cited authorities before they went to conference (Frank 1957, 629n, as quoted in Mason 1979, 171).

Perhaps in reaction to this, Stone ran a more free-flowing conference. His own attitudes about the propriety and even the desirability of expressive dissent transferred over into the manner in which he ran conference (Walker, Epstein and Dixon 1988).

One potential culprit for the rise of dissent behavior is Judiciary Act of 1925, which

[10] 301 U.S. 1.

removed much of the Court's discretionary docket. This meant that easy cases were eliminated from the Court's docket (Halperin and Vines 1977, as cited in Walker, Epstein and Dixon 1988, 364). By skimming the easy cases off the top and leaving the remaining difficult cases for the Justices to fight over, this potentially could have resulted in an increase in the dissent *rate*, even if not the total number of dissents.

This, however, was not the case. The increase in dissenting and concurring opinions did not begin in earnest until the late 1930s, whereas the Court received the ability to reduce its caseload three months after the passage of the Judges' Bill.[11] Moreover, an increase in discretion is, at most, a necessary—but not sufficient—cause of an increasing dissent rate. If the Court had continued to be saddled with a high caseload, it is possible that dissents would have become increasingly rare, as the cost of dissenting would have been measured against disposing of an increasing caseload.

Higher caseload, however, could also cut in the other direction. Walker, Epstein, and Dixon (1988) examine (and ultimately dismiss) the hypothesis that higher caseloads might result in more dissensus due to the fact that it may be "no longer as advantageous to expend substantial resources to convince a dissenting or concurring justice to join the majority opinion" (Walker, Epstein and Dixon 1988, 367). They reject this theory based on evidence that the Court's most dramatic increases in caseload did not occur until the 1960s, more than 20 years after the dramatic spike in Justices' dissents.[12] Walker, et al., additionally disregarded the theory that the mix of cases changed dramatically in the late 1930s and early 1940s. The types of cases that had previously generated the most dissent were present in equal measure following the massive increase in dissent in the early 1940s (368–370).

Nor does it appear that the promotion of an Associate to Chief is the source of the increase in dissent—just as Stone was in 1941 (Walker, Epstein and Dixon 1988). Prior to Stone, Edward Douglass White was promoted from Associate to Chief, but no similar increase in dissent occurred. Turnover, however, could have lead to dissensus in another

[11] 43 Stat. 936, §14 (1925). The Act was passed on February 13, 1925, meaning that the Court's docket became discretionary in May of that year.

[12] Note, also, that the estimates of the effect of total caseload Section 3.5 *supra* confirms, at least for a different period, that caseload is inversely related to dissent behavior.

way. The Associate Justices in the Stone Court had little judicial experience, and "the backgrounds of these men were not such that they would naturally value the practices of deferring to the views of others on matters of public and legal policy" (Walker, Epstein and Dixon 1988, 374). Four were former professors, and three were U.S. Senators. The remaining Justices came from high-ranking Department of Justice positions.

Perhaps the most compelling argument dismissed by the authors is that of ideological disagreement. Citing Pritchett (1948*a*), Walker, et al., argue that ideology could not constitute the sole explanation for the explosion of division on the Stone Court. As Pritchett found, there was robust agreement within "well-defined" liberal and conservative voting blocs. The Stone Court, however, was characterized by a lack of cohesion in the voting blocs, suggesting more than simply ideological disagreement. Nor did the evidence suggest that the Stone Court Justices' latent propensity to dissent was especially high. For example, Justices Douglas and Frankfurter, "were relatively quiet until about 1941"—despite their later reputations as "dissenters" (Walker, Epstein and Dixon 1988, 378).

The most compelling explanation for this shift, argue Walker, et al., is the quality of Chief Justice Stone's leadership. Previous Chief Justice like Marshall,[13] Taney,[14] and (to some extent) Hughes[15] had sought to bolster the institutional prestige of the Court through the suppression of dissent. Stone had no interest in this; he thought dissent was a valuable tool and should not be suppressed (Walker, Epstein and Dixon 1988, 379). For this reason and others, "he had difficulty in massing the Court" (Mason 1979, 169). Stone's disinclination to enforce unanimity or suppress dissent was likely aided by the fact that turnover on the Stone court was unusually high and many of the associates "came from occupational traditions that encouraged individual expression" (Walker, Epstein and Dixon 1988, 374).

Other scholars, while agreeing that "Stone was indeed a notable flop as a Chief Justice," argue that "the surge [in dissent behavior] was attributable to the Justices' having

[13] *See* Section 3.3 *supra*

[14] *See* Section 3.4 *supra*.

[15] Mason (1979) cites President Roosevelt's Attorney General, Homer Cummings, explaining to the President's Cabinet, "The Chief Justice does not like 5 to 4 opinions." Mason continued, "In terms of the value of Hughes customarily placed on 'stability' [(meaning stability of precedent as opposed to the political or social sort)], a 6 to 3 vote in a major case was obviously preferable to a 5 to 4" (95). To this end, another commentator noted, "Hughes used to believe in the appearance of unanimity regardless of the reality" (Frank 1957, 629n, as quoted by Mason 1979, 171).

observed that many dissents by Holmes, Brandeis, Stone, and Cardozo had become law, whereas previously dissents had rarely become law. . . . The perceived value of dissenting shot up" (Epstein, Landes and Posner 2013, 266). This phenomenon, however, is part of a broader constitutional transformation occurring at the end of the Hughes Court and into the beginning of the Stone Court (Hendershot et al. 2012). In their changepoint analysis of dissent and concurrence behavior on the Court, Hendershot et al. (2012) find that, *ceteris paribus*, the identity of the Chief Justice generally (and Stone specifically) that affects the dissent rate. However, they conclude that the "initial fracturing of the norm of consensus" occurred under Chief Justice Hughes, "suggesting that [he] may have been caught between a bloc of holdover justices (e.g., the Four Horsemen) and FDR's New Deal appointees" (476).

This structural break from the old practice seems also to be related to a changing notion of the law itself. Legal realism, which had risen in response to the Court's constrained jurisprudence of the *Lochner* Era was becoming widely accepted as a valid theory of law. The 1937 affair, noted Max Learner, signaled to the nation "that judges are human, and that the judicial power need be no more sacred in our scheme than any other power. . . . They dared look upon the judicial-Medusa head, and lo! they were not turned to stone. . . . It was then that the symbol of divine right began to crumble" (Learner 1941, 259–60, as cited in Mason 1979, 112.)[16]

4.2 Uncovering Variation in Dissent

In the following sections, I explore change in the issuance of divided decisions (i.e., the dissent rate), as well as how the structure and form of dissenting votes and opinions has changed over time. I begin by assessing the responsiveness of the Court's dissent rate to public support for the Court. Next, I examine how the depth of division and propensity to join opinions has changed across time. I conclude by conducting a brief survey of how the *structure* of opinions have evolved by assessing changes in opinion clarity.

[16]Jeff Shesol (2010) noted, "Most realists were deep believers in democratic government. Their assault on abstraction and formalism in the law, in part, an attempt to redeem the promise of self-government, by empowering communities (local, state, and national) to correct injustices through social welfare legislation and by valuing facts above legal abstractions" (loc. 932).

4.3 The Changing Role of Legitimacy

Public support for the Court—in other words, the Court's prestige and legitimacy—is a first-order condition for the issuance of dissent. I argue that the Court's transition from opposing the New Deal to supporting its programs renewed the legitimacy of the Court in the eyes of the public (Friedman 2009) and bolstered its legitimacy enough to permit the creation of new norms of dissent in the modern Court. In this section, I repeat the negative binomial regression analysis of the Court's dissent rate during the 1877–1937 period with data from the 1937–2012 period. They theory is the same. If the Court's perception of its legitimacy constrains it voting, then greater numbers of court-curbing bills observed in the preceding year will result in lower levels of dissent in the current term.

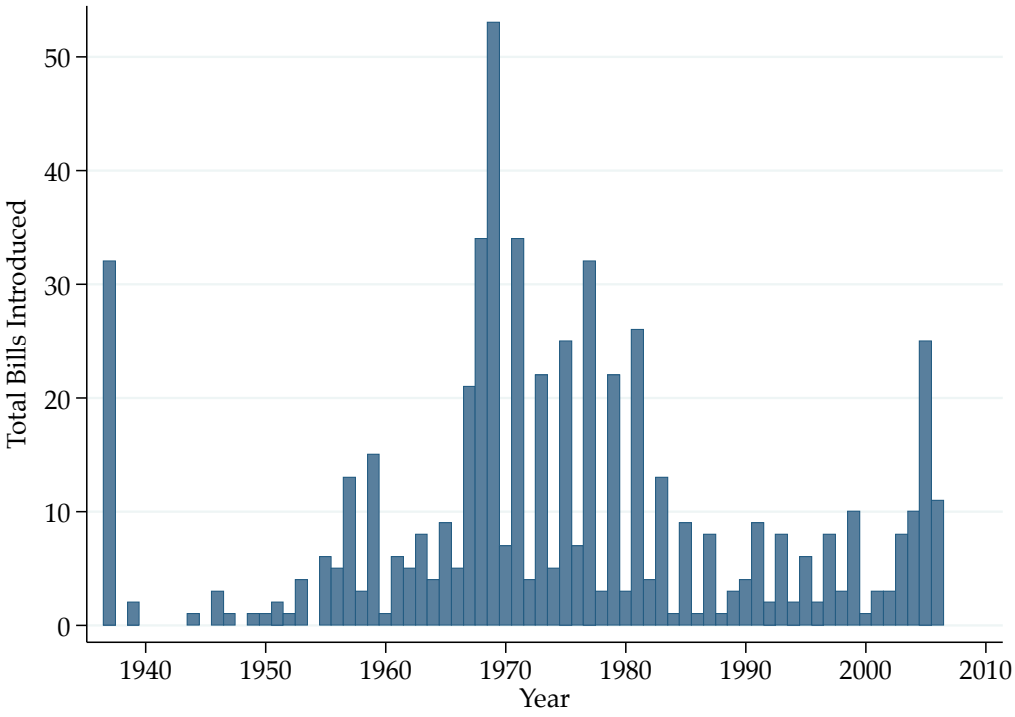
I again use Clark's (2009, 2011) Court-curbing data to test the constraining effects of institutional legitimacy and external threats on the Justices' dissent behavior. I estimate two models; the first uses the lagged number of Court-curbing bills; the second, a dummy variable for period of high Court-curbing bill activity. Clark (Clark 2011) defines these high-density periods as occuring in the following years: 1953-1959, 1965-1969, 1975-1982, and 2001-2008.

In this analysis, I also control for the number of salient decisions, whether Congress is controlled by the opposite party of the Court,[17] and the total number of cases. Given the more recent time period, I am able to use the number of cases appearing on the front page of the *New York Times* as a proxy for salience (Epstein and Segal 2000*b*). As discussed in the previous section, this has the advantage of being contemporaneous with the Court's decisions, as opposed to based on hindsight.[18] The ideology measure employed in this analysis is also considerably better. Instead of using the party of the appointing President as a proxy, I use updated Segal-Cover scores (Segal and Cover 1989). Unlike Martin-Quinn (2002) scores, which are estimated from the Justices' votes, Segal-Cover scores are estimated from an analysis of editorials evaluating Supreme Court nominees from four national newspapers. Using this measure, I calculate the absolute distance between the medians of the four most liberal and four most conservative Justices for each term to con-

[17] Like the number of court-curbing bills, this measure is from Clark (2009).

[18] Note that the CQ salience measure and the NYT measure is correlated at $\rho = 0.2892$.

Figure 4.2: Total Court-Curbing Bills Introduced, 1937–2008



Source: Clark (2009) (*replication data*).

trol for the ideological dispersion on the Court. Summary statistics for these variables are displayed in Table 4.2.

Table 4.1: Summary Statistics

	Mean	Median	Min	Max
$Bills_{t-1}$	8.47	5	0	53
Opp. Congress	0.475	0	0	1
Total Cases	115.54	115	74	155
Salient Decisions	17.32	17	7	30
Ideological Distance	0.591	0.578	0.23	0.92

The negative binomial regression takes the following form:

$$dissent_t = \alpha + \beta_1(court - curbing_{t-1}) + \beta_2(opposing\ congress_t) + \beta_3(court - curbing_{t-1} * opposing\ congress_t) + \beta_4(total\ decisions_t) + \beta_5(number\ salient_t) + \beta_6(ideology_t) + \beta_{7-10}Chief + \epsilon$$

Model results are displayed in Table 4.2. As with the analysis presented in the previous section (Table A.2), the dependent variable (number of dissents) is over-dispersed. In both cases, $ln(\alpha) \neq 0$. This, however, is where the similarities end. Neither the total number of lagged Court-curbing bills (model 1) nor the indicator for a high-density period (model 2) are statistically significant.

Table 4.2: Negative Binomial Regression Estimates for Total Number of Dissents, 1946-2004

	(1)	(2)
	Total Bills$_{t-1}$	High Density Period$_{t-1}$
Court-curbing$_{t-1}$	0.001	0.046
	(0.001)	(0.041)
Opposing Congress	0.073*	0.080**
	(0.030)	(0.017)
Court-curbing$_{t-1}$	-0.001	-0.032
X opposing Congress	(0.002)	(0.044)
Total Cases	0.008**	0.008**
	(0.001)	(0.001)
Number Salient	0.005†	0.005*
	(0.003)	(0.003)
Ideological Distance	0.115*	0.121*
	(0.054)	(0.055)
$ln(\alpha)$	-18.73	-19.59
	(0.534)	(0.241)

Notes: N = 59, $^{**} = p < 0.01$, $^{*} = p < 0.05$, $^{\dagger} = p < 0.1$ (two-tailed test). Estimates for Chief Justices (not significant) and the constant term (significant at $p < 0.001$) are omitted from the table. Errors are clustered by natural court.

Sources: Court-curbing legislation and measure of opposing Congress from Clark (2009, 2011); total cases and dissent from the Supreme Court Compendium; number of salient cases per term from Epstein and Segal (2000*b*, updated and provided on the Supreme Court Database website); and ideological distance calculated using Segal-Cover scores (Segal and Cover 1989, updated and provided on the Supreme Court Database website).

These results reflect the more traditional explanations for dissent and, somewhat reassuringly, confirm the central place of ideology and case salience in Justices' decisions to dissent. Holding all else equal, moving from the minimum ideological distance (0.23) to

the maximum distance (0.92) results in a predicted 4.88 additional dissents over the course of a term.[19] Moving from the minimum number of salient cases (7) to the maximum (30) produces a similar result, increasing the number of dissents per term by 7.33.[20]

These findings, unlike those for the 1877-1937 period, reflect modern scholars' thinking about why dissent occurs. The dramatic difference between the 1877-1937 estimates and the those from 1946–2004 suggests that, as Walker et al. (1988) argue, the transition to a world with high levels of dissent has been permanent in nature.

The events surrounding President Roosevelt's conflict with the Court provide a good illustration of how the legitimacy of the Court—as well as its place in the political system—has grown over time. Throughout the Court's history, presidents have changed the size of the Court for political purposes. For example, in 1863, Congress had increased the size of the Court from 9 to 10 in order to give President Lincoln the opportunity to make a fourth appointment to the Court.[21]. A short three years later, Congress reduced the size of the Court from 10 seats to 7, denying further appointments to President Andrew Johnson.[22] Given this history, changing the size of the Court was clearly not off-limits to Congress or the President. Yet President Roosevelt—who had recently been reelected to his second term by a 24.3 point margin[23] and enjoyed the support of a heavily Democratic Congress[24]—failed to convince Congress to pass his Court-packing plan. The fact that public opinion was strongly against it and viewed it as an attack on the Court (Friedman 2009) suggests that the Court had achieved a level of legitimacy and diffuse support far beyond that previously experienced. Given this environment, it makes sense that the Jus-

[19]The minimum distance produced an estimated 58.99 dissents, *ceteris paribus*; the maximum, 63.87.

[20]The minimum number of salient decisions predicts 58.31 dissents per term, *ceteris paribus*; the maximum, 65.64.

[21]Epstein et al. 2012, Table 1.1

[22]14 Stat. 209 (July 23, 1866). The Federal Judicial Center noted, however, that

> The legislation owed less to the Republican opposition to Johnson, who signed the act, than to the efforts of Chief Justice Salmon Chase. The first draft of the bill proposed a return to nine justices, thus preventing tie votes on the Court and providing a justice for each circuit. In private communication with influential members of Congress and fellow justices, Chase urged a further reduction in the number of seats in hopes of winning approval for an increase in the justices salaries. Congress did not approve an increase in judicial salaries until 1871, after it had returned the Court to nine seats.

Center N.d.*c*

[23]**?**

[24]Of the 435 voting members of the House, 334 (76.8%) of those elected in 1936 were Democrats; of the 96 Senate seats, 69 (71.9%) were held by Democrats.

tices may not view their dissents as affecting institutional legitimacy in the same way as they might have earlier in the Court's history.

4.4 Variation in the Number of Dissenting Votes

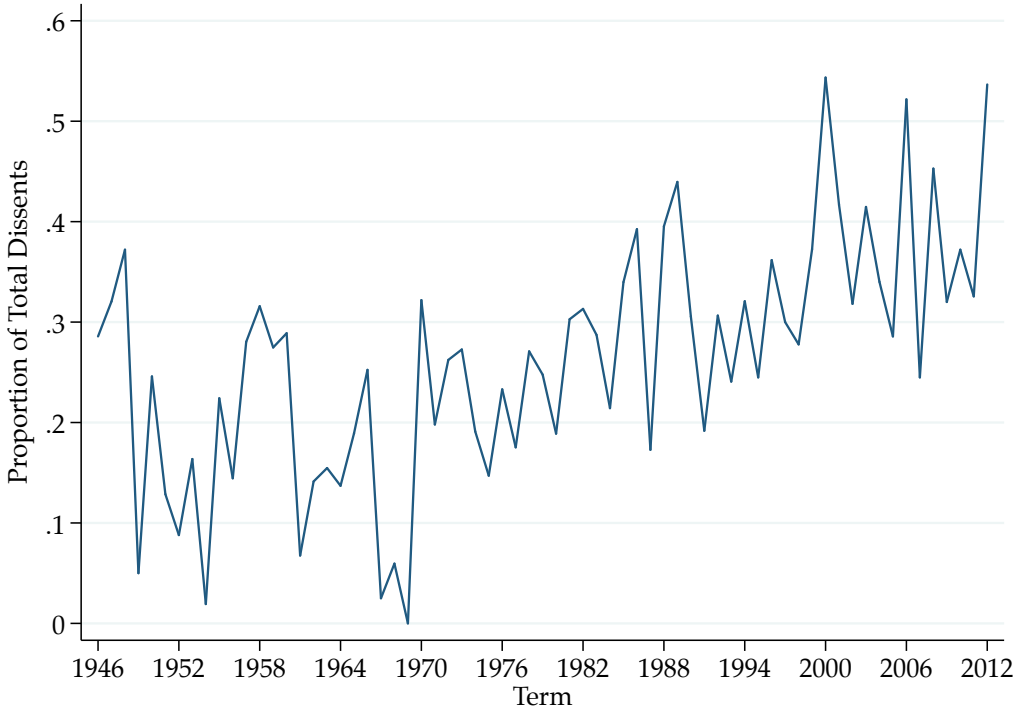
Since the 1940s, dissenting has become a normal occurrence on the Court. However, a singular focus on the rise in the number of Court's divided decisions misses the richness of variation in dissent behavior over time. Justices not only make the decision whether or not to dissent, but also whether to join another's opinion, how much effort to put into writing their own, and how many issues to address, among other things.

Since the Justices began dissenting in earnest 75 years ago, the structure and form of their dissenting opinions have varied greatly. Perhaps the most notable development over time is the rise of multiple Justices voting in dissent and joining to form voting coalitions.[25] At the end of the 2013 October Term, the proportion of unanimous opinions seemed to be at its peak. This figure, in isolation, would seem to suggest relatively low levels of division—an illusion that is largely destroyed by the fact that the proportion closely decided (5–4) of total dissents (0.4, or 10/25) is very much on par with trends in recent years (see Figure 4.3). In fact, the ratio of 5–4 decisions to total dissents was actually larger in 2013 term than in the 2010 or 2011 terms.

Maybe more tellingly, when dissent was present, the decision was more likely to be closely divided than not. For example, in the 2013 term, a single Justice dissented in 5% of decisions accompanied by dissent (2/25), two Justices dissented in 28% (7/25), three Justices dissented in 24% (6/25), and four Justices dissented in 40% (10/25). As illustrated by Figure 4.4, divided decisions in which four Justices dissented (indicated by the gold bar) has increased as a share of total opinions accompanied by dissent over time. At the same time, the share of total divided opinions comprising one-Justice dissents has noticeably shrunk. Finally, like one-Justice dissents, two- and three-Justice dissents have diminished as a share of total dissents in comparison to four-Justice dissents.

[25] As discussed in Chapter 3, Section 3.4, this era is not the first time that Justices have joined together to create voting blocs. Notably, Justices joined each others' opinions during the Taney Court, prior to the *Dred Scott* decision.

Figure 4.3: Closely Decided Decisions (5–4), 1946–2013 Terms

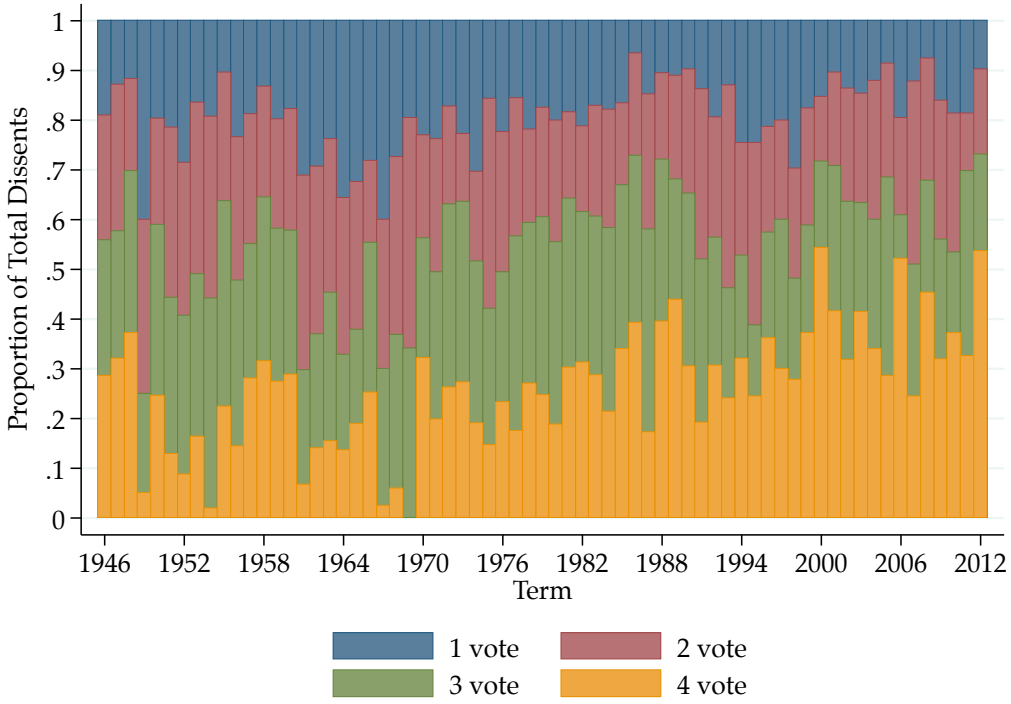


Source: Supreme Court Database and SCOTUSBlog StatPack, OT 2013

In fact, as the total number decisions rendered by the Court have decreased, the number of Justices in dissent to any particular decision has increased. Throughout this period, the dissent rate has hovered around 60%. However, as the Court has limited the number of decisions it promulgates, the rate at which four Justices dissent has increased while the rate at which only a lone Justice dissents has decreased.

This trend is clearly illustrated by Figure 4.5. The light blue bars indicate the total number of dissents per term from the 1946 through 2012 term and are measured by the y-axis on the left-hand side of the plot. The solid blue line represents the percentage of decisions accompanied by dissent in which four Justices voted against the majority. The dashed blue line measures the proportion of decisions accompanied by one-Justice dissent. The percentage of four- and one-vote dissents fluctuated greatly though the end of the Warren Court (1968 term). However, after the appointment of Chief Justice Burger, seeing four Justices in dissent was a more common occurrence than observing a lone dissenting

Figure 4.4: Distribution of Joined Dissents, 1946–2013 Terms



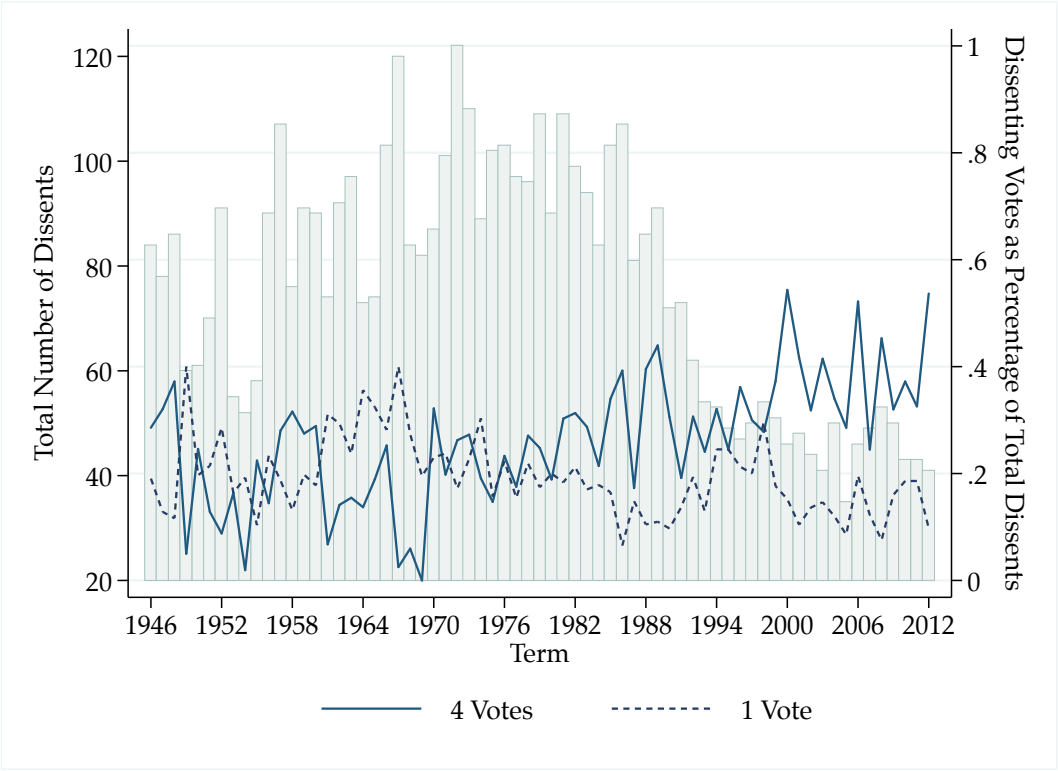
Source: Supreme Court Database, decisionTypes = 1,2,6, and 7.

Justice.

As indicated in Table 4.3, since the Warren Court, the percentage of dissents comprising only one vote has fallen over time. Dissents by a lone Justice have dropped from 24.5% during the Warren Court to 20.0% during the Burger Court and then again to 15.9% during the Rehnquist Court. The drop between the Rehnquist Court and the Roberts Court (13.9%) is far less dramatic, although the trend suggests that, over time, divided decisions in which only one Justice departs from the majority disposition will continue to decrease. An inverse pattern is seen with the rate at which four Justices dissent. This percentage has increased monotonically from the Warren Court to Roberts Court. During the Warren Court, four Justices dissented in only 17.1% of all dissents. This rate increased to 23.3% during the Burger Court and again to 33.4% during the Rehnquist Court. During the Roberts Court, four Justices dissenting have comprised 38.2% of all dissents.

Unlike divided decisions in which one or four Justices dissent, there are no clear pat-

Figure 4.5: Comparison of Proportion Solitary Dissents and Four-Justice Dissents, 1946–2012 Terms



Source: Supreme Court Database, decisionTypes = 1,2,6, and 7.

terns associated with divided decisions in which two or three Justices dissent. Like solitary dissents, two-vote dissents have generally decreased over time. Dropping from 29.3% of all dissents during the Warren Court to 23.5% during the Roberts Court. Although this trend has generally been downward, two-vote dissents experienced a slight uptick during the Rehnquist Court (24.3% of all dissents as compared with 23.9% during the Burger Court).

Note also that the Vinson Court is anomalous. Whereas there is a clear trend toward four-Justice dissents and away from lone dissenters from the Warren Court forward, the Vinson Court is characterized by a good deal more dissensus than the Warren Court. As compared with the Warren Court, in which four Justices dissented in 17.1% of 5–4 opinions, four Justices did so in 21.3% of such decisions. Thus, is it important to note that these trends have been non-monotonic since the rise of dissent behavior in the modern era.

The source of these patterns is unclear but a few factors emerge as candidates. The

Table 4.3: Distribution of Joined Dissents, 1946–2013 Terms

	% of Total Dissents				
Chief Justice	1 Vote	2 Votes	3 Votes	4 Votes	Total
Vinson	21.9%	27.8%	29.0%	21.3%	100.0%
	(113)	(146)	(155)	(116)	(530)
Warren	24.2%	29.3%	29.5%	17.1%	100.0%
	(333)	(384)	(387)	(232)	(1,336)
Burger	20.0%	23.9%	32.8%	23.3%	100.0%
	(334)	(395)	(551)	(397)	(1,677)
Rehnquist	15.9%	24.3%	26.4%	33.4%	100.0%
	(174)	(280)	(319)	(386)	(1,159)
Roberts	13.9%	23.5%	24.4%	38.2%	100.0%
	(50)	(86)	(86)	(138)	(360)
Total	12.3%	25.6%	28.8%	26.3%	100.0%
	(1,004)	(1,291)	(1,498)	(1,269)	(5,062)

Source: Supreme Court Database

most obvious answer is that *workload* has changed, and as a result, the *mix of cases* that the Court is hearing has also changed. In other words, the Court is hearing fewer easy cases now than during the Burger, Warren, and Vinson Courts. As a result, there are fewer cases more likely to evoke minimal dissent and more "hard" cases, in which the Justices are more evenly split.

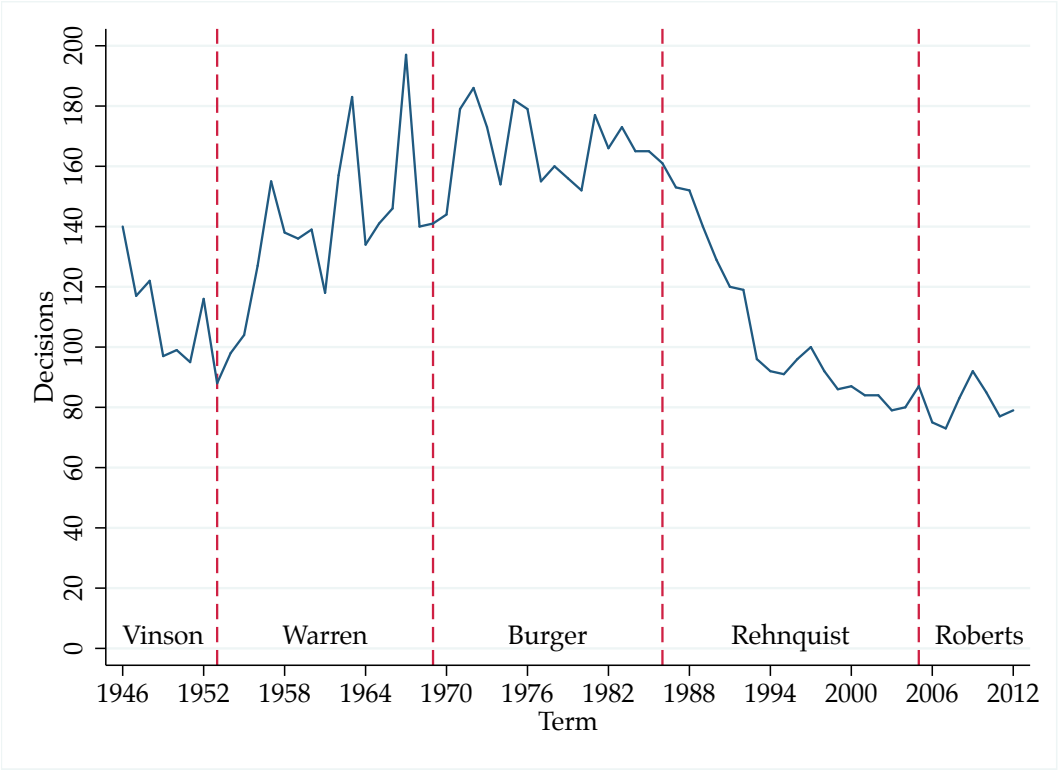
Figure 4.4 plots the number of signed and per curiam opinions, decrees, and judgments promulgated by the Court per term from the 1946 term through the 2012 term.[26] Although this figure understates the total work of the Court,[27] the general pattern is clear. The total number of decisions signed or otherwise accompanied by an opinion increased throughout the Warren Court, dropping precipitously during the Rehnquist Court from 161 such decisions during the 1986 term to 96 during the 1993 term. This provides some preliminary support to the theory that changes in workload and, as a result, case mix has resulted in stabilizing dissent patterns and more deeply divided decisions over time.

Knowing that occurrences of four-Justice dissenting coalitions have increased over time just as workload has decreased suggests that the two may be connected. However,

[26]These data are taken from the modern Supreme Court database and, as a result, do not reflect per curiam opinions printed without a summary (a subset of decisiontype = 2) and memorandum opinions (formerly decisiontype = 3).

[27]*Id.*

Figure 4.6: Workload, 1946–2013 Terms



Source: Supreme Court Database, decisionTypes = 1,2,6, and 7.

other factors may also be responsible for the increase in such closely divided decisions. In addition to workload, it is possible that the Court may have become more ideologically polarized over time. Greater ideological polarization would result in increasingly *cohesive*—that is, stable or consistent—coalitions over time.[28] As discussed above, a closely

[28]This type of analysis is not a particularly new approach to analysis of the Court's decisions. For example, S. Sidney Ulmer (1960) examines the formation of voting blocs using Guttman scaling techniques. In examining civil liberties cases in the 1956 and 1957 terms, Ulmer found that distinct blocs formed with respect to one dominant variable: the deprivation of a civil liberty (300–01).

Table 4.4: Mean Number of Decisions, by Chief Justice

Chief Justice	Number
Vinson	112.29
Warren	137.56
Burger	165.12
Rehnquist	107.42
Roberts	81.38
Total	126.66

divided decision suggests that prior case law or statutory guidance is indeterminate and that the Justices are disagreeing over values as opposed to technical points of law (Epstein, Landes and Posner 2013). A Justice's ideological or policy preferences will make the most difference in their voting decisions in these types of cases. If the Court has become more polarized over time, then the change in cohesion over time should be responsive to changes in the ideological make-up of the Court.

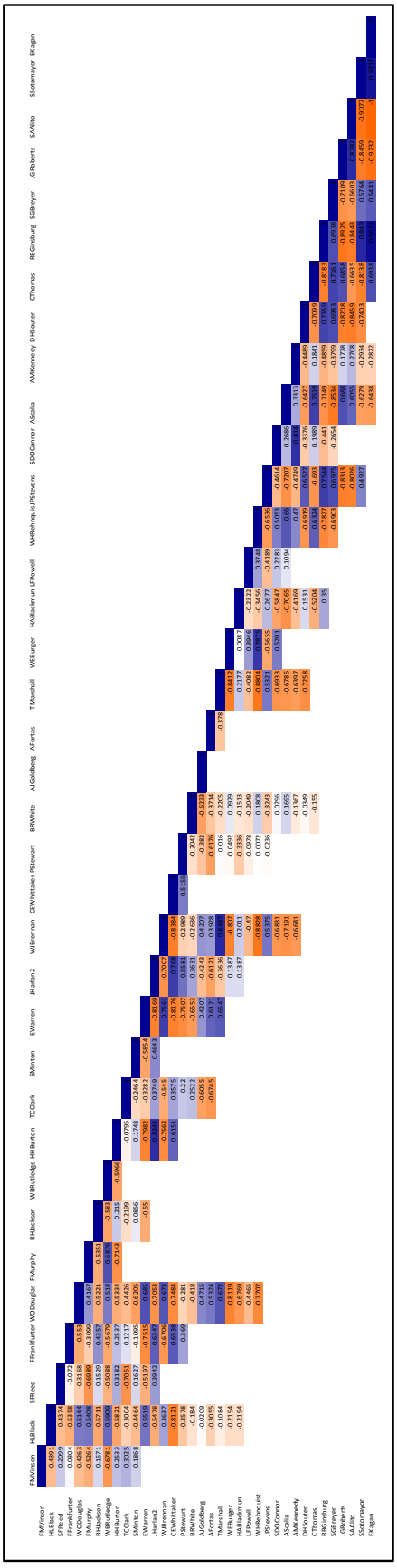
Figure 4.7 gives an overview of pairwise correlations in 5–4 votes from the 1946 term (the first Vinson natural court) through the 2012 term (the fourth Roberts natural court).[29] Blue cells indicate positive correlation; orange cell, negative correlation. The more darkly shaded the cells, the stronger the correlation. Weaker correlation—that is, values approaching 0—suggest unstable voting coalitions and are indicated by light shading. The correlations are arrayed from earliest-serving Justices in the upper-left corner to most recently serving Justices in the lower right. Looking across Figure 4.7 can provide an initial overview of cohesiveness of dissent behavior in close cases over time. Although not dispositive, the correlations between Justices on the Vinson Court are more lightly shaded than the later Warren Court, as well as most of the Rehnquist and Roberts Courts. As a result, a first cut at the cohesiveness of dissenting coalitions weakly suggests that dissenting blocs have become more cohesive over time. This pattern, however, is far from clear and provides information about only pairwise cohesion, instead of the cohesion of the entire four-Justice voting bloc.

Cohesion between entire voting coalitions may be better investigated by examining the stability of four-Justice voting coalitions over time. Table 4.5 provides an overview of: (1) the total number of decisions (by chief justice), (2) the number of 5–4 decisions, (3) the percentage of total opinions comprising 5–4 decisions (in parentheses), (4) the number of unique four-Justice coalitions, and (5) proportion of unique coalitions to 5–4 decisions (in parentheses).[30]

[29]Natural Courts are generally defined as "a period of time during which the membership of the Court remains stable" (Compendium, Table 5–2). Natural courts may be "strong," with beginning and ending dates defined "by the addition of a new justice or a departure of an incumbent," or "weak," defined as "any group of sitting justices." The convention adopted here is that of "strong" natural courts, utilized by both the authors of Supreme Court Compendium and the compilers of the Supreme Court Database.

[30]Four decision types were included in the calculation of the denominator: opinions of the Court (decisionType = 1), per curiam opinions (both those issued after oral argument and those issued with no oral

Figure 4.7: Pairwise Correlations of Justices in Dissent, 1946–2013 Terms



Source: Supreme Court Database, decisionTypes = 1,2,6, and 7.

Table 4.5: Closely Divided Decisions and Unique Coalitions, 1946–2013 Terms

Chief Justice	5–4 Decisions	Proportion 5–4 Decisions	Unique Coalitions	Ratio
Vinson	16.57	0.14	10.57	0.75
(7 terms)	(10.66)	(0.08)	(4.69)	(0.22)
Warren	14.5	0.11	6.56	0.57
(16 terms)	(9.16)	(0.06)	(3.10)	(0.24)
Burger	24.75	0.14	12.88	0.54
(16 terms)	(6.62)	(0.05)	(2.80)	(0.12)
Rehnquist	20.32	0.19	9.37	0.49
(19 terms)	(8.87)	(0.06)	(3.24)	(0.13)
Roberts	17.25	0.22	7.5	0.46
(8 terms)	(5.44)	(0.07)	(1.51)	(0.13)
Total	19.21	0.16	9.44	0.54
	(8.92)	(0.07)	(3.84)	(0.17)

Note: Total decisions = 8,344. Means and standard deviations are calculated per term. Source: Supreme Court Database. Decision types 1 (opinions of the Court), 2 (per curiam opinions following oral argument), 6 (per curiam opinion not accompanied by oral argument), and 7 (judgments of the Court) were included in this calculation.

As indicated in Table B.1, 5–4 decisions have generally, though non-monotonically, increased as a proportion of total cases from the Warren Court through the Roberts Court (see Figure 4.8). At the same time, the number of unique coalitions fluctuated between the Vinson and Burger Courts, while decreasing during the Rehnquist and Roberts Courts. Unlike the percentage of 5–4 decisions, the ratio of unique coalitions to total 5–4 decisions has been monotonically decreasing since the Vinson Court. Whereas there were 3 unique coalitions for every four 5–4 decision, on average, during the Vinson Court (1946–1952 terms), this ratio fell to roughly 2.28 coalitions for every 4 such decisions during the Warren Court (1953–1968 terms). This decreased again to 2.18 coalitions during the Burger Court and again to 1.96 during the Rehnquist Court. The Roberts Court is the most cohesive in terms of four-Justice coalitions of five Courts examined, with only 1.84 unique coalitions per every 4 closely divided decisions.

More interesting, perhaps, are standard deviations from the mean ratio of unique coalitions to 5–4 decisions over time. This ratio was less stable during the Vinson and Warren Courts (s.d. = 0.22 and s.d. = 0.24, respectively) than during the Burger (s.d. =

argument, coded as decisionType = 2 and decisionType = 6), and judgments of the Court (decisionType = 7). Natural courts in which there were no 5–4 decisions were excluded from the table.

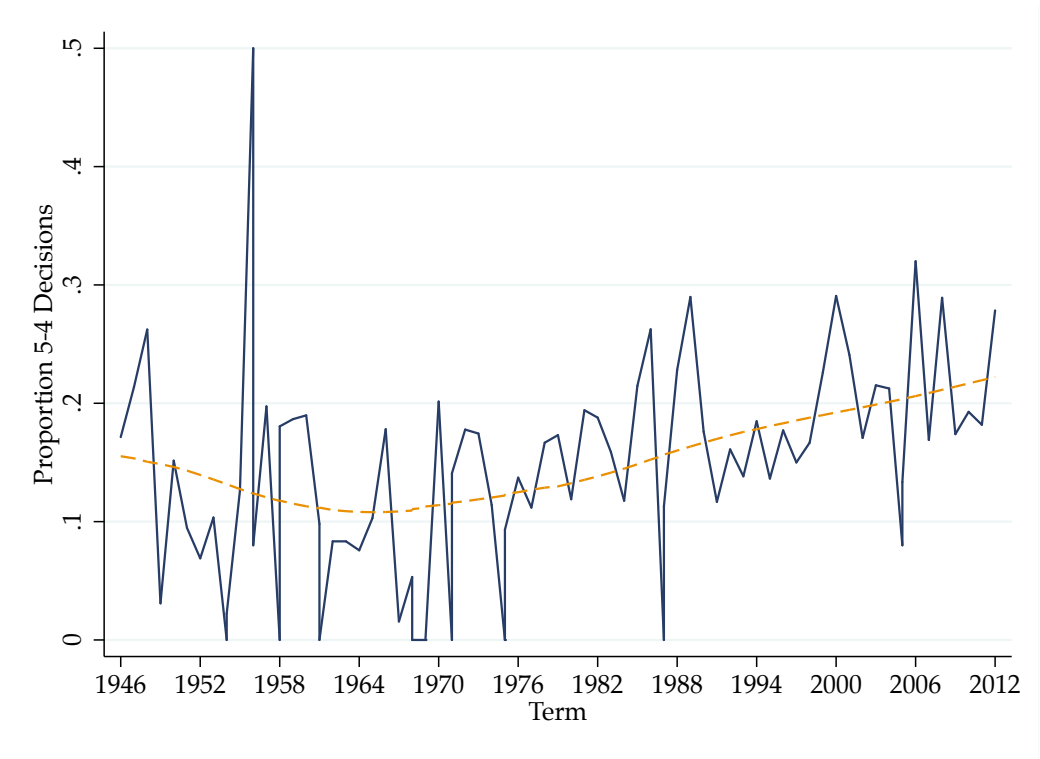


Figure 4.8: 5–4 Decisions as a Proportion of Total Decisions, 1946–2013 Terms

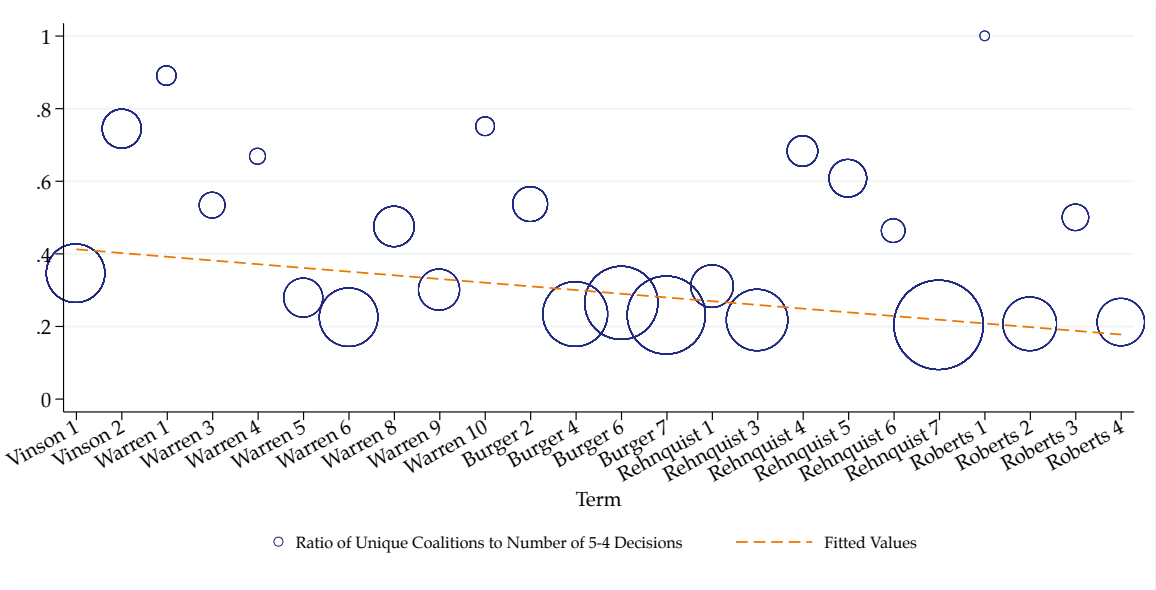
0.13), Rehnquist (s.d. = 0.12), and Roberts Courts (s.d. = 0.12). Thus, not only are there fewer unique coalitions for a greater number of 5–4 opinions than there used to be, but the number of unique coalitions is also more stable.

Although instructive, Table 4.5 provides only a rough cut of change over time and likely masks a great deal of variation across both natural courts and terms. Figure 4.9 displays a different measure of four-Justice coalitions, plotting the ratio of the number of unique four-Justice dissenting coalitions to total 5–4 decisions by natural court for the 1946 through 2012 terms. The dark blue circles plot the ratio of unique coalitions per 5–4 decisions during each natural court from the first Vinson Court (June 24, 1946–August 24, 1949) through 2012 term of the most recent Roberts Court (August 7, 2010–June 30, 2013).[31] The markers are weighted according to the total number of 5–4 decisions promulgated during that natural court. The larger the marker, the greater the number of 5–4 decisions issued during that natural court. The dashed orange line plots the linear fitted values,

[31] The natural courts indicated in Figure 4.9 are those coded in the Supreme Court Database. The numbering is not the same as the natural courts listed in the Supreme Court Compendium (Table 5-2).

weighted by the total number of 5–4 decisions, as an indicator of trend. As indicated by its negative slope, the trend line suggests that the ratio of unique four-Justice coalitions to total 5–4 decisions has decreased over time. By this measure, cohesion has increased over time. This suggests that a reduction in workload is not the only reason that 5–4 decisions have increased. An increase in cohesion among the Justices dissenting suggests that more is occurring within the Court than simply a reduction in easy cases.[32]

Figure 4.9: Weighted Ratio of 5–4 Decisions to Unique Coalitions, 1946–2013 Terms



Source: Supreme Court Database, decisionTypes = 1,2,6, and 7.

As illustrated by Figure 4.9, the ratio of unique four-Justice coalitions to total 5–4 decisions fluctuates dramatically between Chief Justice Vinsons first term (1946) and Chief Justice Warrens final term (1968). This occurs, in part, due to so few 5–4 decisions occurring during several Vinson and Warren Court terms. This might suggest that the trend toward cohesion suggested by the dark orange line is illusory. However, as the dashed line indicates, even when weighted to reflect the total number of 5–4 decisions, a negative trend is still observed, indicating that four-Justice dissenting coalitions have become more stable over time.

The increasing stability of four-Justice dissenting coalitions over time suggests that a

[32] A tabular breakdown of unique coalitions by natural court is presented in Appendix B.

decrease in workload cannot be the sole explanatory factor for an increase in the proportion of 5–4 decisions. If the Court were merely shedding its easiest cases (increasing the share of "hard" or indeterminate cases), then cohesion should be unchanged across time. However, this is not what we observe. There is some evidence that cohesion is increasing across time, suggesting increasing ideological polarization, and that the current Court has the most cohesive four-Justice voting bloc across the 66-year period examined here.

Another obvious way look at changes in ideological polarization in the Court is to examine judicial ideology scores based on votes. In their 2002 study, Martin and Quinn generate dynamic ideal point estimates of Justices' preferences for each term based whether each Justice's decision to affirm or reverse. This suggests, for our purposes, that when the same group of Justices consistently vote to affirm or reverse, in contrast to a different, but also consistently voting, group of Justices, that the distribution of preferences on the Court will become bimodal, the standard deviations associated with those Justices estimates will decrease, and the ideal point estimates of the voting bloc will converge.

In a sense, ideology scores calculated through dynamic ideal point estimation are proxies for cohesion, but they are not exogenous estimates of ideology. Thus, using these scores, it is difficult to say that ideology is the causal motivator for greater levels of cohesion on the Court. Martin-Quinn scores may merely reflect broader changes in the cases taken by the Court and the role played by the Court in American society. As a result, it is instructive to look at the relationship between exogenous measures of ideology and coalition cohesion over time.

One way to do this is through the use of Segal-Cover scores. Observing that "[o]ne cannot demonstrate that attitudes affect votes when the attitudes are operationalized from those same votes," Segal and Cover (1989) derive ideology scores from a content analysis editorials about each Supreme Court nomination in four national newspapers (558–59).[33] Using these sources, Justices' were coded with scores ranging from 0 (most conservative) to 1 (most liberal). While these scores have the benefit of being exogenous from the Justices' votes, they have the disadvantage of being static over time, despite evidence that Justices

[33]Two of the newspapers are considered to have a "liberal stance" (the *New York Times* and the *Washington Post*; two are viewed as having a "more conservative outlook" (the *Chicago Tribune* and the *Los Angeles Times*) (559).

do, in fact, experience ideological drift (see, e.g., Martin and Quinn 2002; Epstein et al. 2007).[34]

If ideology is the driving force behind the rise in the proportion of 5–4 decisions, then we should observe increasing ideological division and polarization over time. For example, we would expect that larger distances in the ideological space between the mean or median of the four most liberal justices and the four most conservative justices would be positively correlated with increases in 5–4 decisions. Moreover, we should observe lower standard deviations of these potential liberal and conservative Justices associated with a greater proportion of closely divided votes. Lower standard deviations would suggest greater ideological similarities within each group. Finally, as demonstrated above, four-Justice coalitions have become more cohesive over time in terms of frequency, but if ideology is driving the shift in voting behavior, then those coalitions should not only be more frequent, but they should be more ideologically similar, as well. As a result, we would expect to observe lower standard deviations of ideology scores in each coalition.

Figure 4.10 illustrates change between the mean and median ideology scores for the four most liberal and four most conservative Justices in each natural court by term. The dark orange line plots the difference in medians between the two groups; the dashed dark purple line, the difference in means. The dark blue line plots the percentage of total de-

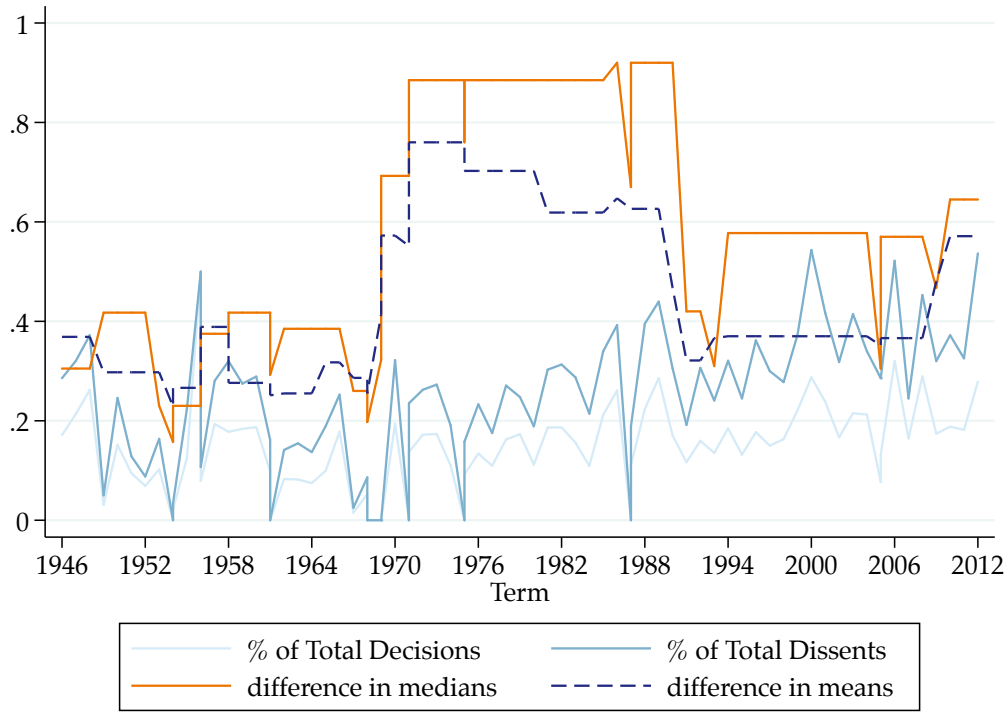
[34]Take, for example, Justice Harry Blackmun and Chief Justice Warren Burger. Warren and Blackmun were lifelong friends, growing up together in Minnesota. Chief Justice Burger was appointed by President Nixon to replace retiring Chief Justice Earl Warren in 1969 after serving as a judge on the U.S. Court of Appeals for the District of Columbia Circuit for 13 years (Savage 2011*a*). Following his appointment, President Nixon sought to replace outgoing Justice Abe Fortas with a southern conservative, first nominating Clement F. Haynesworth (South Carolina) and then nominating G. Harrold Carswell (Florida). Both nominations failed. Although Nixon attributed this to ideological reasons, scholars of these nominations indicate that their failure resulted from inadequate vetting by the Executive, resulting in embarrassing issues, such as questionable financial dealing, coming to light during the Senate confirmation process (Rutkus 2010, 14 n.49, citing Watson and Stookey 1995, 82). Then, in 1970, Justice Blackmun, who had served on the Eighth Circuit for 11 years, was nominated by President Nixon in 1970 and confirmed within a month. Both received conservative Segal-Cover scores of 0.115. This score places Burger and Blackmun among the most conservative Justices on each natural court on which they served. Blackmun voted in virtual lockstep with Burger during his first term, voting with him in 91.7% of decisions during his first full term on the Court. Over time, however, and especially after Blackmun's decision in *Roe v. Wade*, Blackmun's and Burger's voting patterns begin to diverge dramatically.

This drift apart can also be clearly seen by comparing the two Justices' Martin-Quinn scores over time. Although these Blackmun's and Burger's scores begin in roughly the same place and both become more liberal between the 1969 and 1980 term, Blackmun's score become more liberal at a rate quicker than Burger's. Moreover, after 1980, the scores truly begin to diverge, with Blackmun's score generally becoming more liberal and Burger's score more conservative. (For a discussion of this divergence, see Savage 2011*b*.)

Although Blackmun may be an extreme example, the phenomenon of ideological drift does exist, making Segal-Cover scores a noisy indicator at best of ideology across time. Thus, like Martin-Quinn scores, their use is limited, and any findings using these measures should be cautiously interpreted.

cisions comprising 5–4 votes; the light blue line, the percentage of total dissents. If the increase in 5–4 decisions were a function purely of increasing ideology, we would expect to see increases in the distance between means and medians of the two groups positively correlated with increases in the proportion of closely divided decisions. However, this initial look at the data does not bear out this hypothesis. The periods where the ideological distance is greatest between the most liberal and most conservative Justices occur during the Burger and early Rehnquist Courts. However, the terms during which closely divided decisions are the highest occur during the later Rehnquist Court and the Roberts Court.

Figure 4.10: Comparison of Median and Mean Liberal Justices with 5–4 Dissent Rate, 1946–2012



Source: Segal-Cover Scores, Supreme Court Database

Table 4.6 confirms this lack of positive correlation. The difference in means has almost no correlation with 5–4 decisions as a percentage of total decisions ($\rho = 0.08$), as does its correlation with percentage of total dissents ($\rho = 0.10$). The difference in medians fares slightly better, correlating with percentage of total decisions at $\rho = 0.20$ and with the percentage of total dissents at $\rho = 0.26$.

Table 4.6: Correlation Between Ideological Distance and 5–4 Decisions, 1946–2012

		Difference in:		*5–4 Decisions as a % of:*	
		Means	Medians	Total Decisions	Total Dissents
Difference in:	Means	1.00	—	—	
	Medians	0.89	1.00	—	
5–4 Decisions as a % of:	Total Decisions	0.08	0.20	1.00	—
	Total Dissents	0.10	0.26	0.94	1.00

N = 77 terms; Data: Supreme Court Database, decisionTypes = 1, 2, 6, and 7.

The act of voting in dissent has clearly changed over time, and since the late 1930s, the rate at which the Court produces closely divided decisions has increased. As discussed above, this increase may be due in part to the Courts shifting caseload. This has been especially true since the beginning of the Rehnquist Court, as the Court has reduced the total number of decisions promulgated from upwards of 180 decisions per term during the Burger Court to 70–80 during the Roberts Court. By reducing caseload, the Court not only frees up resources for Justices to write separately but also allows to Court to shape its agenda. This practice also allows the Court to remove "easy" cases from its docket. Taken together, creating slack in resources while narrowing its agenda to deal with only the most difficult, legally indeterminate cases, helps to explain the increase in closely divided decisions.

Workload, however, is likely not the entire story. In the previous section, I examined the effect of ideology on 5–4 decisions in two ways. First, I examined whether dissenting coalitions have become more cohesive over time. The evidence suggests that four-Justice dissenting coalitions have become more stable over time; in other words, the same Justices tend to dissent together within natural courts, and this tendency has become more pronounced over time. However, other measures of ideological polarization appear unrelated to the increasing occurrence of 5–4. For example, the ideological distance between the median and mean scores of the four most liberal and four most conservative Justices appears to be unrelated to the prevalence of 5–4 decisions.

What can this tell us about the connection between ideology and the occurrence of closely divided decisions? First, ideological polarization—defined as a Court in which

the four most liberal and four most conservative Justices are, as blocs, quite ideologically distant—does not always produce a high rate of closely divided opinions. *Cohesion* of those blocs, on the other hand, appears to be more important. As indicated by Figure 4.9, fewer unique four-Justice coalitions are related to higher numbers of closely divided decisions. When four-Justice voting blocs are less stable, however, a lower ratio of closely divided decisions to total decisions result. This suggests that, while ideology plays some role, polarization is not the only factor that contributes to the occurrence of such decisions.

4.5 Variation in the Number of Dissenting Opinions

Although caseload and ideology can tell us something about the *voting* patterns of Justices, such evidence tells us very little about the Justices' primary activity and work product: opinions. Does ideological polarization actually result in more opinions in which multiple authors join a single opinion, or does strong opposition to the majority opinion mean that each Justice has a a heightened interest in writing his or her own opinion?

Whenever a Justice dissents, she must determine whether to write her own opinion, join anothers opinion, or give no opinion at all. As a result, although four Justices may vote to dissent, the Court could produce from one to four dissenting opinions, with multiple Justices joining each opinion and forming different coalitions. Between the beginning of the 1946 term and the end of the 2012 term, at least one Justice dissented in 5,062 of the 8,344 decisions handed down by the Court, for an overall dissent rate of 60.7% during that period (See Figure 1).[35] Of these 5,062, 214 were accompanied by no dissenting opinion whatsoever. In other words, one or more Justices chose not to join the majority opinion but gave no reasons for that decision. This behavior has become increasingly uncommon over time. As indicated by Table 4.7, 70 of the 530 (13.2%) Vinson Court decisions in which one or more Justices dissented failed to be accompanied by any minority opinion. This percentage drops by over 40% from 13.2% to 7.8% during the Warren Court, and again during the Burger Court, with 35 of 1,677 (2.1%) divided decisions not accompanied by

[35]Only opinions of the Court (orally argued) and judgments of the Court (orally argued), and per curiam decisions (including both orally argued and not orally argued) were included in this calculation. This corresponds to Supreme Court Database decision types 1, 2, 6, and 7.

written dissent. This practice becomes even more unusual during the Rehnquist Court, with only 5 of 1,159 (0.4%) of all decisions subject to dissent without a written opinion. Notably, between the 2005 and 2012 terms of the Roberts Court, divided decisions were *always* accompanied by at least one written dissent.[36]

Table 4.7: Opinions Accompanying Dissent, 1946–2012 Terms

	Divided decisions with:		
Chief Justice	≥ 1 ***written dissent***	***No written dissent***	**Total**
Vinson	460	70	530
	(86.79%)	(13.21%)	(100.00%)
Warren	1,232	104	1,336
	(92.22%)	(7.78%)	(100.00%)
Burger	1,642	35	1,677
	(97.91%)	(2.09%)	(100.00%)
Rehnquist	1,154	5	1,159
	(99.57%)	(0.43%)	(100.00%)
Roberts	360	0	360
	(100.00%)	(0.00%)	(100.00%)
Total	4,848	214	5,062
	(95.77%)	(4.23%)	(100.00%)

Source: Surpreme Court Database

Just as voting coalitions have become more cohesive over time, so too have joining coalitions. Voting coalitions indicate that four Justices may all decide to dissent from a particular case; despite their agreement about the disposition, however, they all may have different reasons. When this is true, they may all write separately. In other instances, four Justices may vote to dissent but all agree on the reasons for their disagreement. In that case, the Justices may choose to write a single opinion. Like voting behavior, Justices' decisions to join a single dissenting opinion have also changed over time.

To examine some aspects of opinion-joining behavior in more depth, I collected opinion data from stratified sample of 500 decisions promulgated by the Supreme Court during the 1946 through 2012 terms. I randomly selected 100 from each of the five Chief Justices represented in the Supreme Court Database: Vinson, Warren, Burger, Rehnquist,

[36] A similar trend is seen in divided decision for which there is at least one written minority opinion but one Justice dissents without giving his or her reasons.

and Roberts. I then selected opinions accompanied by one, two, three, and four dissenting votes based on the percentage of those vote distributions on each Chief's court.[37]

Table 4.8 provides an overview of number of minority votes per opinion when only one dissent is published. In other words, this table helps to answer the question, "When only one dissent is written, how many votes does it attract?" The answer varies over time. For example, on the Roberts Court, when only one dissent wass written, such a dissent was more likely to be the result of four Justices (50 of 154 total single dissenting opinions, or 32.47%), as opposed to three (36, or 23.38%), two (42, 27.27%), or one (26, 16.88%) Justices. During the Rehnquist Court, on the other hand, if one opinion was promulgated, it was most likely the work of two (44/154, 28.57%) or three Justices (42, or 27.27%), as was also the case under the Warren and Vinson Courts.

Table 4.8: Number of Votes When Only One Dissenting Opinion Published, 1946–2012

	Total Dissenting Votes:				
Chief Justice	1	2	3	4	**Total**
Vinson	30	46	42	24	168
	(21.13%)	(32.39%)	(29.58%)	(16.90%)	(100.00%)
Warren	42	50	54	22	168
	(25.00%)	(29.76%)	(32.14%)	(13.10%)	(100.00%)
Burger	34	38	34	22	128
	(26.56%)	(29.69%)	(26.56%)	(17.19%)	(100.00%)
Rehnquist	28	44	42	40	154
	(18.18%)	(28.57%)	(27.27%)	(25.97%)	(100.00%)
Roberts	26	42	36	50	154
	(16.88%)	(27.27%)	(23.38%)	(32.47%)	(100.00%)
Total	158	214	200	156	728
	(21.70%)	(29.40%)	(27.47%)	(21.43%)	(100.00%)

Source: To collect these data, cases were selected from the Supreme Court Database through a stratified sample. Information about these opinions (such as the text and number of opinions) was collected from the Lexis-Nexis.

When paired with the fact that cohesion has increased over time, these findings suggest an increase in voting *and* joining behavior that did not exist in the Vinson or Warren

[37]The Supreme Court database codes Justices' joining behavior by indicating "first agreement" and "second agreement." If a Justice joined three dissenting opinions or a mixture of dissenting and concurring opinions, not all of this joining activity would be captured. Using the Supreme Court Database as the sole means of assessing joining behavior would result in right-censoring that would bias any analysis.

Courts. Notably, none of the Roberts Court decisions collected were accompanied by four dissenting opinions. Compare this to the five four-opinion dissents during the Rehnquist and Burger Courts, and 10 four-opinion dissents during the Warren Court. Taken together, this suggests that—at least since the Warren Court—dissent behavior has generally become more cohesive over time.

4.6 Variation in Clarity (Readability) Over Time

The data presented to this point suggests the following: (1) closely divided decisions have become more prevalent over time, (2) such decisions are not necessarily the result of increased ideological polarization, and (3) the increase in closely divided opinions appear to be connected to an increase in cohesion in four-Justice dissenting coalitions across time. The data, generally speaking, confirm a sea change in how Justices have approached minority opinions over time.

Given these changes in Justices decisions to both dissent from the majority opinion and join others minority opinions, the next obvious question is whether the *structure* and *content* of minority opinions have changed over time. One way to think about structure is through the *clarity* of the opinion.

Clarity is fundamentally important to the rule of law (Fuller 1964, as cited in Owens and Wedeking 2011, 1029). Doctrines of legality rest on the principle "*Nullum crimen sine lege, nulla poena sine lige*" ("No crime without law, no punishment without law"). There are three corollaries to this principle. The first is notice, or the concept that criminal statutes should be understandable to law-abiding people. This requires that conduct must be criminal at the time of the act and that individuals have fair notice. In other words, conduct cannot be made retroactively criminal.[38]

The second corollary, specificity, means that a statute cannot be vague either facially

[38]Under some conditions, however, that "incremental and reasoned" development in law may be allowed—even when there is otherwise no prior notice. For example, in *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Supreme Court upheld the a man's conviction for second-degree murder, despite the fact that his victim died more than a year and a day after the attack. The "year-and-a-day" rule is a common law standard that had not been codified by the Tennessee Legislature. Justice O'Connor, writing for the majority, argued that abolishing this rule was not "unexpected and indefensible" and that "[s]trict application of *ex post facto* principles . . . would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system" (461).

or in application. For example, in *City of Chicago v. Morales*,[39] a majority found that a gang-violence prevention ordinance that permitted police to arrest an individual determined to be in a place with "no apparent purpose" was inherently subjective and, as a result, unconstitutionally vague. A plurality additionally argued that a law, such as the Chicago ordinance, is unconstitutionally vague when it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.

The third corollary is the application of the "rule of lenity." This rule indicates that when a statute is unclear, courts must resolve the ambiguity in favor of the plaintiff.[40] Although there is some debate over the level of ambiguity that must exist for the doctrine to apply, the very existence of the rule confirms clarity's central role in the the application and administration of law.[41]

Greater clarity in the Court's majority opinion has been found to make compliance more likely (Johnson 1979; Spriggs 1997; Canon and Johnson 1999; Bosworth 2001). A lack of clarity in the statement, as indicated by "sweeping dicta and legal homilies" can allow a Court's opinion to expand among interpreting and implementing populations in unforeseen ways (Souraf 1959, 789). However, there are conditions under which authoring a vague opinion may be appropriate. Vague remand prescriptions can act as a "safety valve" in releasing some of the tension existing between principals and agents, allowing an outlet for "creative noncompliance" without moving to outright defiance (Murphy 1959; Benesh 2000; see also Bueno de Mesquita and Stephenson 2002, 763). Vagueness may also serve the interest of the Court's majority if the Court has great uncertainty over the impact of its policy statement and allow judges to "deal with their limited policy making abilities in an uncertain world" (Staton and Vanberg 2008, 505; see also Bawn 1995).

One way to assess clarity is through the structure of the language in the opinion. This can be measured by calculating readability scores for each dissenting opinion. Readability can be thought of as "the ease of understanding or comprehension due to the style of writing" (Klare 1963). Readability measures use indicators such as the length of sentences,

[39] 537 U.S. 41 (1999)

[40] *See McBoyle v. United States*, 283 U.S. 25 (1931).

[41] There are competing interests at stake, however. For example, the Model Penal Code does not invoke the rule of lenity; rather, §1.02(3) states that ambiguities should be resolved in a way that furthers the "purposes" of the MPC and the specific provision of law.

words, and syllables to determine the complexity of the text. As a result, readability scores tend to "focus[] on writing style as separate from issues such as content, coherence, and organization" (DuBay 2004, 3).

This method of approaching opinion structure is, in some ways, a bit impoverished. Dworkin (1986), for example, explains that a lack of clarity can arise from "an ambiguous word whose meaning is not decisively resolved by the context . . . or contain a vague word that in practice cannot remain vague" (351). Clarity, moreover, is also subjective; Dworkin argues that we tend to insert ambiguity into statutes when they seem to come to the wrong moral conclusion.[42] Despite these shortcomings, even a simplistic measure of opinion structure, such as readability scores, may be able to tell us about the quality of effectiveness of the opinion. Friedman (1985) makes an analogous case for clarity in statutes, arguing

> Rococo excess in the size of a statute does not mean that the statute is successful in controlling its subject. Bulk may mean almost the opposite: a frantic and hopeless attempt to control, after prior laws had repeatedly failed. Or complexity may mean that interest groups, at war with each other, have stakes many and various claims on the subject matter: a long, complex law is the text, then, of an elaborate treaty, full of loopholes, special benefits, and compromise (444).[43]

To assess change in the Court's opinions over time, I use two different methods of calculating readability: the Flesch Reading Ease (FRE) Test and the Coleman-Liau Index (CLI). Created in 1948, the FRE uses a 0–100 scale, with 0 representing the most complex test (i.e., reading at a college graduate level) to 100 (reading at about a 4th grade level, or functionally literate). (Flesch 1949, 149, as cited in DuBay 2004, 21). This score is calculated as:

$$FRE = 206.835 - 1.015 * \left(\frac{words}{sentences}\right) - 84.6 * \left(\frac{syllables}{words}\right)$$

[42] Dworkin uses the classic 1889 case *Riggs v. Palmer* to illustrate this phenomenon. In this case, a grandson had murdered his grandfather to prevent him from cutting him out of his will. Although the statute was clear, the Court ordered the will to be amended to remove the grandson as a beneficiary.

[43] In this case, Friedman was describing laws passed in the late 1800s to control the growth of the insurance industry.

The second measure—the Coleman-Liau Index—provides an alternate method of calculating an opinion's linguistic complexity. Unlike the FRE, it uses only the number of letters, words, and sentences. The result is a score scaled to grade level, with lower values indicating easier-to-read prose than higher values. As Owens, Wedeking and Wohlfarth (2013, 43) note that the CLI "will treat a text as more difficult to read (e.g., produce higher values) wen a text contain 'bigger' words (e.g., words with more characters) compared to smaller words. Likewise, 'long' sentences with a large proportion of words are treated as more difficult to read than 'shorter' sentences." The CLI is calculated as:

$$CLI = 5.88 * \left(\frac{letters}{words}\right) - 29.6 * \left(\frac{sentences}{words}\right) - 15.8$$

Both scores have been used to in recent studies to assess the clarity and simplicity of Supreme Court opinions. Owens and Wedeking (2011) use clarity measures more detailed than the FRE and CLI to find, in particular, that majority opinions issued between the 1983 and 2007 terms tend to be less clear than dissenting opinions. Using the CLI, Owens, Wedeking, and Wohlfarth (2013) conclude, between 1953 and 2008, the Supreme Court wrote less clear opinions when it sought to avoid congressional oversight. Coleman and Phung (2010) apply the FRE to amicus briefs to find, among other things, that clarity varies by subject matter, with less complex language used in criminal cases.

Table 4.9 displays the average FRE for 1,104 majority and dissenting opinions across 500 decisions from the 1946 through 2012 terms.[44] Using the FRE as the sole measure, I find that dissents tend to be less complex than majority opinions during the Vinson, Warren, and Burger Courts, but became slightly more complex during the Rehnquist and Roberts Courts. The difference in the Rehnquist and Roberts Courts may be illusory, however, as t-tests of the differences in mean FRE for majority opinions and dissents were insignificant for both courts.[45] This difference is also significant for the Burger Court. However, in both the Vinson and Warren Courts, the differences in clarity between the dissenting and

[44]These 500 opinions are the same as collected for the analysis of joining behavior presented in the previous section.

[45]Roberts Court: 131 dissents, 101 majority opinions, t=-1.1674, p = 0.2443, df=230 (two-tailed test); Rehnquist Court: 129 dissents, 101 majority opinions, t=-0.8787, p=0.3805, df=228 (two-tailed test).

majority opinions were statistically significant.[46]

Table 4.9: Means and Standard Deviations of Flesch Reading Ease (FRE) Scores for Majority and Dissenting Opinions, 1946–2012 Terms

	Dissent	**Majority**	**Total**
Vinson	34.89	32.00	33.55
	(10.1)	(6.48)	(8.7)
	105	91	196
Warren	31.75	29.34	30.67
	(11.2)	(7.3)	(9.7)
	114	92	206
Burger	27.62	26.75	27.26
	(8.1)	(5.8)	(7.2)
	141	99	240
Rehnquist	26.51	27.20	26.81
	(6.3)	(5.4)	(5.9)
	129	101	230
Roberts	27.92	28.87	28.33
	(6.8)	(5.2)	(6.1)
	131	101	232
Total	29.44	28.77	29.15
	(9.0)	(6.3)	(8.0)
	620	484	1104

Table 4.10 provides the same information calculated using CLI scores. According to the CLI measures, the dissenting opinions are, on average, more clear than majority opinions. This difference is most pronounced during the Vinson Court ($\Delta_{means} = -0.563$) and monotonically narrows over time to $\Delta_{means} = 0.1$ during the Roberts Court. Notably, the difference in CLI scores between the dissent and majority opinions is statistically significant for all courts *except* the Roberts Court.[47] Notably, the CLI scores indicate that clarity has monotonically *decreased* over time for both majority and dissenting opinions.

[46] Warren Court: 123 dissents, 103 majority opinions, t=1.8128, p=0.0712, df=224 (two-tailed test); Vinson Court: 105 dissents, 91 majority opinions, t=2.3470, p=0.0199, df=194 (two-tailed test).

[47] Vinson Court: 105 dissenting opinions, 91 majority opinions, t=-1.3025, p=0.0028, df =194 (two-tailed test); Warren Court: 123 dissents, 103 majority opinions, t=-2.7413, p=0.0066, df=224 (two-tailed test); Burger Court: 141 dissenting opinions, 99 majority opinions, t=-2.7083, p=0.0073, df=238 (two-tailed test); Rehnquist Court: 129 dissents, 101 majority opinions, t=-1.2882, 0.0995 (one-tailed test); Roberts Court: 131 dissenting opinions, 101 majority opinions, t=-0.2140, p=0.8307, df=230 (two-tailed test).

Table 4.10: Means and Standard Deviations of Coleman-Liau Index (CLI) Scores for Majority and Dissenting Opinions, 1946–2012 Terms

	Dissent	Majority	Total
Vinson	11.75	12.32	12.01
	(1.5)	(1.0)	(1.3)
	105	91	196
Warren	12.14	12.56	12.34
	(1.3)	(1.0)	(1.2)
	114	92	206
Burger	13.03	13.42	13.19
	(1.2)	(0.95)	(1.1)
	141	99	240
Rehnquist	13.42	13.59	13.50
	(1.1)	(0.8)	(1.0)
	129	101	230
Roberts	13.5	13.6	13.5
	(1.1)	(0.9)	(1.0)
	131	101	232
Total	12.84	13.12	12.96
	(1.4)	(1.1)	(1.3)
	620	484	1104

4.7 Conclusion

Why do Justices dissent, and what does it mean? What form does it take? As discussed throughout the preceding two chapters, these questions have different answers depending on the institutional position of the Court. Early in its history, the Court was constrained by its own lack of institutional legitimacy. However, as the Court increased in stature, maintaining a unified front in the face of external pressure was less important. This strength was evident in the Court's confrontation with President Roosevelt over his Court-packing plan, and the Court's ultimate victory—combined with a changing constitutional landscape and the legal realist transformation in public perception of the law, among other things—gave the Justices more space to freely disagree with the majority opinion.

This dramatic shift from a norm of acquiescence to regular, well-accepted, institutionalized disagreement was the most visible, yet coarsest, change to occur on the Court. Between the Vinson and Roberts Courts, the form and structure of dissent has changed

a great deal, as well. Over time, closely divided decisions in which four Justices vote to dissent—once a rarity—has become much more prevalent. Dissenting coalitions have also become more cohesive, and the same four Justices are also much more likely to join the same opinion than in previous eras.

Finally, perhaps as a function of dramatic change in Justices' voting and joining behavior, the structure of dissents have also fluctuated over time. In particular, this chapter looked at how the *clarity* of dissents have changed over time. In general, dissenting opinions appear to have become more complex over time, although the evidence on this point is not entirely consistent. By one measure, the Coleman-Liau Index (CLI) this change has occurred monotonically from the Vinson Court through the Roberts Court. By another measure—the Flesch Reading Ease (FRE) score—this change has not been monotonic, with the Roberts Court dissents appearing to be slightly less complex (i.e., more clear) than dissents issued throughout the Rehnquist Court. In any event, the clarity of dissents has not remained static over time, and like voting and joining behavior, as fluctuated throughout the modern era.

Chapter 5

The Benefits of Dissent

Dissents exist in jurisprudential and normative limbo. Traditionally eschewed by formalist scholars and jurists as mistakes, the acceptance of dissent as a legitimate judcial practice has grown with the Supreme Court's rejection of the norm of acquiescence beginning with the constitutional revolution of the 1930s. Although empirical scholars have largely ignored dissents as the by-product of a political Court, dissents are a vibrant and compelling expression of diverse values, priorities, and understandings about American political culture and the way in which we order our institutions. This chapter explores the possible uses of dissent in the modern era. Dissents, far from being marginal and unimportant, have positive value in their own right. Despite their treatment in the literature as either incidental or symbolic, there are good reasons to believe that judges write dissents with the desire to affect policy, and to some extent, they are able to do so.

Much has been written about the Court's institutional role within the American system of government, as well the extent to which the (surprisingly dynamic) institutional arrangement in which the Court finds itself, influences the decisions it makes. Dissent is important precisely because of three different, yet related, aspects of this institutional arrangement: the intracollegial bargaining process between members of the Court, the relationship between the American public and the Court, and the relationship between the Supreme Courts and the lower federal courts.

While these institutional environments set the stage for dissents, its positive value comes from the ability to *communicate ideas* within each of these three contexts. From this

perspective, dissents are best thought of as a form of political communication. To explore this idea, I first discuss political communication within the context of democratic theory. After examining the forms of communication used by political actors to achieve their goals and otherwise organize political life, I turn to the adjudicative process. Although broadly unrecognized in the literature, judicial dissent has its greatest value when viewed through this lens. Finally, I discuss how, as a means of political communication, judicial dissent is able to (1) improve the majority opinion, (2) speak to political minorities as part of the ongoing process of pluralist politics, and (3) shape the decisions of future courts, thus providing avenues and incentives to alter the law.

5.1 Defining Political Communication

Political communication encompasses a broad range of behavior employed by actors before or during a deliberative or otherwise rational decision-making process, with the goal of achieving an actor's most preferred outcome. By necessity, this is a very inclusive (and noticeably vague) definition, so it will be helpful to break this concept into its component pieces.

Start with the premise the actor seeks to achieve his "most preferred outcome," which may take a broad or narrow meaning. The broadest meaning reflects a shared collective desire to achieve a public good. This focus on the *public* good "has traditionally been defined in opposition to self-interest" (Mansbridge et al. 2010), although it need not be. For example, in discussing civil disobedience, Rawls (1971, 365) draws a distinction between fundamental principles of justice and self-interest but recognizes that the two may coincide.

Under a narrower construction, "most preferred outcome" is defined with reference to the rational choice literature and assume that that actors possess unidimensional, single-peaked policy preferences. Adopting this definition does not deny the reality that actors have complex value sets and preferences along many dimensions. However, reference to a rational choice definition of preferences merely assumes that multi-dimensional preferences may be disentangled to allow debate to occur and decisions to be made along a

single dimension at any given time (Miller 1992; Knight and Johnson 1994).[1]

The next term, "deliberative or otherwise rational decision-making process," indicates that the context in which this communication occurs is defined to be quite inclusive. When I speak of rational decision-making process, I refer to interactions that may be viewed as "preference aggregation." The paradigmatic form of preference aggregation is silent voting, in which actors must choose whether to enact a policy but are not allowed to communicate with each other.

This is not how political institutions—such as the Supreme Court—operate, however; such institutions—while fundamentally concerned with preference aggregating—are necessarily deliberative. Deliberation, generally speaking, is a normative description of how political decisions *should* be made, although what exactly comprises (or should comprise) deliberation is the subject of intense debate (*See, e.g.*, Bächtiger et al. 2010). Under one view, deliberation is principally concerned with *arguing*, with the "ostensible goal" of transforming preferences (Elster 1998, 6). Others suggest that deliberation is better characterized as an information-revealing process used principally to *legitimate* decisions. For example, Landa and Mierowitz (2009, 429) define "deliberative democracy" as "a process by which individuals who are committed to offering justifications and seeking understanding actively and sincerely debate merits of policy alternatives in search of the policy that is most consistent with an idea of the common good."

Unlike the silent voting paradigm, actors located inside and outside of political institution use communication to influence political outcomes and are inherently deliberative. In the context of the Supreme Court, Justices use communication to both set its docket through the certiorari process. External actors, such as attorneys appearing before the court or submitting briefs, use communication through institutional channels to inform Justices of the true state of the world—or at least the state of the world as their client sees it. Justices do the same when bargaining and debating with each other in conference and

[1] This is not a wholly uncontroversial assumption, but *preference structuration*, of which single-peakedness is an example, is a sufficient condition to resolve the indeterminacy of preference aggregation, as described by Arrow's impossibility theorem (Arrow 1963). Thus, full, or complete, single-peakedness is a more restrictive assumption than required to resolve issues with decisional indeterminacy posed by Arrow, but it is adopted here to create coherence between this discussion and the vast majority of literature conceptualizing voting mechanisms in the discipline *writ large*. For an excellent discussion of this issue, see Dryzek and List (2003), 12–22.

during the opinion writing process.

Political communication can be seen as taking four general forms: informational, argumentative, reflective, and social (Dryzek and List 2003, 9).[2] Informational political communication attempts to provide facts, signals, or perspectives that clarify the true state of the world. Argumentative political communication seeks to clarify not the true state of the world, but rather clarify the arguments that are being made about the state of the world. Reflective communication pushes the recipient of that message to evaluate the true state of their own preferences and recognize that their preferences must be justified to other actors. Finally, the last type of communication is social in nature. Social communication attempts to create open channels of discourse between members of a community, thus, in the words of Dryzek and List, "enabling each person to recognize their interrelation within a social group" (9).

5.2 Opinions as Political Communication

Although not explicitly discussed as such by scholars of judicial behavior, opinions are fundamentally a form of political communication. Indeed, the primary purpose of an opinion is to communicate *reasons* for a court's decision (Scalia 1994). Opinions are also the product of an adversarial adjudicative process saturated with and shaped by communication from a variety of actors, such as other judges, attorneys, and amicus curiae. Analyzing opinions as both intrinsically communicative and the product of an extrinsic communicative process may help to shed light on how they are used by courts, officials in other branches of government, and political actors in the broader political community.

Opinions, furthermore, may be seen as communicative within a larger deliberative *democratic* process. They are both evidence of deliberation and contribute to deliberation in an ongoing society-wide debate over values and policy. Justice Scalia in particular, has argued that the transparency of the deliberative process, as evidenced by the existence of dissenting opinions, has actually increased the Court's prestige. Scalia (**?**, 33) observed,

[2] Although Dryzek and List (2003) specifically refer to these modes of communication as deliberation, such categories are also useful in thinking about political communication generally.

> Justice Louis Brandeis made his oft-quoted observation that the reason the justices of the Supreme Court enjoyed such a high level of popular respect was that, as he put it, "[we] are almost the only people in Washington who do [our] own work." Dissents make that clear. Unlike a unanimous institutional opinion, a signed majority opinion, opposed by one or more signed dissents makes it clear that these decisions are the product of independent and thoughtful minds, who try to persuade one another but do not simply "go along" for some supposed "good of the institution."

In the following sections, I frame the adjudicatory process as an essentially deliberative one, observing how political communication infuses each step of the appellate decision-making process. I then turn my attention to judicial opinions, reflecting on how each of the four types of political communication discussed above—informational, argumentative, reflective, and social—are embodied by Justices' reasoning. In the final section of this chapter, I examine how dissenting opinions—through this communicative capacity—are able to achieve three important functions. First, dissents can improve the quality of the majority opinion. As dissents are circulated through the bargaining process, they push the majority to narrow it holding and eliminate weaker arguments. Second, dissents may also signal to society that the Court is a deliberative institution and, through its serious consideration of competing view points, provide a form of second-order representation to political minorities. Finally, I argue that dissents can shape *future* majority opinions by preserving alternate lines of legal reasoning for future courts.

5.2.1 The Adversarial Process as a Deliberative Process

The adjudicative process leading to the Court's collegial opinion writing process is marked by tension between preference aggregation and deliberation. This process is driven by self-interested attorneys, who are motivated in part by their career, reputation, or fees. However, attorneys themselves have a moral and professional duty as a representative of their client and an officer of the court.[3] As a result, attorneys who engage in this adversar-

[3]For example, the Preamble of the *New York Rules of Professional Conduct* states

ial process necessarily promote competing arguments of truth, albeit constrained by legal principles, competing duties, and the rules of the court before which they are appearing. This ethical obligation encourages an openness and rationality that operates in tension with incentives for winning a case at any cost.

Judges and Justices are also subject to competing constraints. They have preferences over policy (*see, e.g.*, Epstein and Knight 1998; Segal and Spaeth 2002) but have multiple goals and audiences (Baum 1994). They also have a limited capacity to estimate the impact of their policy pronouncements. Judges in collegial courts do not act in a vacuum, however. Throughout this process, various actors engage in communication with the Court, transmitting information that helps the Justices efficiently coordinate on appropriate legal remedies in a case and making arguments calculated to convince one or more Justices as to the wisdom of an attorney's position.

Lower courts, litigants, and amicus curiae present arguments, provide information about the state of the world, make reflective claims about consistency and stability in the law, and offer social statements about the appropriate role of the Court in American society. This may occur either before or during oral argument (Collins 2005; Corley 2008). Through this interaction, the Justices are able to gather information about the impact of possible legal rules, determine the dimensions over which there exists the most conflict, and coordinate on the policies that are most likely to achieve their goals or reflect their values.

The Court begins the process of opinion formation by receiving information from lower courts, such as federal appellate courts and state supreme courts, the parties involved in the case, and any amicus curiae the Court permitted to file a brief. Beyond

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> A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the publics understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority. . . . The touchstone of the client-lawyer relationship is the lawyers obligation to assert the clients position under the rules of the adversary system, to maintain the clients confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

simply encouraging or discouraging review by the Court (Cameron, Segal and Songer 2000; Caldeira and Wright 1988; McGuire 1994), briefs submitted by the parties and amicus curiae present reflective statements and arguments that cite precedent, indicating that the issues and doctrines debated in the instant case are sufficiently similar to those of earlier cases to justify following the Court's prior decisions (Dworkin 1986, 24; Calvert and Johnson 1998). Alternatively, if the instant case is sufficiently dissimilar, these briefs may invoke principle that the instant case should or should not be treated like other lines of cases (Nozick 1993, 12-14).

Litigants and amici briefs may provide information about the likelihood of various states of world given each proposed policy choice (Collins 2004, 2005; see also Calvert and Johnson 1998, 6). For example, in *Federal Communications Commission v. AT&T, Inc.*, in a brief by the Reporters' Committee for Freedom of the Press and 22 media organizations (filed in support of the Federal Communications Commission), amicus curiae argued that if the Court chose interpret the Freedom of Information Act (FOIA) to exempt certain corporate records from mandatory disclosure, such an act would "hinder journalists' ability to perform their constitutionally protected 'watchdog' role and inform the public about corporate action bearing upon public health, safety and welfare" (18).[4] In support of this position, the brief cited several instances in which reporters had used records obtained through FOIA to alert the public to the unsafe operations of airlines, nuclear power plants, and copper mines, as well as public health violations with respect to tainted meat and drinking water (18–32).

Amici briefs may also provide information in the form of a summary of relevant specialized research, with which the Justices may have little to no familiarity. Take, for example, an amici brief filed by the Center of Wrongful Convictions of Youth, et al., in *J.D.B. v. State of North Carolina*.[5] In this case, the Court was asked to rule on whether a minor's age must be taken into account for the purposes of determining whether the minor was "in custody."[6] In their brief, amici wrote, "While other briefs presented to this Court under-

[4]This case was argued on Jan. 19, 2011, and decided on Mar. 1, 2011.

[5]This case was argued on March 23, 2011, and decided on June 16, 2011.

[6]When a person is "in custody," custodians are required to inform the that person of his rights as enunciated by the Court in *Miranda v. Arizona* (1966).

score the legal arguments as to why age must be a factor in the custody determination, we write separately to emphasize the practical results of omitting age from this calculus: an increase in false confessions and unreliable statements elicited from children by police in the stationhouse and the schoolhouse" (13). The brief then discussed findings of various psychological and criminological studies suggesting that children are especially susceptible to giving a false or unreliable statement under the "inherently compelling pressures" of interrogation.[7]

Through such briefs, actors are able to *efficiently coordinate expectations* about how cases should be viewed and, as a result, the rules that the Court should apply to evaluate them (7–9). The reasoning of lower courts, for example, may affect the universe of arguments the Court perceives as valid. In the case of intercircuit conflict on an issue, for instance, the Court is more likely to adopt the reasoning adopted by a majority of circuits and well-respected, or high quality, appellate judges, and less likely to adopt the reasoning of panels whose majority opinions were also accompanied by dissent (Lindquist and Klein 2006). Moreover, the Court relies so heavily on litigant briefs that roughly 20% of the language used in the Court's majority opinions come from appellants' and respondents' briefs—a much higher percentage than from other sources (Corley 2008, 471–74). Additionally, amicus curiae briefs, including those submitted by the Solicitor General of the United States, also present arguments that Justices may incorporate into their opinions (Spriggs and Wahlbeck 1997, Collins 2005; see also Segal 1988; McGuire 1995, 1998).

Like litigant and amici briefs, oral argument may facilitate efficient communication and coordinate Justices' expectations through the presentation of legal arguments, reflective statements about consistency in the law, and social comments about the role of the Court in the American political system. Taken together, these types of communication tell the Justices something useful about the propriety and feasibility of particular policy outcomes. As with the briefs submitted to the Court, Justices may also use the oral argument as an opportunity to collect information about available policy options and the potential issues with implementation beyond that which is available in the briefs by asking questions

[7] Acker (1990) argues, however, that when justices cite social science research they tend to cite studies not discussed in briefs. He attributes this, however, to a lack of participation by social scientists in the authorship of amici briefs.

(Johnson 2001). Justices also may be able to transmit information about their own preferences to their colleagues through questions revealing their perception of an argument's quality or merit. (For an application of this idea, see Black and Johnson 2010.)

Oral argument encourages efficient coordination on a reasonably narrow set of legal arguments that could be used by the Justices in their decisions and thereby enhance "collective consideration" of the case's major issues (Schubert et al. 1992). Justice John Marshall Harlan II once commented that there was "no substitute" for oral argument, which allowed him to get "at the heart of an issue [and find] out where the truth lies" (*Structure and Internal Procedures: Recommendations for Change* 1975, 104–05, as cited in Wasby, D'Amato and Metrailer 1976, 411). In this respect, oral arguments can be seen as adding to the value of briefs (Wasby, D'Amato and Metrailer 1976, 413), and Justices have been responsive to to high-quality legal reasoning presented during oral argument (Johnson, Wahlbeck and Spriggs 2006).

Like the broader adjudicative process, the act of collegial opinion writing is also marked by elements of both preference aggregation and deliberation. The most obvious element of preference aggregation is the bargaining that occurs between Justices with respect to opinion writing, and the voting mechanisms employed to express who will join each opinion (Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000; Spriggs, Maltzman and Wahlbeck 1999). The nature of legal reasoning, however, is inherently deliberative. Through the act of collegial opinion writing, Justices learn about the preferences of their colleagues, as well as hone the scope and structure of their arguments to persuade other Justices to join. Thus, the practice of circulating drafts of opinions has elements of bargaining and argument, as Justices use multiple drafts of opinions to attempt to change each others' minds and reveal to their colleagues what they see as the consequences of their colleagues' preferences (*see, e.g.*, Howard 1968).

5.2.2 The Intrinsically Communicative Nature of Opinions

Unlike some forms of legislative bargaining, in which politicians are seeking essentially to divide up a pie, compelling legal writing is inherently communicative. Opinions possess

argumentative, informational, reflective, and social facets. While each is distinct, all of these elements must be present and artfully interwoven to produce a high-quality judicial opinion.

5.2.2.1 Argumentation

The argumentative aspect of judicial opinions comprises the core of legal persuasion. Fundamentally, legal reasoning is concerned with how texts should be interpreted and the manner in which those principles should be applied in a specific case. The most prominent and widely used form of argument is analogical reasoning, or "arguing by analogy" (Brewer 1996). Analogical reasoning can take many forms, all of which are characterized by "focus and reliance on examples in the process of inferring conclusions from premises" (Brewer 1996, 927).

However, the quality of any argument offered by a judge depends in part on the informational, reflective, and social factors that provide the context in which the argument is made. In other words, these additional types of communication situate the argument within the facts of the case, demonstrating coherence between the logic of the argument and the situation in which it is applied.

5.2.2.2 Information Transmission

Informational aspects of opinions apprise implementing and interpreting actors, such as lower court judges and executive branch officials, of the knowledge gathered by the Court throughout the adjudicative process. These informational statements help to justify the Court's legal conclusions by grounding its reasoning in an empirical reality.

Communicating information is especially important when the Court's decision has a scientific or medical basis, such as when Court decisions dealing with abortion. For example, in *Planned Parenthood of Southeastern PA v. Casey*, Justice O'Connor, writing for the majority, altered the *Roe v. Wade* trimester framework to reflect changing medical understanding of fetal viability.[8] Her reasoning provided information about medical advances in prenatal care and fetal development to support the Court's decision that *Roe* should be

[8] 505 U.S. 833 (1992).

altered to reflect new scientific evidence and practice. Similar use of empirical information appears in *Stenberg v. Carhart*[9] and *Gonzalez v. Carhart*.[10] These cases involved challenges to partial birth abortion bans at the state (*Stenberg*) and federal (*Gonzalez*) levels. In each case, Justices supporting the laws described in graphic detail the method by which fetuses were aborted using the procedures proscribed by the law. There is a good argument that the language in the *Stenberg* dissent and *Gonzalez* majority is not meant to be informative so much as shocking. That these rather gruesome procedures are discussed for their "shock value," however, does not devalue the informational function of the description. The Justices engaging in this discussion may have believed that public debate and legal deliberation is better informed by understanding exactly what the procedure entails.[11]

Sometimes, however, empirical statements or predictions turn out to be incorrect. Revelation that the opinion rested on a false empirical assumption or foundation can undermine the reasoning of the argument. For example, in *Clinton v. Jones*[12], Paula Jones, a former Arkansas state employee, sued President Clinton for sexual advances he allegedly made towards her while a state employee during his governorship, retaliation against her when she spurned those advances, and defamation by those authorized to speak for the then-Governor Clinton. Although the President argued that he should not be subject to suit while in office, the Court found that

> [Clinton's] predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions . . . . If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time (702).

[9] 530 U.S. 914 (2000).
[10] 550 U.S. 124 (2007).
[11] Justice Thomas discusses the specifics of the procedure, terms "dilation and extraction" (D&E) in *Stenberg* at 984–90 and in *Gonzalez* at 135–40.
[12] 520 U.S. 681 (1997).

The Court's assessment, however, would prove to be gravely mistaken, as the suit led to the Monica Lewinsky scandal, perjury charges, and eventual impeachment by the House of Representatives. This process, contrary to Court's assertions, swallowed up most of President Clinton's second term in office.

5.2.2.3 Reflective Statements

An opinion's legal arguments are also supported by reflective statements. Recall that a reflective statement is one in which either the sender or receiver recognizes that his opinions must be justified to other actors. In this context, reflective statements are those that demonstrate an awareness of the importance of consistency and stability in the law. In particular, reflective arguments are those that respect the norm of *stare decisis*. Reflection in the legal context provides authority for the opinion and signals to the receiving audience that the Court's decision was not arbitrary. Note that arguing by analogy is inextricably linked to reflectivity, as it provides the referent for the Court's analogical argument.

The Court signals the importance of stare decisis's reflective justification by vehemently arguing that the norm does not apply when it is in the midst of violating it. For example, in *Citizens United v. FEC*[13], the Court overruled its prior decisions in *Austin v. Michigan Chamber of Commerce*[14] and *McConnell v. FEC*[15], finding that the First Amendment barred limits on independent corporate expenditures for "electioneering communication" (i.e., political speech during elections). Chief Justice Roberts wrote a concurring opinion, seemingly for the sole purpose of explaining why stare decisis did not apply. In doing so, he suggested that the majority is, in fact, acting consistently with those strains of precedent in line with the true meaning of the First Amendment; *Austin* and *McConnell* were not. As a result, the Court was not compelled to follow them. This is a good illustration of how important reflective statements are. Even when the Court's majority rejects a dominant reflective norm, such as stare decisis, it is compelled to argue that it hasn't.

While reference to stare decisis is broadly reflective, an opinion's author may make a more narrow statement about the consistency of their own beliefs and views of the law

[13] 558 U.S. 310 (2010).
[14] 494 U.S. 652 (1990).
[15] 540 U.S. 93 (2003)

over time. While reflective affirmations to precedent may be normatively desirable and legitimizing, personal reflective affirmations may be more compelling from a moral perspective. These types of narrow reflective assertions are most common in minority opinions on controversial social issues. A well-known example of this is Justice Thurgood Marshall and William Brennan's dogged insistence on registering their disapproval of the death penalty in every decision touching the issue—including denials of petitions for writ of certiorari—from *Gregg v. Georgia*[16] onward. Together, Brennan and Marshall dissented from the denial of petitions for writs of certiorari in death penalty cases at least 909 times from the promulgation of *Gregg v. Georgia* to Brennan's retirement in July 1990.[17] In the vast majorities of these cert denials, Brennan and Marshall's joint dissent was a single sentence: "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in this case."

5.2.2.4 Social Statements

Social statements may also be used to support the an opinion's central legal argument. Like reflective statements, social commentary in the context of judicial opinions has a distinct meaning. Social statements are those which situate the Justices' opinions within the broader American political community. Such comments recognize the unique role of the federal courts, as well as its limitations, although social statements need not be consistent across the Court's opinions or membership.

For example, one way of making a social assertion in support of an argument acknowledges the importance of judicial restraint or recognizes the importance of Congress and the Presidency as co-equal branches, capable of coordinate construction of the Constitution. Alternatively, the Court may seek to limit its role in a dispute between the other

[16] 428 U.S. 153 (1976) (finding Georgia's application of the death penalty to be constitutional).

[17] I conducted the search for dissents to denials of cert with Lexis Advance using the following search terms: `petition w/1 writ w/1 certiorari p/2 gregg dissent***` . This search was furthered narrowed by the following parameters: `U.S. Federal;Supreme Court; 07/01/1976 to 07/21/1990; 428 U.S. 153; USCS Const. Amend. 8; Marshall /15 Brennan; certiorari` .

two branches. To this end, Justice Powell has noted,

> This Court has recognized that an issue should not be decided if it is not ripe for judicial review. Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict. *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (internal citations omitted).

A Justice might focus on the ways in which the Court is uniquely suited to respond to distortions or defects in the political process that reduce fair and equal representation, referred to as *representation reinforcement theory* (see, e.g., Ely1980). This theory, however, has not been widely adopted by the Court and has been criticized by the academy as incomplete (see, e.g., Jr. 2005). For example, this concept was dismissed by Justice O'Connor speaking for a plurality in *City of Richmond v. J.A. Croson Co*.[18] In rejecting Richmond's requirement that city contractors spend a defined percentage of the contract amount on the hiring of minority subcontractors, O'Connor shunned a "representation reinforcement" interpretation that would call for a lower standard of scrutiny for race-conscious laws that benefited "discrete and insular minorities," such as African-Americans or Latinos. In doing so, she notes that, given that the population of Richmond is 50% black and the more than half of the seats on the city counsel are held by blacks, such protection is inappropriate (495–96). While this comports with a shallow reading of representation reinforcement, it is unfaithful to a broader historical understanding of widespread discrimination and perva-

[18] 488 U.S. 469, 495 (1989).

sive in the South in general and Richmond in particular, leading to long-term disparities in wealth and political power.[19]

Some Justices, however, do see a role for representation reinforcement theory in their concept of judicial role. One important proponent of this perspective was Justice John Paul Stevens. Justice Stevens, dissenting from the majority's decision that a collective bargaining agreement protecting minority teachers from layoffs was unconstitutional, cited Ely (1980) directly, noting, "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (*Wygant v. Jackson Bd. of Educ.* (Stevens, dissenting), citing Ely (1980, 75–77).[20] Later, writing for the Court in a decision holding that an early filing deadline constituted an "unconstitutional burden on the voting and associational rights" of the supporters of a candidate for public office, Stevens again cited the unique role of the Court in safeguarding minority rights from a distorted political process, arguing, "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny" (*Anderson v. Celebrezze*[21].

5.3 Unique Communicative Functions of Judicial Dissent

Minority opinions, as statements of a Justice's reasons for his vote, may communicate in the same ways as majority opinions. Dissent can transmit information, make an argument, compel reflection, and acknoweldge the social and political context in which the Court acts. However, dissents—unlike majority opinions—do not set national legal policy or need to inspire compliance by lower courts or other actors. Why, then, do judges invest resources in crafting such communicative opinions? What do judges get out of writing

[19] This criticism also speaks to the majority conclusion (also written by O'Connor) that that the city's program would only be constitutional if the city could demonstrate a history of discrimination against minority contractors.

[20] 476 U.S. 267, fn 10 (1986).

[21] 460 U.S. 780, 793 n.16 (1983)

and what purpose do they serve? In some ways, judicial dissent plays a similar function to other forms of political dissent. Dissenting is a non-conformist act that may serve a multitude of personal, social, and political purposes. Following Gerken (2005), I focus on three: (1) dissent as contributing to the "marketplace of ideas," (2) dissent as helping "electoral minorities in the project of self-governance," and (3) dissent as helping political minorities engage in "self-expression" (1749-51).

First, dissent "contributes to the marketplace of ideas" (Gerken 2005, 1749). The primacy of the marketplace of ideas was forcefully defended by Justice Holmes, among others, who, dissenting from the Court's decision to uphold the conviction of five men who published political pamphlets against the war effort during World War I, chastized the majority for failing to recognize that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution" (*Abrams v. U.S.*, 250 U.S. 616, 630 (1919)). This idea is a powerful justification for expansive First Amendment protections and "essential to effective popular participation in government" (Ingber 1984, 3). This idea assumes a perfectly efficient political market, however, which is certainly not the case in American political culture. Systematic class and educational dispartities, not to mention longstanding racial and gender biases, serve to reinforce the influence of elite white males at the expense of other actors.[22] These longstanding social sources of distortion are amplified by other forms of "free speech" market failures, including a lack of access to communication technology,[23] hegemonic control of the media by historically favored groups, and irrational responses by the majority to manipulative information or

[22]Gerken 2005 notes, however, that some sufficiently powerful groups "are more than capable of making dissenting views visible without the aid of formal decision-making authority. The Democratic Caucus can easily make its position on an issue visible even when it does not control Congress. The NAACP or Common Cause can make their members' views clear to the world even if their supporters cannot muster enough votes to control any relevant governing institution" (1762-63).

[23]This aspect of market failure is potentially ameliorated by widespread accesibility to the internet. On the other hand, writing a blog post about an issue is a bit like pouring a glass of water into the ocean. While the act of posting information carries with it a greater potential that a wider audience will see it, unless it is a video of a cat playing the piano, political messages will still have the greatest probability of being seen and taken seriously when connected to or endorsed by historically powerful institutions or groups, such as a major news media outlet or political party. However, to the extent that the internet actually creates a "crowding out" effect, the internet may do little to create greater visibility for minority views.

messages (Ingber 1984, 5).

Any cure aimed directly at equality of influence, as opposed to the necessary deliberative requirement of equal status, is likely to be worse than the disease (Dworkin 1996, 26–29). These distortions can, however, be minimized by creating mechanisms to help make dissents more visibile to the broader political community (Gerken 2005, 1762-63). Unlike many other political actors, Justices have the ability to make a minority or otherwise marginalized position visible to other elites. The weight of a Supreme Court Justice's opinion and the prestige of the Court as an institution give judicial dissents a platform that many other political minorities lack. As a result, judicial dissents are more likely to make a contrbution to the marketplace of ideas than other forms of political dissent.

One criticism of this assertion might point to the Supreme Court's prominance as a historically privileged body. Those appointed to the Court are well-connected poltically, receiving their appointments, in part, due to these close personal connections with Senators or President (see generally, Abraham 1992). Supreme Court Justices have represented a historically dominant white, protestant, male ruling elite (Smelcer 2010). Thus, legal positions espoused by the Justices will likely not stray far from well-accepted majority positions, continuing to marginalize of true political minorites. This issue is exacerbated by Court's near-total discretion over its own docket. While this claim is undoubtedly true, I offer two responses.

First, to the extent that the judicial process is at least deliberative in part, the force of a litigant's argument, as conveyed through briefs, may help to overcome institutional biases created by underlying power structures. This is, after all, the object of deliberation. Still, whatever benefit the deliberative nature might bring would be counteracted by a selection effect limiting the type of claims that are brought before a court. Doctrines regarding standing, mootness, ripeness, and political questions allow the Court to avoid or redirect challenges involving core legal values. For example, unless as in *Abrahms* a distinctly legal matter were identified, members of the Communist Party would be barred from file a suit to force radical economic and political changes regarding the distribution of wealth in American society; implementation of such a policy is a legislative, as opposed to judicial, function. However, where the Court has jurisdiction and a fundamental question of equal

rights or political participation can be framed as a legal issue, such as in equal protection cases like *Brown v. Board of Education*[24] and *Reed v. Reed*,[25] the Court is able to address fundamental issues of rights and participation. Thus, to the extent that political minorities are unable to articulate a legal theory underlying their statement of protest, they will be unable to turn to the Court, but this still leaves a very wide range of issues to which the Court might speak.[26]

Second, the Court need not be able to speak to all perspectives to effectively promote some of them. A judicial dissent's contribution to the "marketplace of ideas" is no less important because the Court as an institution does not or cannot reflect all minority perspectives of an issue. The Court is but one of many institutions and avenues for political legal debate. That it cannot speak to all social unrest or debate does not make it any less important or relevant for the issues it does address.

Judicial dissent may also help "electoral minorities in the project of self-governance" (Gerken 2005, 1750). Gerken connects the idea of self-governance to respect for the minority's First Amendment free speech/free expression rights, arguing that "[d]issent matters . . . because a government's legitimacy in the eyes of the minority depends in part on its creation of channels for dissent" (Gerken 2005, 1775).[27] Dissent by Supreme Court Justices in a form sanctioned by the state embodies the highest form of political legitimacy. Alternatively, judicial dissent can be seen as a second-order type of political or moral rerpesentation. Litigation allows political minorities to use public authority, through the power of the courts, to achieve its own ends through a process that may be characterized as democratic *if political minorites have access to the courts* (Zemans 1983). Self-governance through the courts is more compelling when the Court adopts a minority group's legal position. However, even recognition of a minority position that has been unrepresented previously at the elite level may be an important step forward for political minorities.[28]

[24] 347 U.S. 483 (1954).

[25] 404 U.S. 71 (1971).

[26] *See generally*

[27] "Steven Shiffrin has argued that protecting the rights of dissenters to protest helps bind them to the political community" (Gerken 2005, 1775, citing Shiffrin (1999).

[28] In some ways, dissents are analogous to congressional floor statements made by minority members. For example, such floor statements may be in support of a bill or position that has no hope of passing and, as a result, are not intended to persuade colleagues. Rather, such statements are intended for a Member's constituents; the member is not able to insure the passage of legislation to pay his constituents rents, so he pays

This function of political dissent has its weaknesses. First, this line of argument about legal mobilization and second-order representation is conditional on access to the courts. Some political minorities may not be able to overcome collective action problems inherent in coordinating a legal message and reaching the courts in the first instance. Others, even if the collective action problem has been overcome, may not have the ability to engage in a sustained legal battle with the possibility for only incremental success, such that the legal fight the NAACP sustained during the Civil Rights Movement. Finally, the idea of judicial dissent as self-governance presumes that political minorities are aware of the Court's decisions. This may only be possible if the group has some sort of organizational structure, in which group elites communicate the Justices' opinions to rank-and-file members of the group.

Finally, dissent may help political minorities engage in "self-expression" (Gerken 2005, 1791). Dissent has elements of both individual and group expression. As discussed in Chapter 3, early Justices used dissent to express their disagreement with the majority on salient issues (*see* Kelsh 1999). For example, as discussed earlier, Justice Livingston dissented in *United States v. Smith*,[29] to protest the imposition of capital punishment in a piracy case, noting, "In a case affecting life, no apology can be necessary for expressing my dissent from the opinion which has just been delivered." More than 150 years later, also discussed above, Justices Marshall and Brennan continued to dissent against the imposition of death penalty.

While dissent is frequently conceptualized as individualist, in many cases policy and value disagreements align with group divisions—such as race or gender. As Gerken (2005) notes,

> the problem of dissent seems to be most nettlesome when the views of the polity divide along *group* lines and those in dissent share the same racial or ethnic background. Dealing with dissent is difficult in this context because we are dealing not just with disagreement, but disagreement that corresponds to power disparities and the continuing legacy of past discrimination (1792).

his constituents in rhetoric.

[29] 18 U.S. 153 (1820).

This kind of expression of group interests is illustrated by Justice Sonia Sotomayor's dissent in *Schuette v. Coalition to Defend Affirmative Action*.[30] In *Schuette*, the Court was faced with the question of whether an amendment to the Michigan constitution, which prohibited state and local agencies from giving minorities preferential treatment, violated the Equal Protection Clause of the 14th Amendment.[31] In essence, the referenda could be interpreted as bifurcating the political process, creating one path—a legislative one—for all non–affirmative action policies and another, significantly more difficult one—constitutional amendment—for policies dealing with affirmative action. Justice Kennedy, writing for majority, rejected this interpretation, arguing that the ballot initiative simply reflected a reasoned, race-neutral policy decision by the Michigan voters that did *not* bifurcate the policy process.[32]

Justice Sotomayor forcefully dissented, arguing that the policy was anything but race-neutral. The Michigan ballot amendment that forbade "race-sensitive admissions policies"—and the majority opinion that passed on its constitutional validity—failed to recognize that

> [t]he effect of §26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never had absent a [race-conscious admissions policy] (1662).

[30]The case's full citation is *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), et al.*, 134 S. Ct. 1623 (2014).

[31]134 S. Ct. at 1629. By way of background, the constitutional amendment was passed by ballot proposal in response to the Court's 2003 decisions in *Gratz v. Bollinger*, 539 U.S. 244, and *Grutter v. Bollinger*, 539 U.S. 306. Both cases considered race-conscious admissions standards at the University of Michigan. *Gratz* struck down the undergraduate admissions plan but *Grutter*p][l] upheld the law school's plan. In 2006, Michigan voters approved Proposal 2, which barred any "public college or university, community college, or school district [from] discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting" (134 S. Ct. at 1629).

[32]Specifically, Kennedy argued that this policy decision did *not* target racial minorities. Rather, "Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power" (1654). Furthermore, Kennedy argued that case could be distinguished from previous cases "in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by race" (1642).

Justice Sotomayor's opinion, while individually expressive, could also be seen as expressive of a *group* identity, as the concept is described by Gerken (2005). Sotomayor used "practical language that best captures the diverse experiences of different [historically marginalized] communities" (Fontana 2014). Moreover, Sotomayor was seen as especially coherent with her own personal story to form a "coherent narrative" (see, e.g., Fontana 2014).

These functions of political dissent are expressed through judicial dissent in three distinct and useful ways, explored in the remainder of the chapter. First, dissent has a function internal to the Court: its circulation may improve the quality of the majority opinion. This claim is hardly new, but it is worth examining through the lens of opinions as political communication. Second, dissent may serve an affiliative function for political minorities *writ large*. This discussion draws heavily on Gerken's understanding of political minorities and Dworkin's theories of "moral membership." Finally, judicial dissent may keep ideas alive so that one day, the minority position will become the majority. This last function of dissent is the focus of the empirical investigation that follows.

5.3.1 Dissent in the Collegial Bargaining Process

One of the primary uses of dissent—or the threat of dissent—has been to improve the majority opinion or extract concessions from the majority opinion writer. This element of the collegial bargaining process has been examined extensively by judicial behavior scholars over the past 20 years (*see, e.g.*, Maltzman, Spriggs and Wahlbeck 2000). Consequently, my discussion will be relatively brief, and my purpose is merely to provide an overview, rather than break any new ground.

The nine Justices on the Court engage in a collaborative process characterized by a "mixture of appeals, threats, and offers to compromise" (Murphy 1964, 42). After oral argument, the Justices gather in conference and the Chief Justice (or the most senior Justice in the majority, if the Chief is in the minority) assigns the majority opinion. This Justice writes a draft opinion, which is then circulated to her colleagues, who respond to the opinion in writing. This cycle of call-and-response continues until all Justices have decided to

join the majority opinion or write separately (Spriggs, Maltzman and Wahlbeck 1999, 486).

As part of the bargaining process, Justices may attempt to influence the content of the opinion by simply recommending changes, but this is not their only tool (**?**). Justices may employ "a variety of means beyond simple persuasion and personal regard, and they must choose which is most likely to produce the desired effect" (487). For example, Justices can hold out and wait to sign an opinion, act unsure about joining the circulated opinion, threaten to dissent, or actually circulate a separate opinion, among other things. This implies, rightly, that dissent may either be a product of the intial conference vote, honed through a multi-stage revision process, or a product of the revision process itself (Baum 2005).

This process of requesting revisions, threatening dissents, and playing a game of wait-and-see has significant effects on the content of both the majority and dissenting opinions. Under most conditions, dissent's main role will be to inform other members of that court of the weaknesses of the majority opinion. It will force the majority to rethink its logic, possibly to narrow the holding, and at the end of the day, may produce a better opinion. Threats and circulation of dissenting opinions may be able to limit the scope of the majority opinion and provide competition for the majority opinion (Flanders 1999).

This impact on the majority opinion suggests that dissent does, in fact, contribute to the marketplace of ideas in this narrow realm of the bargaining process. Justices can use draft *minority* opinions to shift the policy adopted by the Court. Justice Ruth Bader Ginsburg has noted that "[t]he prospect of a dissent or separate concurring statement pointing out an opinion's inaccuracies and inadequacies strengthens the test; it heightens the opinion writer's incentive to 'get it right'" (Ginsburg 1990). Justice Brennan, for example, viewed the circulation of dissent as an important way to "expose flaws" in the majority's legal analysis. He remarked that "[t]his function reflects the conviction that the best way to find truth is to go looking for it in the marketplace of ideas" (Brennan 1986, 430). To this end, Justice Scalia noted, "Though the fact never comes to public light, the first draft of a dissent often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule. . . . [The possibility of dissent can persuade the majority opinion writer] to accept reasonable suggestions on major points"

from other members of the Court. (Scalia 1994, 41). This effect is reflected in Owens and Wedeking's (2011) finding that decisions characterized by minimum winning coalitions are more clear than those written by a unaimous court.[33]

In other situations, a dissent may actually become the majority opinion (Scalia 1994, 9–10). Dissenters have the opportunity to construct an alternate legal framework that competes with the majority opinion for acceptance. Whether or not this alternate view of the case is accepted by the Supreme Court is a function of ideology and the bargaining process itself. On occasion, this competing view wins due to vote fluidity during the bargaining process (Howard 1968).

5.3.2 Dissent as Legitimating the Court's Role in a Deliberative Democracy

It is widely accepted that "the political legitimacy of the Supreme Court depends in part on its consistency with democratic rule is a core assumption—perhaps the fundamental assumption—of dominant contemporary constitutional theories" (Stack 1996, 2247). Under the right institutional conditions, dissent helps to create consistency with democratic rule by demonstrating that, when performing its primary function of writing opinions, the Court is truly deliberative (Scalia 1994, 2–4; Stack 1996, 2248). As discussed in Chapter 3, the Court must first feel secure that political actors charged with enforcing its decisions will comply. This first-order condition—that the Court is respected as a coequal institution deserving of respect—must be fulfilled before dissent can fulfill this purpose. Otherwise, dissent may simply breed non-compliance and serve to damage, as oppose to enhance, the Court as an institution.

Given the presence of adequate institutional strength, this legitimating function justifies the *general* practice of writing dissents. It does not, however, speak to the effect of specific dissents issued from the bench. Individual dissents can serve a further democratic function by speaking to electoral and other minority groups. In essence, dissents can act as more than a signal that the Court is engaged in real deliberation. Dissents can (1) perform

[33]This clarity may also be a function of the fact that "Ideologically more heterogeneous majority . . . coalitions lead to greater efforts by authors to build coalitions" (**?**, 118). The larger the coalition's tent, the more difficult it will be to write an opinion that satisfies all of the coalition's members. In addition, it is possible that unanimous opinions are the result of the Court punting—in other words, avoiding the difficult issue. In that case, the Court may try to write around that issue, resulting in a more convoluted opinion.

a representative function, speaking to minority groups to reassure them that their position was subject to the full deliberative process, (2) elucidate a legal position that can be used by the minority group to achieve their objectives in another political subcommunity and provide a focal point around which a minority group can organize, and (3) help to consolidate minority group preferences or identity. In each of these ways, dissents are able to contribute to the marketplace of ideas, creating opportunities for self-government, and fulfilling the purpose of self-expression.

To think about these legitimating functions, it is useful to refer to Heather Gerken's trichotomy of dissent: acting moderately, speaking radically, acting radically (Gerken 2005). The first category, *acting moderately*, refers to the widely recognized ability of dissent to shape the governing majority's policy or decision at the margins. In joining with the majority, a dissenter acts in an isolated way within the power of the state. In doing this, political minorities are not acting collectively to achieve their goals. Political minorities do have the ability to act collectively by invoking Gerken's second category of dissent, *speaking radically*. When speaking outside of the governing structure of the state, political minorities can speak collectively with fidelity to their message, but they do so by isolating themselves from the broader political community. Gerken's third category of dissent, *acting radically*, dissenters may act through "disaggregated institutions," such as school boards, city councils, and zoning boards, thus allowing "global miorities to constitute local majorities" (Gerken 2005, 1749). In doing so, political minorities may act both collectively and with the power of the state, affirming their affiliation with the larger political community.

The first of these, acting moderately, is the function performed by a dissent that is used to influence the direction and content of the majority opinion, as discussed above. By this definition, when a judge dissents from his colleagues' majority opinion, he is is not acting moderately. "Moderately", in this context, does not reference to the policy location of the opinion along any sort of policy continuum. Rather, "moderately" is defined in reference to the majority. Acting moderately, therefore, would entail acting within the dominant governing structure, which in this case, means joining the majority opinion.

The second of these, speaking radically, would seem to be clearly accomplished by dissenting opinions. In making public her views, a dissenting justice forgoes any ability to

bind those interpreting and implementing the Court's decision to her preferences. However, in the case of a minority opinion, the dissenters—while not part of the governing majority—are still acting under the authority of the state. The institutionalized nature of dissent and the historic nature of the practice set it apart from ordinary political dissent, which is performed *outside* the authority of the state. Judicial dissent differs from ordinary political dissent because it is not only permitted by the state, as it is when political dissenter publishes an op-ed critical of the Iraq War or participates in Occupy Wall Street, but it is also an institutional *function* of the state. Although primarily an act of speaking radically, dissent by a Supreme Court Justice is also an act of affiliation. This quality derives from the institutionalized, if somewhat romanticized, role of dissent in current American political society. In this way, judicial dissent sits halfway between what Gerken terms *acting* radically and *speaking* radically.

How are dissents a way of acting radically? Dissents can speak to minority groups to reassure them that their position was subject to the full deliberative process and reinforce what Ronald Dworkin refers to as "moral membership" in the American political community (Dworkin 1996). Dworkin's conception of constitutional (as opposed to majoritarian) democracy requires communal (as opposed to statistical) collective action. He notes,

> "If I am a genuine member of a political community, its act is, in some pertinent sense, my act, even when I argued and voted against it, just as the victory or defeat of a team of which I am a member is my victory or defeat even if my own individual contribution made no difference either way. On no other assumption can we intelligibly think that as members of a flourishing democracy we are governing ourselves" (22).

In order for the membership of that community to be genuine, three relational democratic prerequisites must be met.[34] First, every citizen must have a *part* in the collective decision-making. The ability to influence the political process must not be fixed according to some institutional valuation of a citizen's worth; each citizen must be given equal status.

[34]Dworkin also requires that certain structural prerequisites be met that describe the overall character of the community. For example, the community must have stable boundaries produced through a legitimate historical process. He also notes that political scientists and others may require that the community share a culture, language, set of experiences, among other things

Second, each citizen must have a stake in the governance of the community. That is, the political process must account for the welfare of each citizen. This means that "political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all. . . . [A] society in which the majority shows contempts for the needs and prospects of some minority is illegitimate, as well as unjust" (25).

Finally, each citizen must have *moral independence* from the society as a whole. This means that each member of the community must determine his own tastes, preferences, and moral convictions. While living in society means that we must accept some collective judgments about the appropriate bounds of behavior, each citizen must be an independent moral actor.

Dworkin's view that the constitutional conception of democracy does not require that the best decisions or the most deliberative decisions be made by legislative or executive institutions. Rather, judicial institutions, though insulated from the electorate, may better serve the democratic prerequisites by protecting each of these three concerns. However, Dworkin does not address the role of judicial dissent in meeting these democratic prerequisites. While a state action, dissent does not channel the state's full power, it is incapable of directly resolving violations in inequality of status or any lack of moral independence. At most, it can reveal that the Court has failed to protect these interests. In this way, dissent can only speak radically.

However, Justices may be able to use judicial dissent to *act* radically to ensure that the deliberative processes of the state adequately guarantee that each citizen has a stake in governance. Publishing dissent is, in essence, an act of "institutional disobedience" (III 1983, as cited by O'Brien 1999, 93). The practice of dissent generally allows observers to draw the conclusion that dissent is a deliberative process (*see* Stack 1996). Thus, the practice of dissent generally informs both political majorities and minorities that their positions have been given meaningful consideration. Dissents in specific cases and about specific issues give institutional voice to the concerns of legal, political, and social positions that may be minority positions in the broader community. As noted by Roscoe Pound, "[i]f nothing more it indicates that the case was considered by the full bench of judges who sat and that the opinion of the court was not perfunctorily adopted as written by one judge"(1953, 795).

This understanding of acting radically, however, stands in tension with Gerken's conception. For Gerken, acting radically entails actually *winning* in some meaningful sense and depends on the highly layered, disaggregated federal structure to give global minorities the space to constitute a local majority. I argue, however, that formal recognition is a form of winning—if not a policy success—under Dworkin's conception of moral membership. Moral membership requires that people's voices are actually heard and taken seriously. Dissents, especially those that consider and promote well-articulated opposing viewpoints, communicate to policy "losers" that the process was not a sham, and their viewpoints were seriously considered.

This sentiment can be seen throughout the Court's history. Thomas Jefferson, for example, abhorred the advent of the "opinion of the Court" for precisely this reason. In his letter to his appointee, Justice William Johnson, Jefferson argued,

> [S]eriatim argument shews whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself. . . . It would certainly be right to abandon [the practice of providing an opinion of the court] to give our citizens one and all, that confidence in their judges which must be so desirable to the judges themselves, and so important to the cement of the union (Morgan 1953, 356–57, citing Jefferson 1905, 249–50).

Even Chief Justice John Marshall saw the power of dissents for this purpose. In the landmark case *Cherokee Nation v. Georgia*,[35] the Court waded into the relationship between states and the sovereign Native American tribes within their borders.[36] Many states had sought removal of these tribes to western lands, but the Cherokees had opted to stay. Georgia began to place pressure on the Cherokees to leave, in part by imposing Georgia law on the tribe. Sometime after this, a Cherokee man, Corn Tassel, was accused of murder on tribal land and convicted under Georgia law. Tassel appealed to the U.S. Supreme Court for a writ of error and received it. However, before the Court could hear the cause, Georgia executed Tassel. The Cherokee Nation sued the state under a provision of the Judiciary Act

[35] 30 U.S. 1, (1831).

[36] This discussion of the Court's showdown the state of Georgia over the status of the Cherokee Nation is taken from Friedman 2009, 88–95.

that permitted suits between a state and a "foreign nation." Although the Court denied jurisdiction, "Marshall . . . expressed considerable concern for the Cherokee." This led Marshall to encourage Story and Thompson to "memorialize the grounds for their dissent after the decision was handed down" (Friedman 2009, 90). This, in and of itself, is interesting given Marshall's efforts to suppress dissent, but it is truly remarkable as "neither [judge] contemplated delivering a dissenting opinion, until the Chief Justice suggested to [them] the propriety of it, and his own desire that [they] should do it" (Friedman 2009, 90, citing Burke 1969, 516–18).[37] Even Marshall—the man who consolidated the practice of producing a unanimous, institutional opinion—saw the value in expressing a position in support of the Cherokee Nation, even if the political circumstances of the time did not allow that sentiment to be expressed as the opinion of the Court.

In order for dissent to serve its purpose, however, it must be visible (Gerken 2005, 1752). The Supreme Court, however, is probably the least visible of all the branches. This absence of visibility is exacerbated by the lack of televised proceedings, secret conferences, and the tendency of the body's members to shy away from political life. This objection, however, can be overcome by two factors. First, even if the Court is less visible than Congress or the President, the Court is the most well-known judicial body in the country. Second, the fact that it hears so few cases means that each case will receive more attention than it would if heard by a court with a larger caseload.

One might still complain that the Court is relatively invisible in a political system that values volume, brashness, and oversized gestures. However, Gerken's definition of political minority as a relatively isolated and cohesive group capable of acting radically suggests that at least some members will be aware of the Court's action and transmit that information to the broader group. Her definition of a dissenter—"some who subscribes to an outlier view on an issue salient to her identity"—presupposes awareness of the legal and political state of that issues (Gerken 2005, 1752). Even if this is not true, it is likely that the minority group's elite members (such as specialized news media, church leaders, etc.) pay attention to such developments and relay them to other group members.

[37] Burke, specifically, was quoting a letter from Justice Story to Richard Peters, the Supreme Court's reporter at the time, who published the dissent and the opinion together as a pamphlet.

Although Gerken is especially concerned with *perpetual* political minorities, this definition can be loosened to encompass *occasional* or *periodic* political minorities that are more dispersed. In addition, when the issues are especially salient, members of the minority group may not need elite members to transmit information about Supreme Court opinion due to the publicity such opinions will receive in the popular press. As a result, dissents may help minority groups reach the conclusion that their position was considered seriously by the Court. Thus, through Supreme Court dissents, political minorities may come to see their views as validated by a well-respected institutional authority, thus creating affiliation, while at the same time fostering a radical position. The role of the minority position in the Court's deliberation may satisfy Dworkin's requirement that all citizens have a stake in the governance of the state.

As an illustration of this, return for a moment to Justice Sotomayor's opinion in *Schuette*.[38] Sotomayor powerfully dissented from a plurality opinion upholding the constitutionality of a Michigan state constitutional amendment barring state universities from using affirmative action entrance policies. In particular, she argued that "[a] majority of the Michigan electorate changed the basic rules of the political process . . . in a manner that uniquely disadvantaged racial minorities" (1652). This, Sotomayor insisted, was a violation of equal protection, which extends beyond substantive law to process, "securing to all citizens the right to participate meaningful and equally in self-government" (1651). Notably, the dissent was written in what one commentator has dubbed the "Sotomayor Style": The use of clear, simple language that is able to communicate both to elites, who must implement the law, and regular citizens (Fontana 2014).

Judicial dissent may also elucidate a legal position that can be used by the minority group to achieve their objectives in another, more local institution and create focal points around which a minority group can organize their activity. The foregoing discussion rested on the assumption that minority groups are both well delineated and have clear ideas about their goals and how best to accomplish them. However, even if a group is clearly defined, it does not mean that that group has a clear plan to move their agenda forward. A well-crafted dissent may help them focus their litigation strategy and craft a coherent

[38] A discussion of the case may be found in Section 5.3 *supra*.

legal rationale for future political or judicial battles. Consider, however, a minority group that is neither well-organized, well-defined, or has a clear strategy for moving their policy agenda forward. In these cases, a poignant judicial dissent may help to consolidate group preferences or group identity (*see* Hafer and Landa 2007, Mansbridge et al. 2010). This, however, seems to be the least likely use of dissent, as many groups are likely to have overcome collective action problems to bring a case before the Court in the first instance.

5.3.3 Dissent as a Future Majority Position

To this point, I have discussed the contemporaneous role that dissent plays in the collegial bargaining process, as well as the effect it might have in the broader political system. In the first instance, the effect of dissent is both fleeting and enduring. The dissent is fleeting in the sense that it is circulated or threatened, and then evaporates when its author joins the majority. Despite never reaching the public, its effect is felt as long as the precedent ultimately issued by the Court remains good law. In its second function, dissent's impact is far less direct, especially with respect to achieving an actual policy goal. At best, it is a starting point toward building a more robust democratic structure.

The democratizing influence of dissent can also lead to legal change. As Jacobson (2005, 33) noted,

> An opinion in American courts is a first draft of justice, subject to recall and revision. By publishing dissents along with majority opinions common law honors losing visions of justice; it suggests that it would be legitimate and appropriate for them one day to form a majority; it makes law in principle infinitely revisable.

From this perspective, dissent is capable of explicitly enduring and achieving policy change by influencing the direction of future court decisions. Chief Justice Hughes eloquently captured the essence of this idea in writing that dissent 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" (Hughes 1936, 68, as cited in Blake and Hacker 2010, 1). Indeed, dissents can presage future di-

rections of the Court's jurisprudence. In discussing the influence of Justice Stephen Field in shaping the Court's decision-making after his departure, one scholar notes, "Although Field dissented in [*The Slaughterhouse Cases* and *Munn v. Illinois*] his opinions are founding texts of the *Lochner*-era constitutionalism. They are, in this regard, like Justice Holmes's classic dissents in *Lochner v. New York* and *United States v. Adair*—seminal statements of the philosophical basis of the coming era of constitutional law" (Siegel 1991, 92).

Separate opinions, such as dissents, also provide litigants ammunition to attempt to affect policy change. This is true even of the attorneys appearing before the earliest courts. For example, in *Satterlee v. Matthewson*,[39] Satterlee's attorney—arguing that a particular state remedy in a land dispute was unconstitutional—stated "[i]f this Court has not decided that the destruction of all remedy by a state law is an unconstitutional act, the several judges have at least expressed such an opinion." The attorney then proceeded to list of the Justices' separate opinions that offered this position.[40]

The question, however, is under what conditions would the Court ever want to adopt a dissenting opinion? Like a majority opinion, a dissent is capable of transmitting information about appropriate legal rules and, as a result, encourage coordination. In some instances, there may be informational reasons that the Court would prefer to ground its decision within an existing line of precedent. For example, maintaining precedent, especially over a long period of time, may help judges more accurately communicate their preferred legal rules to the lower courts, resulting in better policy outcomes at the trial level (Bueno de Mesquita and Stephenson 2002). As a result, Justices are more able to accomplish their policy goals by maximizing the extent to which the Court's body of precedent reflects the Justices' policy preferences (Hansford and Spriggs 2006).

The question is whether dissents could ever serve the same function? I argue that they can. While the reasoning of a dissent does not constitute precedent, dissents can be constructed as competing majority opinions, defining the scope of the majority's legal policy, framing future challenges through intellectual innovations, and acting analogously to

[39] 27 U.S. 380 (1829).

[40] Specifically, Satterlee's attorney listed the following opinions: "C. J. Marshall, 4 Wheaton, 207; Justice Washington, 12 Wheaton, 271, 267; Justice Johnson, 286; Justice Thompson, 295, 301; Justice Trimble, 327; Justice Story, 8 Wheaton, 12; and state decisions, 5 American Law Journal, 520, 8 Mass. 423, 430, 12 Serg. & Rawle, 358."

persuasive precedent. Dissents develop and embed a line of legal reasoning within relevant case law. Like precedents, dissents are published, preserved, and read by judges on other courts.

For example, dissents may inform lower and future courts about the appropriate scope of an opinion. Dissent transmits information about not only the stability of the precedent in a vote-counting sort of way, but also indicates that the policy is stretched to its outer limit (Scalia 1994, 6). Dissents may also act as "damage control," providing lower courts tools to mitigate the perceived damage cause by the majority opinion by limiting it scope (Brennan 1986).

Dissent may also frame future legal arguments through intellectual innovation. Judges may choose to cite or adopt dissenting opinions because they provide intellectual innovations that are useful in constructing an informative opinion in intermediate appellate courts. Such innovations can provide intermediate appellate panels the opportunity engage in "creative non-compliance" with the Supreme Court majority decision (Benesh 2000) or extend the ideologically preferable reasoning of the dissent to an area of the law the Supreme Court has not recently or fully addressed. For example, dissenting opinions asserting a jurisdictional conflict have resulted in a lagged groundswell of appeals alleging—and Supreme Court decisions determining—that the federal courts lacked authority to decide the case on the merits (Baird and Jacobi 2007).

Like lower appellate courts, future Supreme Courts may use the intellectual framework of past dissenting opinions, in whole or in part, to support their own majority opinions. Supreme Court Justices may cite dissent for reasons similar to lower court judges. The intellectual infrastructure of high-quality dissenting opinions efficiently provides the majority opinion writer with a alternate, yet reasonable, legal interpretation of a particular issue. Legal argument of the dissent may not have succeeded when it was issued, but it "may salvage for tomorrow the principle that was sacrificed or forgotten" (Douglas 1948, 107, as cited in Fuld 1962) or articulate an argument useful in another issue area. In this respect, the issuance and use of dissent creates a vibrant debate about the appropriate position of the law, potentially improving the administration of justice. As Justice Scalia (1994) noted, "The system of separate opinions has made the Supreme Court a central forum

of current legal debate, and has transformed its reports from a mere record of reasoned judgments into something of a History of American Legal Philosophy with Commentary" (40).[41]

Nor is this sentiment particularly new. The Court's reporter justified including in later editions of the U.S. Report an opinion prepared by Justice Story in *Trustees of the Philadelphia Baptist Association v. Hart's Executors*[42]—a case from which Story recused himself—in the following way:

> This opinion was prepared, at the time, by Justice S[tory], but not delivered. It was published in the appendix to the first edition of 3 Peters' reports [1830]; but omitted in the subsequent editions, most probably, because Judge Story had then changed his opinion as to the origin of the jurisdiction of the court of chancery over charitable bequests. It is, however, worth preserving, as a part of the history of the case, and as containing much learning upon a very interesting legal question.

Dissents also may operate analogously to persuasive or foreign precedent. A Supreme Court justice debating the legal merit of an existing dissent has the luxury of observing how that dissent has been treated by the Courts of Appeals, if applicable. In particular, the majority opinion writer can observe whether panel judges have achieved desirable policy outcomes applying the logic of that dissent. If the dissent has been widely interpreted and applied across circuits, then the use of that dissent to explain a finer or more difficult point of law may be valuable in accurately communicating the policy position of the opinion. Thus, while not binding, such opinions offer alternative legal arguments that a judge could use to change the direction of the law. These types of opinions may influence judges or be used by judges to rationalize decisions (Walsh 1997). Moreover, legal arguments presented in persuasive precedents and dissents may be more useful to American judges at all levels than foreign precedents. While foreign precedents may be ideologically compatible with

[41] This type of legal exchange and debate is not unique to the United States. In the German Federal Constitutional Court, for example, "dissent does not affect the states of the precedent to which it objects, but serves a more general purpose to create a dialog about the issue in legal communities . . . . What can be influenced is the critical discussion of the decision which may end in its revision by the Federal Constitutional Court itself" (MacCormick and Summers 1997, 35).

[42] 17 U.S. 1 (1819).

judge's policy preferences in some cases, foreign precedents are constructed to address social, political, and legal problems in other institutional contexts.

For example, Justice Kennedy looked to the practices of foreign courts and governments in *Roper v. Simmons*[43] to determine the constitutionality of state execution of juveniles. From his examination of foreign precedent and practices, Justice Kennedy determined that, in the international context, the execution of juveniles was considered to be cruel and unusual—violating "evolving standards of decency" and, as a result, the modern understanding of the language of the Eighth Amendment. This approach would be less useful in determining the constitutionality of government action grounded in the United States' specific institutional context, such as a constitutional challenge to a congressional law deriving its authority from the Commerce Clause.[44] Recognizing this limitation, Justice LaForest of the Canadian Supreme Court reflected on the growing trend of citations to American Supreme Court and Courts of Appeals decisions by his own tribunal:

> [The Canadian Supreme Court] should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances. . . . American jurisprudence, like the British, must be viewed as a tool, not as a master" (Ostberg, Wetstein and Ducat 1997, 382).

Appellate court judges' dissents may be more effective at changing the law than those promuglated by Supreme Court Justices. If a judge on a three-judge panel in one circuit dissents, other judges considering the same issue in other circuits may be convinced to choose the path laid out by the dissent. Take, for example, a Ninth Circuit case, *Catholic Social Services, Inc. v. Thornburgh*,[45] This case considered a challenge to the Immigration and Nationalization Services' (INS) implementation of the Immigration Reform and Control Act (IRCA) of 1986 (916). Catholic Social Services had initiated challenges in several district courts, seeking "declaratory and injunctive relief against the INS for its administration of IRCA's legalization program for aliens living illegally in this country."[46] The government argued that the district courts did not have jurisdiction under IRCA and, as a

[43] 543 U.S. 551 (2005).
[44] U.S. Constitution, Article I, §8.
[45] 956 F.2d 914 (9th Cir. 1992).
[46] 956 F.2d at 916.

result, could not hear the dispute. In an earlier action, *Ayuda, Inc. v. Thornburgh*, the D.C. Circuit had found that the district courts did not possess jurisdiction, with Judge Patricia Wald dissenting.[47] Judge Alfred Goodwin, a judge on the *Catholic Social Services* panel, argued in a memorandum to the panel that Judge Wald's dissent "effectively refute[d]" the majority decision in *Ayuda, Inc.* (Wasby 2002, 178).[48] This is just one example of the type of influence a judge's dissent may have given the decentralized structure of decision-making on the U.S. Courts of Appeals.

Dissents also may be less effective than concurrences at changing the law due to the norm of *stare decisis*. Stare decisis is important for both legitimacy and informational reasons. Stare decisis, by its very nature, promotes consistency, which "serves the goal of treating persons subject to the adjudicatory process fairly, and is essential to the ability of affected persons to anticipate legal outcomes and plan their affairs accordingly" (Kornhauser and Sager 1986, 104). This stability can, in turn, serve to reinforce the Court's legitimacy.

The informational benefits of stare decisis stem, in part, from the decentralized nature of the courts. As discussed elsewhere, Bueno de Mesquita and Stephenson (2002) argue that honoring stare decisis over time can increase the informational value of precedent for interpreting courts. In other words, courts can use precedent to increase subsequent courts' interpretations of their decisions.[49]

In other circumstances, the case for discarding precedent is compelling.[50] It is in these situations that the dissent will be most likely to have an impact on the court's decision-making. When is the Court most likely to discard precedent? In his dissent in *Leegin*

[47] 948 F.2d 742 (D.C. Cir. 1991).

[48] In addition, Goodwin's clerk, Mary Rose Alexander, "advised the judge that 'Judge Wald's dissent appears to have the better argument on both the legislative history and the plain meaning of the statute,' and that the Wald dissent 'compellingly refutes' cases from other circuits 'as inconsistent with Supreme Court jurisprudence' " (Wasby 2002, 178).

[49] According to the authors' model, however, this function does have its limits. Specifically, very new precedents and very old precedents are not as effective in assist with the interpretation of new decisions.

[50] Some Justices have argued that valuing stare decisis is ill-advised generally. Justice William O. Douglas argued, "This search for a static security—in the law or elsewhere—is, misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts. There is only an illusion of safety in a Maginot Line. Social forces like armies can sweep around a fixed position and make it untenable. A position that can be shifted to meet such forces and at least partly absorb them alone gives hope to security" (Douglas 1949, as cited in Weinstein 2008, 20).

Creative Leather Products, Inc. v. PSKS, Inc.,[51] Justice Breyer explored five circumstances in which the norm of *stare decisis* is comparatively weak.[52] First, Justice Breyer noted that "the Court applies *stare decisis* more 'rigidly' in statutory than in constitutional cases."[53] Whereas if Congress feels that the Court's interpretation of a statue is in error, Congress may correct that error via a statutory override (e.g., Eskridge 1991; Meernik and Ignagni 1997; Blackstone 2009).[54] Only the Court can (easily) correct a constitutional interpretation it deems to be in error.[55]

Second, the Court may seek alter precedent to change a rule or standard that is deemed to be "antiquated." For example, in *Zobrest v. Catalina Foothills School District*,[56] the Court considered whether allowing a deaf student the benefit of public-funded sign language translator in the student's Roman Catholic high school violated the Establishment Clause. The majority noted that a "flat rule" barring that public employee from the high school "smacked of antiquated notions . . . [that] would exalt form over substance."[57] When the Court overruled *Aguilar v. Felton*[58] in *Agostini v. Felton*,[59] the Court referred to this notion that such bright-line rules about the Establishment Clause were "antiquated" and inappropriate.[60]

Third, as Justice Breyer noted in *Leegan*, "the fact that a decision creates an 'unworkable' legal regime argues in favor of overruling."[61] This justification was used by the Court in *Montejo v. Louisiana*[62] to explain its decision to overturn *Michigan v. Jackson*.[63] In *Jackson*, the Court was asked the following question: "If police initiate interrogation after a

[51] 551 U.S. 877 (2007)
[52] 551 U.S. 877, at 923–25.
[53] *Id.* at 923.
[54] For example, Justice Kennedy, in writing for the Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), stated, "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done" (172–73).
[55] Obviously, the constitution could be amended. According to Article V of the U.S. Constitution, this process must be initiated by either Congress or the states, although this mechanism is difficult to implement and rarely used.
[56] 509 U.S. 1 (1993).
[57] *Id.* at 13.
[58] 472 U.S. 402 (1985).
[59] 521 U.S. 203 (1997).
[60] Id. at 223.
[61] *Supra* note 52, at 924.
[62] 551 U.S. 778 (2009)
[63] 475 U.S. 625 (1986).

defendant in a criminal trial asserts his right to counsel, is a subsequent waiver of that right invalid if counsel was not provided prior to the waiver?" At the time the Court decided *Jackson*, it was operating under the *Edwards* rule. The *Edwards* rule is a bright-line rule which stated that once a defendant invokes his right to counsel while in custody, he may not be subjected to further interrogation unless he himself initiates it.[64] This rule was based on the right to counsel inferred from the Fifth Amendment's protections against self-incrimination. *Jackson* differed from *Edwards* in that the defendant requested counsel not during a custodial interrogation, but rather during arraignment (a judicial proceeding covered by the Sixth, as opposed to Fifth, Amendment). However, before he was given an opportunity to consult with his attorney, he waived his right to counsel and confessed. In *Jackson*, six of the nine Justices voted to extend the *Edwards* rule to cover requests for counsel made outside of the context of custodial interrogation.[65] As a result, Jackson's subsequent waiver of counsel was deemed to be invalid. Twenty-three years later, the Court reconsidered this issue in *Montejo v. Louisiana*. In particular, the rule established in *Jackson* was deemed to be unworkable, because the process by which counsels are assigned for criminal trials varies from states to state. In some states, for instance, a counsel is automatically assigned. If a defendant is required to ask for an attorney during a judicial proceeding, does the protection provided by *Jackson* against involuntary coercion ever attach? In determining that the prior decision was so flawed as to warrant it hopeless, Justice Scalia, writing for the Court, noted,

> We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies. To the contrary, the fact that a

[64] This rule was established by the Court in *Edwards v. Arizona*, 451 U.S. 477 (1981).

[65] The thorny issue here was that the Court extended a right inferred from the Fifth Amendment (the right to counsel during custodial interrogation) to the Sixth Amendment context (i.e., a judicial proceeding). The three Justices in dissent—Rehnquist, Powell, and O'Connor—argued that the *Edwards* rule does not make sense in the Sixth Amendment context. *Edwards*, they argued, was designed to prevent police badgering during a custodial investigation. In the dissenters' view, *Edwards* did not create a new substantive right, it simply augmented an existing constitutional guarantee (638). This is because the Fifth Amendment does not provide a right to counsel; rather, the right to counsel is ancillary and unstated. This right is a way of protecting the defendant's right against self-incrimination. The dissenters argued that the analytical problem with the Court's decision is that it relies on the defendant's request for counsel, whereas the Sixth Amendment guarantee to counsel attaches without a request (642). As a result, they viewed the application of the *Edwards* rule as nonsensical.

> decision has proved 'unworkable' is a traditional ground for overruling it.[66]

Fourth, the Court may decide to discard precedent if the unintended effect of that precedent was to "unsettle" the law.[67] This particular justification was used when the the Court overruled *United States v. Arnold, Schwinn & Co.*[68] with its decision in *Continental T.V., Inc v. GTE Sylvania*.[69] In *Schwinn*, the Court considered whether a manufacturer's geographic restrictions placed on goods sold by franchised retailers and wholesalers violated the Sherman Antitrust Act[70]. Whereas in prior cases, the Court relied on the *rule of reason*,[71] the Court in this instance determined that, for at least one type of reseller, the appropriate rule was the *per se* rule.[72] However, when considering an indistinguishable issue in *GTE Sylvania*, Justice Powell, writing for the Court, commented:

> Although Schwinn is supported by the principle of stare decisis, we are convinced that the need for clarification in the law in this area justifies reconsideration. Schwinn itself was an abrupt and largely unexplained departure from [existing precedent], where only four years earlier the Court had refused to endorse a per se rule for vertical restrictions. Since its announcement, Schwinn has been the subject of continuing controversy and confusion, both in scholarly journals and in the federal courts. . . . In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial

[66] 556 U.S. 778 (2009), at 792.

[67] See *Leegin*, note 52 supra, at 924.

[68] 388 U.S. 365 (1967)

[69] 433 U.S. 36 (1977).

[70] 15 U.S.C. §1 (1890).

[71] The *rule of reason* is a method of evaluating whether a commercial practice violates the Sherman Act, where the "fact finder must weigh all circumstances of the case to decide whether [a] practice unreasonably restrains competition," among other things (Black 1991, 926). The essence of the rule of reason was stated by Justice Brandies in *Chicago Board of Trade v. U.S.* 246 U.S. 231 (1918):

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts (238).

[72] Literally translated as "by itself," in the context of antitrust law, a *per se* violation "implies that certain types of business agreements . . . are considered inherently anti-competitive and injurious to the public without any need to determine if the agreement has actually injured market competition" (Black 1991, 791).

importance.[73]

Finally, the Court may be more likely to overrule prior decisions when reliance interests are *not* involved.[74] *Reliance interests*, defined in a general sense, are the extent to which individuals, corporations, or executive agencies have organized their financial affairs based on the Court's rulings. For example, when the Court decided in *Leegin* to discard a *per se* rule barring vertical price fixing agreements—a rule established by the Court in 1911 by its decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[75]—in favor of the *rule of reason*, Justice Breyer objected, writing in dissent:

> [T]here has been considerable reliance upon the per se rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire. . . . The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. Moreover, whole sectors of the economy have come to rely upon the per se rule. A factory outlet store tells us that the rule "form[s] an essential part of the regulatory background against which [that firm] and many other discount retailers have financed, structured, and operated their businesses."[76]

Although "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, where advance planning of great precision is obviously a necessity,"[77] individuals also have personal reliance interests in the stability of the law with respect to the availability of abortion.[78] or the "true meaning of the right to keep

[73] 433 U.S. 36, 47 (1977) (citations omitted).

[74] See Justice Breyer's dissent in *Leegin*, note 52 *supra*, at 925, and the opinion of the Court (written by Justice Kennedy) in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 911–12 (2010).

[75] 220 U.S. 373 (1911).

[76] 551 U.S. at 925.

[77] See the opinion of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992).

[78] In *Casey*, Justices O'Connor, Kennedy, and Souter, wrote,

> While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for [*Roe v. Wade*'s] holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be *de minimis*. This argument would be premised on the hypothesis that reproductive

and bear arms."[79]

This exposition indicates some of the limits of the *stare decisis*. When one or more of these conditions are met, what is the Court to do? If a line of precedent falls, how does the Court determine what should be erected in its place? In some instances, the Court might benefit from relying on the reasoning of a dissenting opinion. Unlike maintaining precedent, however, there are far fewer institutional benefits to adopting the reasoning of a dissenting opinion. After all, the essence of the dissent is that of a protest, a statement enduring for the ages that the Court was wrong. By legitimizing such commentary on the work of the Court through the adoption of a dissent, the Court invites criticism that the decisions of the Court are fundamentally a product of the preferences of the Justices, not the law. In fact, prior to the New Deal, the Court "was extremely reluctant to admit error . .

> planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.
>
> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed (855–56).

[79] In *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia, writing for the majority, argued that "millions of Americans (as our historical analysis has shown) [rely] upon the true meaning of the [Second Amendment]"—that is, an individual right to own a handgun—as opposed to a more limited reading in which it protects the right to bear arms in order to "preserve the militia" (554 U.S. 570, at 624, note 24). However, writing in dissent, Justice Stevens responded,

> The majority appears to suggest that even if the meaning of the Second Amendment has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the "reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms." Presumably by this the Court means that many Americans own guns for self-defense, recreation, and other lawful purposes, and object to government interference with their gun ownership. I do not dispute the correctness of this observation. But it is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have relied on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures.
>
> Indeed, reliance interests surely cut the other way: Even apart from the reliance of judges and legislators who properly believed, until today, that the Second Amendment did not reach possession of firearms for purely private activities, millions of Americans, have relied on the power of government to protect their safety and well-being, and that of their families. With respect to the case before us, the legislature of the District of Columbia has relied on its ability to act to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia[;] so, too have the residents of the District (677 n.38, citations omitted).

. . Indeed, it feared that doing either would undermine its legitimacy as final arbiter of the nation's laws" (Krishnakumar 2000, 785). Justice Scalia, however, argued that dissenting opinions may help to enhance the prestige of the Court because

> "[w]hen history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the justices saw the danger clearly and gave voice, often eloquent voice, to their concern" (Scalia 1998, 19).

Even taking Justice Scalia's rosier view of the value of dissents, it is clear that adopting such opinions hold little institutional benefit for the Court, especially when compared with the norm of *stare decisis*. Adopting—or even referencing—a dissent similarly holds less informational value than does the adoption of a majority opinion. In most cases, the dissent will have been mentioned or applied sparingly since it was published. There is little chance that the Court has been able to observe the policy outcome of the application of the dissent. What does it gain from adopting such an opinion?

It is under these conditions that the quality of an opinion (in this case, a dissent) would be most important. Adopting a dissent does not clearly or always increase the institutional reputation of the Court, nor would it seem to encourage compliance. Moreover, there is little that the Court could learn about ultimate policy outcomes that adopting the dissent might produce. The only thing that dissent can truly offer the Court is its quality. High-quality dissents, like any other opinion, can reduce the opinion writing costs of a judge by offering a well-developed legal framework to adopt. If the Court has decided to discard precedent for any or all of the reasons discussed above, it is reasonable to assume that the Court is looking for an alternative. An existing high-quality dissent offers just that.

5.4 Conclusion

In this chapter, I have argued that opinions, in general, and dissents, in particular, should be seen as a form of political communication. This is not a revolutionary thought; opinions,

at their essence, are fundamentally concerned with telling other actors—whether other institutional actors, such as Congress of the President; elites, such as the media; or non-elites—how a particular statute or constitutional provision should be understood.

Explicitly framing opinions as political communication, however, allows me to focus on both how arguments are made and the purposes those arguments can serve. The first of these purposes, improving the majority opinion through the collegial bargaining process, is widely recognized by both judges and scholars.

Dissent's second use—a method of legitimating the Court's role in a deliberative democracy—is a bit more novel but has historical roots. This idea's roots go back to Jefferson's disapproval of the Marshall Court's practice of issuing an institutional opinion; with only one opinion produced, it appeared that the Justices were not all doing their own work. When the Court "shows its work," it is essentially demonstrating to the population at large that it is deliberating. As a result, dissenting opinions can give voice to minority preferences in a way that other majoritarian institutions—such as Congress—cannot.

Finally, I discussed how dissents may shape future majority opinions. By embodying alternate lines of legal reasoning, dissents offer future judges and Justices another interpretive path. This function is explored in more depth in the remaining chapters. In the following chapter, I present a formal model generating hypotheses regarding the conditions under which a court would adopt a previously promulgated dissenting opinion. The final chapter empirically tests the hypotheses generated by the formal model.

Chapter 6

A Model Explaining the Dissent Adoption

6.1 Structure of the Model

In the first stage of this decision theoretic model, an appellate court (conceptualized as a unitary actor) observes a case characterized by a bundle of facts (defined as x_o). This fact bundle can be thought of as a single point on a unidimensional continuum comprising all possible combinations of facts for a specific type of case. This continuum is commonly referred to as a case space (see Kornhauser 1992; Cameron, Segal and Songer 2000; Lax 2003; Lax and Cameron 2007).[1]

Definition 1 (*Case Space*)**.** Assume x_o is a particular bundle of facts located at a single point along a continuum of possible fact bundles, such that $x_o \in X \in \mathbb{R}$.

After the court observes the relevant bundle of case facts, x_o, it must then apply a legal policy (p) to dispose of the case. This policy p serves as a cut point determining the disposition (D) of the issue. In other words, any fact bundle falling to the left of the policy receives one disposition ($\underline{D}$), and any falling to the right receives another ($\overline{D}$). This relationship is displayed in Figure 6.1.

[1] A case space could be multidimensional (see Lax 2007), where each element of the case is conceptualized as a different dimension. However, in this model, all aspects of a fact bundle are collapsed into a point placed on a single dimension. Opinion quality is conceptualized as the only relevant additional dimension. This choice maintains the model's simplicity while capturing the relevant dynamics.

Definition 2 (*Legal Policy*)**.** Assume p is a particular rule, or policy, governing the disposition of a case. Further assume that p is a single point located along the case space continuum, such that $p \in P \in \mathbb{R}$. Let p be a cut point that determines the disposition of the case, such that $D \in \{\underline{D},\ \overline{D}\}$ and $D = f(x,\ p)$ where $x \leq p \rightarrow \underline{D}$ and $x > p \rightarrow \overline{D}$.

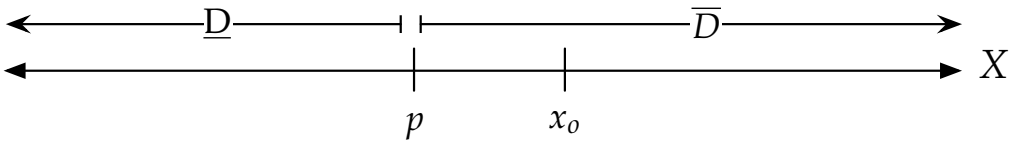

Figure 6.1: Illustration of Case Space

The court prefers policy i on this continuum, and this preference is single-peaked.[2] For the sake of simplicity and clarity, assume that $i = 0$.

Definition 3 (*The Court's Ideal Point*)**.** Assume i represents the court's most preferred policy, such that $i = 0$. Let i be single-peaked, such that the court strictly prefers $p = i = 0$ to all other policies, such that the court's utility u for all $p' \neq i$ is monotonically decreasing.

How will the court decide to resolve the case? In other words, what considerations must the court take into account when choosing a policy to resolve the case? The simplest answer is that the court could simply choose its ideal point $i_c = 0$ as the policy location for its decision. Such a decision would enable the court to maximize its utility *in this moment* for the current case.

However, the court must operate within a hierarchical court system, in which lower and future courts will interpret its decision. Thus, the court must also be forward-looking. However, the power of the court's decision is grounded in the authority of that decision, which is determined in part by the court's ability to create continuity between past precedent and its instant decision. As discussed above, the American common law system derives authority from prior decisions, building and changing the legal doctrine developed in prior opinions. Importantly, because courts' understanding of doctrine has benefitted from experience in applying that doctrine over time, adopting prior opinions may help

[2] Although the court's policy preferences are structured to fall along a single dimension, as noted by Bueno de Mesquita and Stephenson (2002) such a policy preference reflects "public-policy preferences, normative judgments regarding fairness or justice, or a weighted combination of various factors" (758).

lower and future courts faithfully interpret and apply the court's decision in subsequent cases. This is especially important when doctrine demands the application of a standard or test defined by vague terms, such as "essential nexus"[3] or "reasonable relationship."[5]

Given these institutional arrangements, the court not only observes the fact bundle x_o but also the relevant precedent with policy p_m and quality q_m at time t following the opinion's original promulgation. In addition, the court also observes the policy location (p_d) and quality (q_d) of any accompanying dissent. Like the court's ideal point and the observed bundle of facts, the observed policy location of the precedent (p_m) and dissent (p_d) are points on the case-space continuum.[6]

Definition 4 (*Policy Location of the Precedent and Any Dissenting Opinion*)**.** Assume the observed precedent and any accompanying dissenting opinion are points on the case space continuum, such that $p_o \in \mathbb{R}$ and $o = \{m, d\}$

The precedent observed at time t is the court's interpretation of the original opinion based on how the reasoning of that opinion has been applied since $t = 0$. Over $t - 1$ periods, various appellate courts have observed and interpreted this precedent, altering the precedent's policy and quality as observed by a subsequent court. In other words, the policy embodied by the precedent may "drift" over time. For example, in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the Supreme Court overruled in part a longstanding precedent interpreting the standards plaintiffs must meet when pleading their case. Prior to the Court's decision in *Twombly*, pleading requirements were relatively lenient, requiring only that plaintiffs provide enough information to provide notice to the defendant of the claim brought against them.[7] This standard permitted plaintiffs to come to the court with little

[3] See *Nollan v. California Coastal Commission*,[4] in which the Court found that there was no "essential nexus" between a legitimate state interest in protecting the public's view of the beach and the state's condition that the Nollans build a public walkway on their property.

[5] See *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Court adopted an additional requirement that there be a "reasonable relationship" or "rough proportionality" between the government's exactions and proposed construction or land use.

[6] In the context of the preceding discussion, it is safe to assume that the briefs submitted by the litigants and other interested parties, as well as the judges' own observations, have placed the current case clearly within a stream of existing precedent.

[7] In *Conley v. Gibson*, 355 U.S. 41 (1957), the Court determined that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (45-46).

more than a vague grievance[8] or a simple assertion of the plaintiff's legal claim against the defendant.[9]. However, in *Twombly* the Court required that a plaintiff must plead sufficient facts which, taken as true, state a claim to relief that is plausible on its face. Although the Court originally limited this heightened standard to cases arising under federal antitrust law[10], this holding was expanded two years later by the Court's decision in *Ashcroft v. Iqbal* to apply this heightened standard to pleadings in *all cases*.[11]

After observing the relevant precedent and any accompanying dissenting opinion, the court may choose to maintain precedent (M) or discard it ($\sim M$) and adopt the dissenting opinion (A_d) or no opinion ($\sim A$). In either case, the court must write its own opinion with policy p_c and quality q_c. Given the presence of policy drift and the cumulative nature of precedent, however, courts are not free to unilaterally set the precedent's policy location. The observed precedent's policy is actually the average of each of the policy locations chosen by the previous courts that maintained precedent in the $t-1$ previous periods. As a result, if the court at time t decides to maintain and add to the line of precedent, the policy location it selects (p_c) contributes to the policy location observed by a future court in period $t+1$, defined as $p_\mu = \frac{p_m*(t-1)+p_c}{t}$.

Note, however, that the dissent's policy (p_d)—being a minority position not adopted by any court majority—is determined by the dissent's original author. As a result, if the court decides to adopt the dissenting opinion the resulting policy observed by a future court is defined as $p_\mu = \frac{p_d+p_c}{2}$. If the court decides to adopt no opinion, it may unilaterally determine the policy observed by a future or lower court as p_c.

The court also observes the *quality* of the relevant precedent and any accompanying dissent. The quality of the observed precedent (q_m) and dissent (q_d) are non-zero, positive numbers, bounded between 0 and 1.

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[8] See *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), in which the U.S. Court of Appeals for the Second Circuit found that a "home drawn" petition that failed to state any particular legal claim should not be dismissed for failure to state a claim upon which relief can be granted. In particular, the court noted that "there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" according to Rule 8(a) of the Federal Rules of Civil Procedure (775).

[9] For an example, see Form 11 in the Appendix of Forms accompanying the Federal Rules of Civil Procedure.

[10] Sherman Act, 15 U.S.C. §1 (1890).

[11] 556 U.S. 662 (2009).

Definition 5 (*Quality of the Precedent, q_m and Dissenting Opinion, q_d*)**.** Assume the court observes the quality of the relevant precedent (q_m) and any accompanying dissenting opinion (q_d), such that $q_o \in (0, 1]$ and $o = \{m, d\}$

Like its policy, a precedent's quality q_m may also experience drift over time. The court chooses a quality for its opinion (q_c), but this quality only contributes to the quality observed by the court in the next period ($t + 1$). The quality observed by a future court is defined as $q_\mu = \frac{q_m * (t-1) + q_c}{t}$. Since dissent is not interpreted by any court prior to adoption, its quality is set solely by the dissent's author. Thus, if the court decides to adopt an existing dissent, the opinion's quality, as observed by the next court, is $q_\mu = \frac{q_d + q_c}{2}$.

Whereas policy drift implies movement along the case-space continuum, quality drift is more opaque. As discussed previously, an opinion's quality is a function of its craftsmanship, clarity, and precision. A high quality opinion gives clear guidance to lower and future courts, encouraging faithful interpretation. A lower quality opinion lacks the clarity and precision to provide such guidance. Thus, quality drift can make a decision more clear and coherent or less.

For example, when the Court decided in *Twombly* to require more stringent standards for pleadings in antitrust cases, the majority set forth a new plausibility requirement for the complaint, which demanded that courts evaluate the complaint's factual "showing" to determine whether the conduct alleged is "plausible" on its face. The Court clarified and expanded this decision in *Iqbal* two years later. This refinement of the Court's prior decision in *Twombly* required judges to draw on their "judicial experience and common sense" to determine whether the plaintiff made an adequate factual showing to establish the plausibility of the alleged conduct.[12] Although *Twombly's* holding itself has been heavily criticized as "shadowy at best," commentators have noted that the standard suggested by the phrase "judicial experience and common sense" is really no standard at all, as they are "highly ambiguous and subjective concepts largely devoid of accepted —let alone universal —meaning" (Miller 2010, 25-26). Although it seems clear that *Twombly* itself was lacking, *Iqbal* gave even less help to a federal judiciary struggling to uniformly apply new

[12] 556 U.S. at 679.

pleading standards.

Quality gives the court an incentive to adopt an opinion. As discussed above, adopting a high-quality opinion reduces opinion writing costs by presenting a coherent and well-developed intellectual framework to be interpreted and applied by future or lower courts. In this model, the court derives utility from how the policy will be implemented in the next period by a court acting as an unfaithful agent. The court's utility is derived from implementation of p_μ by a future court, such that the court receives $-\left(p_\mu + \omega\left(1 - q_\mu\right) - i_c\right)^2$. The divergence from policy by the court in the next period is estimated by the current court to be $\omega \sim N(\Omega, 1)$. However, this divergence can be constrained by the quality of the precedent q_μ. A high quality opinion can bind the next interpreting court to p_μ, as the next interpreting court's bias is effectively negated when $q_m \to 1$.

There are conditions under which a court may choose to discard precedent ($\sim M$) but adopt no opinion ($\sim A$). In this case, the court unilaterally determines a policy location and quality of the opinion observed by a lower or future court since the meaning of the court's opinion will not be interpreted in the context of a sequence of prior decisions. In this case, the court's utility of choosing policy p_c and quality q_c is also subject to interpretation and implementation by an unfaithful agent, such that it receives $-(p_c + \omega(1 - q_c) - i_c)^2$.

If the court maintains precedent (M), the court pays two costs. The first is a cost incurred by the court as a result of the effort put into the opinion—that is, the opinion's quality q_c. The second cost is a function of the policy location of the court's opinion. The court may place the policy of its own opinion anywhere along the policy continuum. However, the court must also reconcile the logic of its own opinion with that of the opinion it is adopting. The higher the quality of the precedent, the more difficult this is to do. As a result, the court incurs a cost of $-q_m(p_m - p_c)^2$.

Taken together, the court's utility takes the following form when maintaining precedent: $-(p_{m\mu} + \omega(1 - q_m\mu) - i_c)^2 - q_c - q_m(p_m - p_c)^2$

The court may also choose to discard precedent ($\sim M$). When adopting dissent, the court incurs the same costs as when adopting the majority opinion, paying for both the quality (q_d) and any deviation from dissent's policy ($-q_d(p_d - p_c)^2$). When a court rejects adopting both the existing precedent and dissent, however, it incurs slight different

costs. As when adopting, the court pays for effort required to write an opinion with the court's chosen level of quality q_c. In addition, the court also incurs a cost for how far the opinion's policy strays from its most preferred policy. Just as a court maintaining precedent incurs a cost for "stretching" an opinion from the precedent's policy, a court breaking from precedent incurs a cost from stretching an opinion from their most preferred policy $(-(p_c - i_c)^2)$.

In addition, when the court chooses to break from precedent, it pays a cost $\alpha > 0$. This cost can be thought as the extent to which changing legal policy would be disruptive to both the institutions implementing the court's decision and society at large. These reliance interests court may include the extent to which "police and prosecutors have been trained to comply" with a particular decision,[13] or precedents that implicate property or contract rights.[14]

The court's utility function takes the following form when discarding precedent ($\sim M$) and adopting dissent (A_d): $-(p_{d\mu} + \omega(1 - q_d\mu) - i_c)^2 - q_c - \alpha - q_d(p_c - p_d)^2$

When discarding precedent but adopting no other opinion ($\sim M, \sim A$), the court receives: $-(p_c + \omega(1 - q_c) - i_c)^2 - q_c - \alpha - (p_c - i_c)^2$

6.2 Analysis of the Model

The court's selection of its opinion policy p_c and quality q_c is a function of the policy and quality of both the observed precedent and dissent, as well as the bias expected from interpretation by a future or lower court. In making its decision, the court must not only choose p_c and q_c, but also whether to maintain precedent or discard it and, given that choice, which opinion to adopt.

[13] *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

[14] *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 925 (2007) (Breyer, dissent).

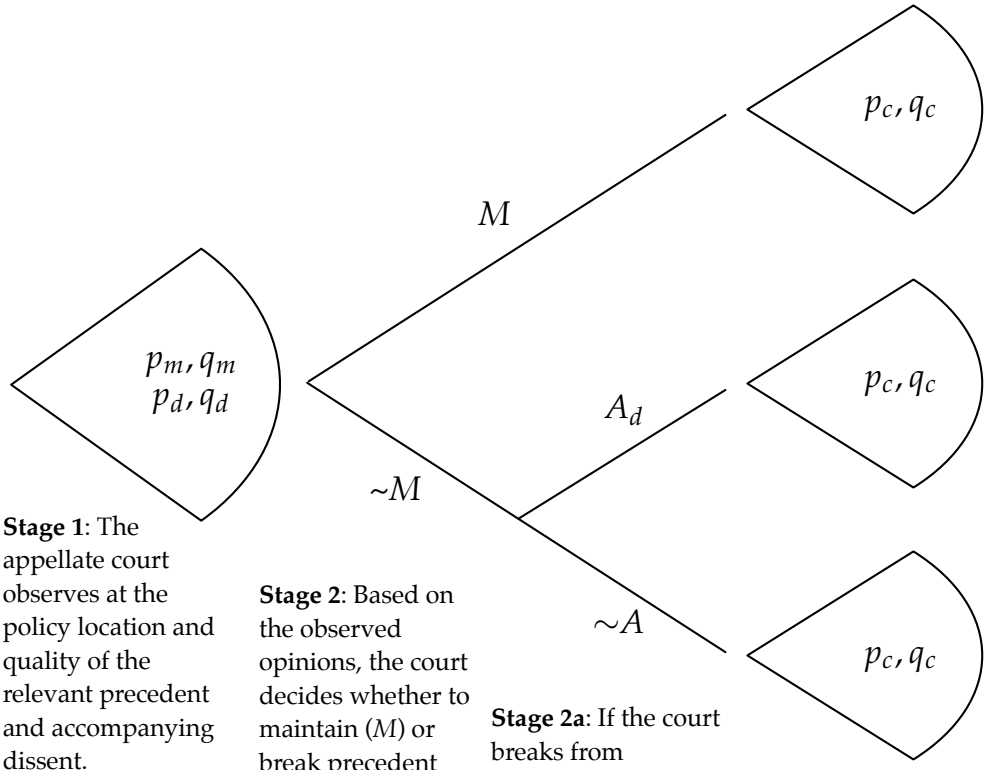


Figure 6.2: Structure of the Model

6.2.1 Choosing Policy and Quality (p_c, q_c)

6.2.1.1 Policy and Quality When Maintaining Precedent

When choosing to maintain precedent (M), the court will seek to maximize its utility by solving the following maximization problem:

$$max\{-(p_\mu + \omega(1 - q_\mu) - i_c)^2 - q_c - q_m(p_m - p_c)^2\} \tag{6.1}$$

When maintaining precedent, the court is constrained by the precedent's observed policy location, $p_\mu = \frac{p_m(t-1)+p_c}{t}$, and quality, $q_\mu = \frac{q_m(t-1)+q_c}{t}$. Given that the quality chosen

by the court (q_c) is bounded between 0 and 1, the Lagrangian takes the following form:

$$L = -\left(\frac{p_m(t-1)+p_c}{t} + \omega(1 - \frac{q_m(t-1)+q_c}{t}) - 0\right)^2 - q_c - q_m(p_m - p_c)^2 - \gamma(-q_c) - \delta(q_c) \tag{6.2}$$

Solving (6.2) yields two boundary solutions and one interior solution:

$$p^*_{\underline{c},m} = \frac{p_m\left(t^2 q_m - t + 1\right) + (t-1)\omega q_m - t\omega}{t^2 q_m + 1},\ q^*_{\underline{c},m} = 0 \tag{6.3}$$

$$p^*_{\overline{c},m} = \frac{p_m\left(t^2 q_m - t + 1\right) + (t-1)\omega\left(q_m - 1\right)}{t^2 q_m + 1},\ q^*_{\overline{c},m} = 1 \tag{6.4}$$

$$p^*_{c,m} = p_m - \frac{1}{2\omega q_m},\ q^*_{c,m} = \frac{t p_m}{\omega} - (t-1)q_m - \frac{1}{2\omega^2 q_m} - \frac{t^2}{2\omega^2} + t \tag{6.5}$$

Assume that the court weakly prefers the interior solution (p^*_c, q^*_c). This interior solution yields $q^*_c < 0$ when the following conditions are met:

$$\omega < 0,\ p_m > \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} - \omega \tag{6.6}$$

OR

$$\omega > 0,\ p_m < \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} - \omega \tag{6.7}$$

In these states of the world, the court strictly prefers $(p^*_{\underline{c},m}, q^*_{\underline{c},m})$ (Equation 6.3). Define this boundary as $p'_m = \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} - \omega$.

Similarly, when $q^*_{c,m} > 1$, the court prefers $(p^*_{\overline{c},m},\ q^*_{\overline{c},m})$ (Equation 6.4). This is true when ω and p_m take the following values:

$$\omega < 0\ \ p_m < \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} + \frac{\omega}{t} - \omega \tag{6.8}$$

OR

$$\omega > 0,\ p_m > \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} + \frac{\omega}{t} - \omega \tag{6.9}$$

Define this boundary as $p''_m = \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} + \frac{\omega}{t} - \omega$.

When $\omega < 0$, meaning that the court expects a future or lower court to shift the opin-

ion policy in a more liberal direction, the current court will select the interior solution $(p^*_{c,m}, q^*_{c,m})$ only when $p''_m \leq p_m \leq p'_m$. When $\omega > 0$ (i.e., the lower court's expected bias is conservative), these boundaries will be reversed, such that the current court will prefer the interior solution when $p'_m \leq p_m \leq p''_m$. In both cases, this interval is a function of the magnitude of bias expected by the current court (ω), the precedent's quality (q_m), and the precedent's age (t). Figure 6.3 illustrates how this interval changes across a range of ω, q_m, and t. The dashed line represents $p'_m = \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} - \omega$; the solid line plots $p''_m = \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} + \frac{\omega}{t} - \omega$.

What does this mean substantively? In the following sections, I discuss how changes in the expected bias of the interpreting court (ω), the age of the precedent (t), and the quality of the precedent (q_m) affect the court's preference for writing a high-quality $(p_{c,m} = 1)$, low-quality $(p_{c,m} = 0)$, or intermediate quality $(q_{c,m} = \frac{tp_m}{\omega} - (t-1)q_m - \frac{1}{2\omega^2 q_m} - \frac{t^2}{2\omega^2} + t)$ opinion.

The effect of bias (ω) on q_c given p_m. When p_m falls between the two dashed lines, the court prefers $(p^*_{c,m}, q^*_{c,m})$ (Eq. 6.3). Define this set of p_m as $P^*_{c,m} = \{p_m | (\omega < 0, p_m > p'_m)$ or $(\omega > 0, p_m < p'_m)\}$. Define the slope of p'_m as $m(p'_m)$, with the size of the set denoted as $|P^*_{\underline{\ }}|$. As illustrated in Figure 6.3, $m(p'_m) \to -\infty$ as $\omega \to 0^-$. This means that $|P^*_{c,m}|$ increases as $\omega \to 0^-$, holding all else equal. In other words, as the expected bias of the future court changes from extremely liberal to more moderate, $m(p'_m)$ becomes steeper and more negative. A similar effect can be seen as $\omega \to 0^+$, in which case $m(p'_m) \to \infty^+$. The implication of this is that, holding all else equal, as the magnitude of the interpreting court's expected bias decreases, the court will prefer to write an opinion with $q_{c,m} = 0$ for an ever-increasing range of p_m.[15]

Intuitively, this makes a great deal of sense. In the model, opinion quality is used to bind the interpreting court to the current court's policy decision. As ω approaches 0, there is no need to spend resources in writing a high-quality opinion to bind an already faithful agent. By implication, the range of p_m over which the court prefers to write a low-quality opinions grows larger as the interpreting court's expected bias gets smaller.

How do changes in the interpreting court's expected bias alter the court's preference

[15]The proof for these comparative statics may be found in Appendix C.

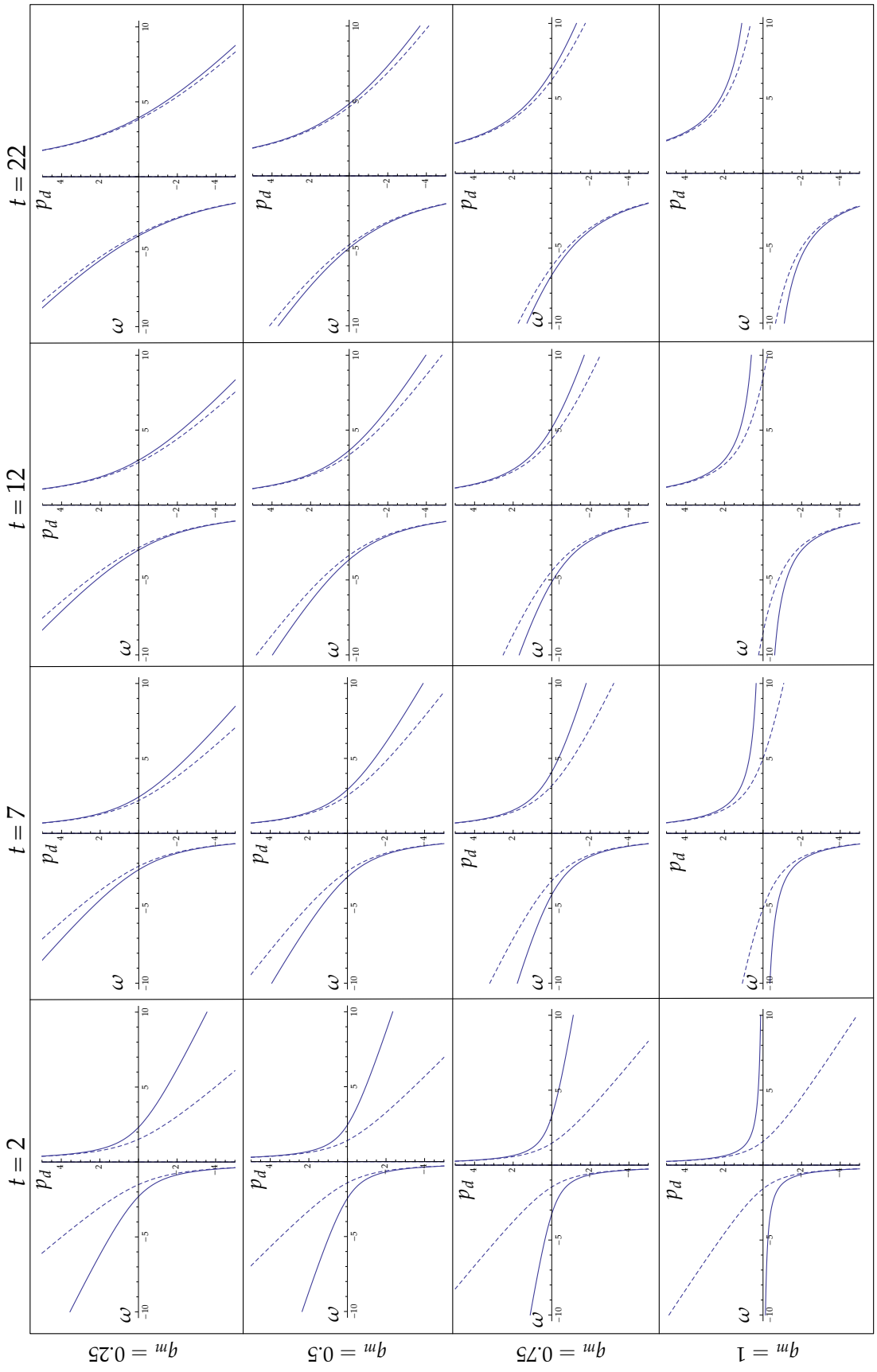


Figure 6.3: Change in p'_m and p''_m across ω, t, and q_m

for writing a high-quality opinion ($q_c = 1$)? As mentioned above, the solid lines represent $p''_m = \frac{1}{2t\omega q_m} - \frac{\omega q_m}{t} + \omega q_m + \frac{t}{2\omega} + \frac{\omega}{t} - \omega$. When $\omega < 0$ and $p_m < p''_m$, the current court prefers $(p^{\overline{*}}_{c,m}, q^{\overline{*}}_{c,m})$ (Eq. 6.4). This is also true when $\omega > 0$ and $p_m > p''_m$. Define the set of p_m for which the court prefers $(p^{\overline{*}}_{c,m}, q^{\overline{*}}_{c,m})$ as $P^{\overline{*}}_{c,m} = \{p_m | (\omega < 0, p_m < p''_m)$ or $(\omega > 0, p_m > p''_m)\}$. Denote the slope of p''_m as $m(p''_m)$ and the set's cardinality as $|P^{\overline{*}}_{c,m}|$.

As with $m(p'_m)$, $\forall\omega : m(p''_m) < 0$. In other words, the slope of p''_m is always negative, with the implication that, as $\omega \to 0^-$ and $\omega \to 0^+$, $|P^{\overline{*}}_{c,m}| \to 0$. Unlike $|P^{*}_{c,m}|$, $|P^{\overline{*}}_{c,m}|$ shrinks as the expected bias of the future court approaches 0. As the interpreting court becomes a more faithful agent, the current court will be less compelled to invest a lot of effort in the quality of its own opinion, holding all else equal.[16]

Again, given the function of quality in the model, this makes a great deal of sense. The court need only write a high-quality opinion, then, when the danger of an unfaithful agent is greatest (i.e., when $\omega \to \infty$ or $\omega \to -\infty$). As the future court becomes more and more faithful in expectation, investing in writing a high-quality opinion is unnecessarily costly.

How does change in the interpreting court's expected bias affect the current court's preference for the interior solution $(p^*_{c,m}, q^*_{c,m})$? Define the set of p_m over which the court prefers (p^*_c, q^*_c) as P^*, with its cardinality represented in the standard way as $|P^*_{c,m}|$. The absolute difference between p'_m and p''_m is $|\frac{\omega}{t}|$, making the total size of $|P^*_{c,m}| = \frac{2\omega}{t}$. Taking the first-order condition with respect to ω yields $\frac{2}{t}$. In other words, for every one-unit increase in the magnitude of ω, the interval of p_m over which the current court prefers $(p^*_{c,m}, q^*_{c,m})$ increases $\frac{2}{t}$, holding all else equal.[17] As a result, $|P^*_{c,m}|$ increases as the absolute value of ω increases. Thus, the effect of increasing bias by the interpreting court is most pronounced when the precedent is relatively young.

In summary, as the expected bias of the interpreting court increases in magnitude—that is, as the interpreting court becomes more biased in either direction—the current court is less likely to write a low-quality opinion (reflecting the lower boundary solution $(p^{\overline{*}}_{c,m}, q^{\overline{*}}_{c,m})$), such that $q_{c,m} = 0$, and is more likely to write a high-quality opinion (reflecting the upper

[16] The proof for these comparative statics may be found in Appendix C.

[17] The proof for this result can be found in Appendix C.

boundary solution $(p^{\overline{*}}_{c,m}, q^{\overline{*}}_{c,m})$), such that $q_{c,m} = 1$. Moreover, as the magnitude of the bias increases in either direction, the court is more likely to choose the interior solution $(p^{*}_{c,m}, q^{*}_{c,m})$, writing an opinion with quality $q_{c,m} = \frac{tp_m}{\omega} - (t-1)q_m - \frac{1}{2\omega^2 q_m} - \frac{t^2}{2\omega^2} + t$.

The effect of the precedent's age (t) on q_c given p_m. How does the court's selection of q_c differ based on the age of the precedent the court is adopting (t)? This can be evaluated by assessing how p'_m, p''_m, and $|p''_m - p'_m|$ change in response to increases in t.

The court prefers $(p^{*}_{\overline{c},m}, q^{*}_{\overline{c},m})$, choosing a low-quality opinion $q_c = 0$ when $\{\omega < 0, p_m > p'_m\}$ or $\{\omega > 0, p_m < p'_m\}$ (i.e., the values of p_m falling between the dashed lines in Figure 6.3). When $\omega > 0$, the first order condition $\frac{\delta p'_m}{\delta t} = \frac{\omega q_m}{t^2} - \frac{1}{2t^2\omega q_m} + \frac{1}{2\omega}$ is positive when q_m is sufficiently large, such that $\frac{1}{4}\sqrt{\frac{t^4+8\omega^2}{\omega^4}} - \frac{t^2}{4\omega^2} < q_m \leq 1$. When $\omega < 0$, this condition must also be true in order to produce a decrease in p'_m. This cutpoint is monotonically decreasing in t, ceteris paribus. In other words, as the precedent ages, a widening range of q_m will satisfy this condition. Thus, holding all else equal, an increase in t when q_m is sufficiently large will result in an expanding range of p_m over which the court prefers $(p^{*}_{\overline{c},m}, q^{*}_{\overline{c},m})$.

Intuitively, this makes a good deal of sense. The opinion quality observed by the interpreting court (q_μ) is the weighted average of the quality of the opinion adopted by the current court (q_m) and the quality chosen by the current court (q_c), such that $q_\mu = \frac{q_m(t-1)+q_c}{t}$. Thus, as q_m increases, t gets larger, or both, the court's choice regarding the quality of its own opinion, q_c, is less able to affect the total quality observed by a future court. As a result, when adopting a really old precedent or a precedent of high quality, the current court does not need to write a high-quality opinion achieve a desirable interpretation by a future court and will choose $q^{*}_{\overline{c},m} = 0$.

Recall that the court will write the highest quality opinion, $q^{\overline{*}}_{c,m} = 1$, when $\{\omega < 0, p_m < p''_m\}$ or $\{\omega > 0, p_m > p''_m\}$. The set of p_m for which the court prefers $(p^{\overline{*}}_{c,m}, q^{\overline{*}}_{c,m})$ is defined as $(|P^{\overline{*}}_{c,m}|)$. When $\omega < 0$, $|P^{\overline{*}}_{c,m}|$ expands when p''_m is increasing in t; when $\omega > 0$, this is true when p''_m is decreasing in t. The first-order conditions $\frac{\delta p''_m}{\delta t} > 0$ (where $\omega < 0$) and $\frac{\delta p''_m}{\delta t} < 0$ (where $\omega > 0$) are met only when q_m is sufficiently small, such that $0 < q_m < \frac{1}{4}\left(-\frac{t^2}{\omega^2} + \sqrt{\frac{(t^2-2\omega^2)^2+8\omega^2}{\omega^4}} + 2\right)$. This cutpoint is monotonically decreasing in t. In other words, as a precedent ages, the range of q_m for which the court prefers $q^{\overline{*}}_{c,m}$ shrinks. Thus,

as the age of the precedent increases, the less the current court can affect the overall quality (q_μ). As a result, the current court will be less willing to invest in writing a high-quality opinion.

How does a precedent's age affect $|P^*_{c,m}|$? As might be expected, the interval over which the court prefers $(p^*_{c,m}, q^*_{c,m})$ shrinks over time. The size of this interval is defined by $|p''_m - p'_m| = \frac{\omega}{t}$. The presence of t in the denominator indicates that $|P^*_{c,m}|$ is monotonically decreasing in t. In other words, the range of p_m over which the court prefers the interior solution $p^*_{c,m} = \frac{tp_m}{\omega} - (t-1)q_m - \frac{1}{2\omega^2 q_m} - \frac{t^2}{2\omega^2} + t$ is smaller for older precedents as compared with younger precedents.

The effect of the precedent's quality (q_m) on q_c given p_m. How does the precedent's quality (q_m) affect the courts preferences over q_c? Unsurprisingly, this answer is contingent on the precedent's age. Recall that the court will prefer the lower boundary solution $(\underline{q}^*_{c,m}, \underline{q}^*_{c,m})$, when $\omega < 0,\ p_m > p'_m$ or $\omega > 0,\ p_m < p'_m$. This is plotted in Figure 6.3 as the space between the dashed lines and defined as $P^*_{\underline{c},m}$. Solving for the first-order condition reveals that $|P^*_{\underline{c},m}|$ is increasing in q_m only when t is sufficiently large, such that $t > \frac{1}{2q_m^2\omega^2} + 1$.[18]

The court will prefer the upper boundary solution $(\overline{p}^*_{c,m}, \overline{q}^*_{c,m})$, writing the highest quality opinion $q_c = 1$, when $\omega < 0, p_m < p'_m$ or $\omega > 0, p_m > p''_m$. These boundaries are represented by the solid lines in Figure 6.3. The set of p_m for the which the court prefers the upper boundary solution $(P^*_{\overline{c},m})$ is expanding in q_m only when t is sufficiently small, such that $t < \frac{1}{2q^2\omega^2} + 1$.

The size of the interval of p_m for which the court prefers the interior solution $(p^*_{c,m}, q^*_c)$ is not directly a function of q_m. This interval is defined as $|P^*| = 2|p''_m - p'_m| = \frac{2\omega}{t}$. The width of this interval is insensitive to changes in q_m, although its location is a function of q_m through the effect of q_m on p'_m and p''_m.

6.2.1.2 Policy and Quality when Discarding Precedent and Adopting Dissent

Under some conditions, the current court will choose to discard precedent and must adopt either the observed dissenting opinion or no opinion at all. When adopting dissent, the

[18] The proof for this is found in Appx. C.

court solves the following maximization problem:

$$max\{-(p_{\mu,d} - \omega(1 - q_{\mu,d}) - i_c)^2 - q_c - q_d(p_d - p_c)^2 - \alpha\} \tag{6.10}$$

Recall that, when adopting dissent, $p_{\mu,d} = \frac{p_d + p_c}{2}$ and $q_{\mu,d} = \frac{q_d + q_c}{2}$. The age of the dissent does not play a role because the dissent has not been interpreted in the same way as precedent over its life. The Lagrangian takes the following form:

$$L = -\left(\frac{1}{2}(p_d + p_c) + \omega\left(1 - \frac{1}{2}(q_d + q_c)\right) - 0\right)^2 - q_d(p_c - p_d)^2 - \alpha - \gamma(-q_c) - \delta(q_c - 1) - q_c \tag{6.11}$$

Solving the Lagrangian yields two boundary solutions and one interior solution:

$$p^*_{c,d} = \frac{p_d(4q_d - 1) + \omega(q_d - 2)}{4q_d + 1},\ q^*_{c,d} = 0 \tag{6.12}$$

$$p^{\overline{*}}_{c,d} = \frac{p_d(4q_d - 1) + \omega(q_d - 1)}{4q_d + 1},\ q^{\overline{*}}_{c,d} = 1 \tag{6.13}$$

$$p^*_{c,d} = p_d - \frac{1}{2\omega q_d},\ q^*_{c,d} = \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d - \frac{2}{\omega^2} + 2 \tag{6.14}$$

Assume that the court weakly prefers the interior solution. However, under some conditions, the optimal opinion quality ($q^*_{c,d} = \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d - \frac{2}{\omega^2} + 2$) falls outside the boundaries of $q_c \in [0,1]$. The optimal quality $q^*_{c,d}$ falls below 0 when the following conditions are true:

$$\omega < 0,\ p_d > p'_d = \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega} \tag{6.15}$$

OR

$$\omega > 0,\ p_d < p'_d = \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega}. \tag{6.16}$$

When $q^*_{c,d} < 0$, the court will prefer the lower boundary solution $q^*_{c,d} = 0$. Similarly, the court will prefer the upper boundary solution $q^{\overline{*}}_{c,d} = 1$ when $q^*_{c,d} > 1$, which is true when:

$$\omega < 0,\ p_d < p_d'' = \frac{2}{\omega} - \omega + \frac{1}{2\omega q_d} + \omega q_d \tag{6.17}$$

OR

$$\omega > 0,\ p_d > p_d'' = \frac{2}{\omega} - \omega + \frac{1}{2\omega q_d} + \omega q_d \tag{6.18}$$

Taken together, when $\omega < 0$, meaning that the court expects the lower court to move the opinion in a liberal direction, the court will prefer the interior solution $(p^*_{c,d},\ q^*_{c,d})$ when p_d is between the upper boundary solution cutpoint (in this case, $p_d'' = \frac{2}{\omega} - \omega + \frac{1}{2\omega q_d} + \omega q_d$) and the lower boundary solution cutpoint ($p_d' = \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega}$), such that:

$$p_d'' \leq p_d \leq p_d'$$

$$\frac{2}{\omega} - \omega + \frac{1}{2\omega q_d} + \omega q_d \leq p_d \leq \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega} \tag{6.19}$$

When $\omega > 0$, this interval is reversed, the interior solution is preferred when:

$$p_d' \leq p_d \leq p_d''$$

$$\frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega} \leq p_d \leq \frac{2}{\omega} - \omega + \frac{1}{2\omega q_d} + \omega q_d \tag{6.20}$$

These boundaries are a function of the quality of the adopted dissent (p_d) and the expected bias of the interpreting court (ω). Figure 6.4 illustrates how p_d' and p_d'' change across these parameters. Expected bias, ω, is arrayed along the x-axis; the policy location of the observed dissent, p_d, on the y-axis. The dashed lines represent $p_d' = \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega}$. The solid lines plot $p_d'' = \frac{2}{\omega} - \omega + \frac{1}{2\omega q_d} + \omega q_d$.

The effect of bias (ω) on q_c given p_d. When $\{p_d > p_d', \omega < 0\}$ or $\{p_d < p_d', \omega > 0\}$, the court will prefer $p^*_{c,d} = \frac{p_d(4q_d-1)+\omega(q_d-2)}{4q_d+1},\ q^*_{c,d} = 0$. Define the set of p_d over which the court prefers $(p^*_{c,d},\ q^*_{c,d})$ as $P^*_{c,d}$, with the cardinality of the set defined in the standard way ($|P^*_{c,d}|$). Solving the first-order condition $\frac{\delta p_d'}{\delta \omega} = -\frac{1}{4q_d\omega^2} + \frac{q_d}{2} - \frac{1}{\omega^2} - 1$ demonstrates that $|P^*_{c,d}|$ is never increasing in $|\omega|$. In other words, as bias becomes more extreme, the court is less likely to prefer $p^*_{c,d},\ q^*_{c,d}$.

When $\{p_d < p_d'', \omega < 0\}$ or $\{p_d > p_d'', \omega > 0\}$, the court will prefer $p^{\overline{*}}_{c,d} = \frac{p_d(4q_d-1)+\omega(q_d-1)}{4q_d+1},\ q^{\overline{*}}_{c,d} = 1$. Unlike its preference for $(p^*_{c,d},\ q^*_{c,d})$, the first-order condition $\frac{\delta p_d''}{\delta \omega} = -\frac{1}{2q_d\omega^2} + q - \frac{2}{\omega^2} - 1$ is increasing in $|\omega|$. In other words, as the future court's expected bias becomes more

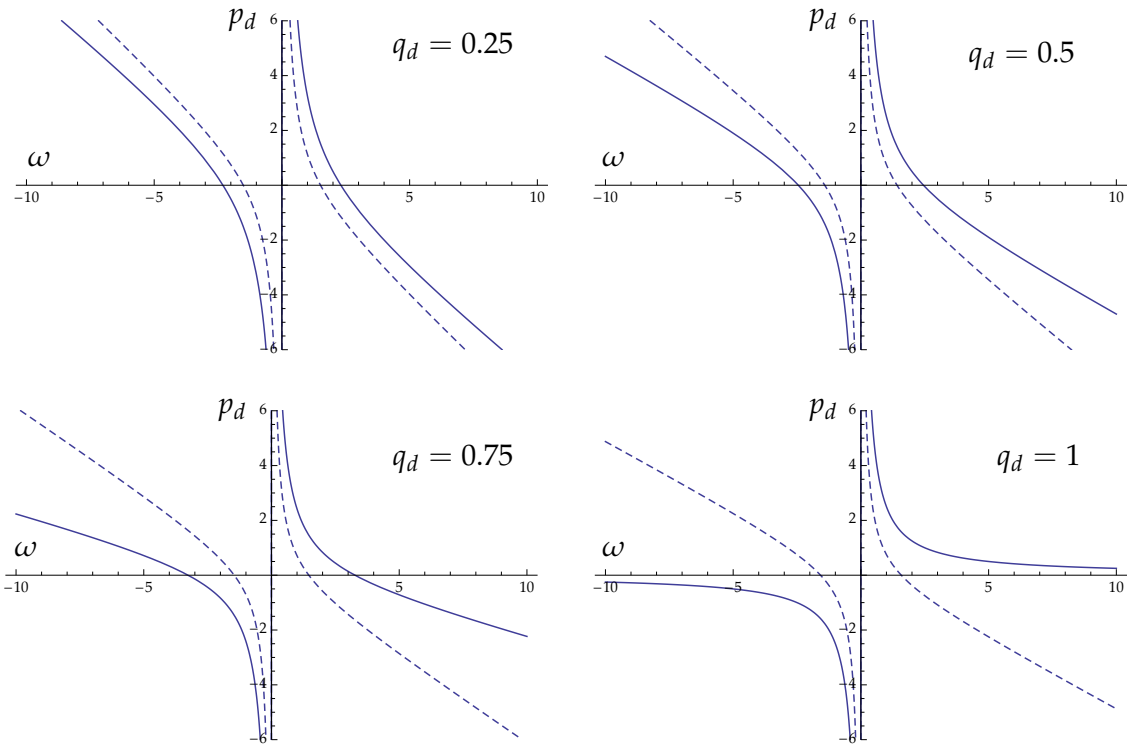


Figure 6.4: Change in p'_d and p''_d across ω and q_m

extreme, the court increasingly prefers to write high-quality opinions and $|P^{\overline{*}}_{c,d}|$ increases.

Regardless of ω, when p_d falls between p'_d and p''_d, the court will prefer $p^*_{c,d} = p_d - \frac{1}{2\omega q_d}$, $q^*_{c,d} = \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d - \frac{2}{\omega^2} + 2$. The set of p_d over which the court prefers is defined as $|P^*_{c,d}| = |p''_d - p'_d| = |(\frac{2}{\omega} + \frac{1}{2q_d\omega} - \omega + q_d\omega) - (\frac{1}{\omega} + \frac{1}{4q_d\omega} - \omega + \frac{q_d\omega}{2})|$. Solving the first-order condition reveals that $|P^*_{c,d}|$ is increasing in $|\omega|$. In other words, as the expected bias of the future court increases, the court is more willing to invest in writing higher quality opinions.

The effect of the adopted dissent's quality (q_d) on q_c given p_d. The effect of the adopted dissent's quality (q_d) on the range of p_d over which the current court prefers $q^*_{c,d}$, $q^{\overline{*}}_{c,d}$, or $q^*_{c,d}$ is conditional on ω. Recall that the current court will choose $\{p^*_{\overline{c}}, q^*_{\overline{c}}\}$ when $\{p_d > p'_d, \omega < 0\}$ or $\{p_d < p'_d, \omega > 0\}$ (illustrated by the dashed lines in Figure 6.4). Solving for the first-order condition $\frac{\delta p'_d}{q'_d}$ reveals that $|P^{\overline{*}}_{c,d}|$ is increasing in q_d only when the the dissent's quality is sufficiently large, such that $|\frac{1}{\sqrt{2}\omega}| < q_d \leq 1$, and the expected bias of the future court is sufficiently extreme, such that $|\omega| > \frac{1}{\sqrt{2}}$. In other words, the current

court will only choose to piggyback on the quality of the adopted opinion when the future court is sufficiently unbiased given q_d. The shaded area of Figure 6.5 indicates the values of ω and q_d for which $|P^*_{c,d}|$ is increasing in q_d.

Exactly the opposite is true of the court's preference for $(p^{\overline{*}}_{c,d}, q^{\overline{*}}_{c,d})$. Recall that the court prefers to write an opinion of the highest quality when $\{p_d < p''_d, \omega < 0\}$ or $\{p_d > p''_d, \omega > 0\}$. Solving for the first-order condition $\frac{\delta p''_d}{q_d}$ indicates that $|P^{\overline{*}}_{c,d}|$ is expanding in q_d when the quality of the dissenting opinion is sufficiently small compared with the expected bias of the future court, such that $q_d < |\frac{1}{\sqrt{2}\omega}$ and $\{\omega \leq \frac{-1}{\sqrt{2}\omega}|\omega \geq \frac{1}{\sqrt{2}\omega}$, or when the expected bias of the future court is sufficiently small, such that $\frac{-1}{\sqrt{2}} < \omega < \frac{1}{\sqrt{2}}$. In this range, the set of p_d for which this is true is increasing in q_d when the quality of the adopted dissent is sufficiently low given the expected bias of the future court. It may seem odd that $|P^{\overline{*}}_{c,d}|$ is actually *decreasing* when $|\omega|$ is small. This is a function of the fact that the values of $(p_d,\ q_d)$ for which the current court prefers to invest the maximum amount of effort to write $q_c = 1$ are pairs in which the dissenting policy is quite distant from the court's ideal point. The values of q_d and ω for which this is true is captured by the unshaded area in Figure 6.5.

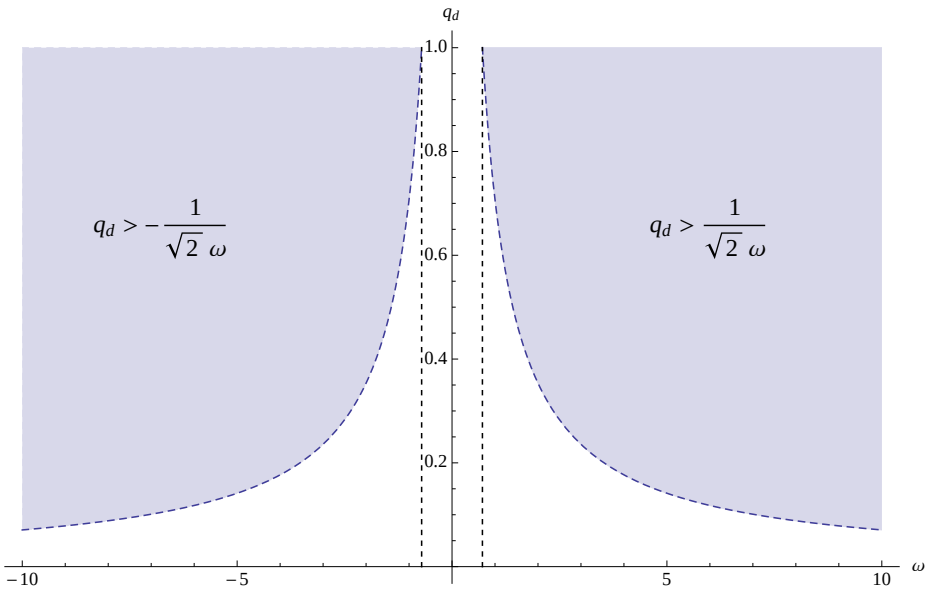


Figure 6.5: Values of ω and q_d for which $|P^*_d|$ is increasing in q_d

The set of p_d over which the court prefers $(p^*_{c,d},\ q^*_{c,d})$ is a function of p'_d and p''_d. As a result, the effect of q_d preference for the interior solution is also a condition on the expected bias of the future court (ω). This set is increasing only when ω is sufficiently extreme, such

that $|\omega| > \frac{1}{\sqrt{2}}$, and q_d is sufficiently large, such that $\frac{1}{\sqrt{2}|\omega|} < q_d \leq 1$.

6.2.1.3 Policy and Quality when Discarding Precedent and Adopting No Opinion

If the court discards precedent but does not adopt the dissent, what policy and quality will the court choose? When choosing to adopt no opinion, the court does not benefit from any other opinion's quality but, at the same time, it is also unconstrained by any preexisting policy. In this situation, the court's maximization problem takes the following form:

$$max_{p_c,\, q_c}\{-\left(p_c + \omega\left(1 - q_c\right) - i_c\right)^2 - \left(p_c - i_c\right)^2 - q_c - \alpha\} \tag{6.21}$$

Solving this maximization problem yields two boundary and one boundary solutions:

$$p^*_{\overline{c},\sim a} = -\frac{\omega}{2},\ q^*_{\overline{c}} = 0 \tag{6.22}$$

$$p^{\overline{*}}_{c,\sim a} = 0,\ q^{\overline{*}}_{c} = 1 \tag{6.23}$$

$$p^*_{c,\sim a} = -\frac{1}{2\omega},\ q^*_c = 1 - \frac{1}{\omega^2} \tag{6.24}$$

The optimal interior solution ($p^*_{c,\sim a} = 1 - \frac{1}{\omega^2}$) exceeds the boundary conditions ($0 < q_c \leq 1$) when $-1 < \omega < 1$. The interior solution is never greater than 1. When $q^*_{c,\sim a} < 0$, the court prefers to adopt ($p^*_{\overline{c},\sim a},\ q^*_{\overline{c},\sim a}$). The court never prefers ($p^{\overline{*}}_{c,\sim a},\ q^{\overline{*}}_{c,\sim a}$). Substantively, this means that when the expected bias of the future court is small ($-1 < \omega < 1$), the court will prefer to write an extremely low-quality opinion ($q_c = 0$) at its ideal point $i_c = 0$. Under these conditions, the cost of investing in writing a higher quality opinion is greater than the extent to which the future court will move the policy location of that opinion. When the expected bias of the future court is more extreme, such that $\omega \geq 1$ or $\omega \leq -1$, the court will invest in writing a higher quality opinion, such that $q_{c,\sim a} = 1 - \frac{1}{\omega^2}$.

6.2.2 Given the decision to discard precedent, when will the court adopt a dissenting opinion?

When the court chooses to break from precedent, when will it prefer to adopt the dissent over adopting no opinion? As with the court's choice of p_c and p_c, this decision is dependent, among other things, on the expected bias of the future court (ω).

6.2.2.1 When the expected bias of the future court is sufficiently small, such that $-1 \leq \omega \leq 1$

Assume that ω is sufficiently small, such that $-1 \leq \omega \leq 1$. Under these conditions, if the court adopts no opinion, then it will prefer $p^*_{c,\sim a} = -\frac{1}{2\omega}$ and $q^*_{c,\sim a} = 0$. However, there are some conditions under which the court will prefer to adopt the dissenting opinion and write an opinion with $p^*_{c,d}$ and $q^*_{c,d}$. The court prefers to adopt the dissenting opinion rather then no opinion at all only when the following is true:

$$\frac{q\omega}{2} - \omega - \frac{\sqrt{\left(\frac{1}{q} + 4\right)\omega^2}}{2\sqrt{2}} \leq p_d \leq \frac{q\omega}{2} - \omega + \frac{\sqrt{\left(\frac{1}{q} + 4\right)\omega^2}}{2\sqrt{2}} \tag{6.25}$$

This space is graphed in Figure 6.6. As the quality of the dissenting opinion *decreases*, the range over which the court is willing to adopt the dissenting opinion increases. Intuitively, this results from the fact that, at more distant policies p_d, the court would rather be free to write an opinion closer to its own ideal point, rather than be bound to the policy embodied by the dissent. Thus, when the quality is lower, and the court is less bound to the precedent's policy, it is more willing to adopt a dissenting opinion over a larger range of p_d than when the quality is large. Figure 6.6 illustrates that the range of p_d over which the court prefers to adopt dissent also increases as the expected bias of the future court becomes more extreme.

6.2.2.2 When the expected bias of the future court is more extreme, such that $|\omega| > 1$

In this state of the world, if the court discards precedent and adopts no opinion, it will set the policy of that opinion at $p_{c,\sim a} = -\frac{1}{2\omega}$ with quality $q_{c,\sim a} = 1 - \frac{1}{\omega^2}$. However, the court

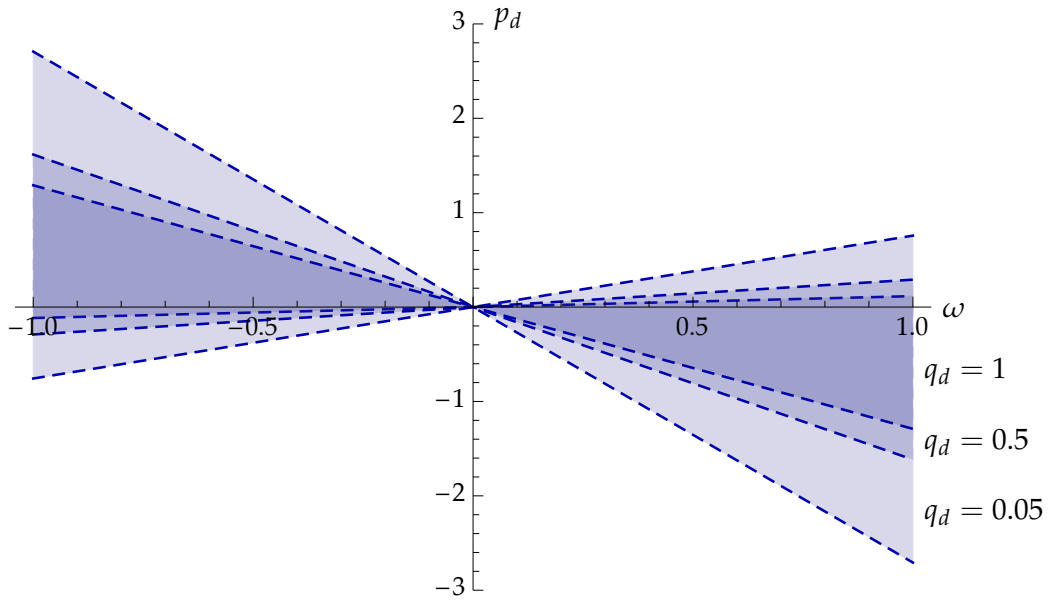


Figure 6.6: Range of ω and p_d over which the court prefers to adopt the dissenting opinion when $-1 \leq \omega \leq 1$

prefers to adopt dissent under three different conditions. The first condition is presented in Equation 6.26.

$$\frac{\omega q_d}{2} - \omega - \frac{\sqrt{\frac{(2\omega^2-1)(4q_d+1)}{\omega^2 q_d}}}{2\sqrt{2}} \leq p_d \leq \frac{\omega q_d}{2} - \omega + \frac{\sqrt{\frac{(2\omega^2-1)(4q_d+1)}{\omega^2 q_d}}}{2\sqrt{2}} \tag{6.26}$$

When Eq. 6.26 holds, the court will choose to adopt dissent and write an opinion with policy $p^*_{c,d}$ and quality $q^*_{c,d}$. Recall that, when adopting dissent, the court prefers $(p^*_{c,d}\ q^*_{c,d})$ when $\{\omega < 0\ p_d > \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega}\}$ or $\{\omega > 0,\ p_d < \frac{\omega q_d}{2} + \frac{1}{4\omega q_d} - \omega + \frac{1}{\omega}\}$. These conditions are always satisfied when Eq. 6.26 holds.

As illustrated in Figure 6.7, the range of p_d for which the court prefers to adopt dissent rather than adopt no opinion is dependent on both dissent quality (q_d) and the expected bias of the future court (ω). The range for which this condition holds is narrowest for high quality dissents (shown by the blue shaded area). This range becomes more negative as the expected bias of the future court becomes more extreme, and the set of p_d for which this holds increases as the dissent *decreases* in quality.

The second two conditions are presented in 6.27 and 6.28. These two conditions are satisfied only when the quality of the dissenting opinion is sufficiently high, such that

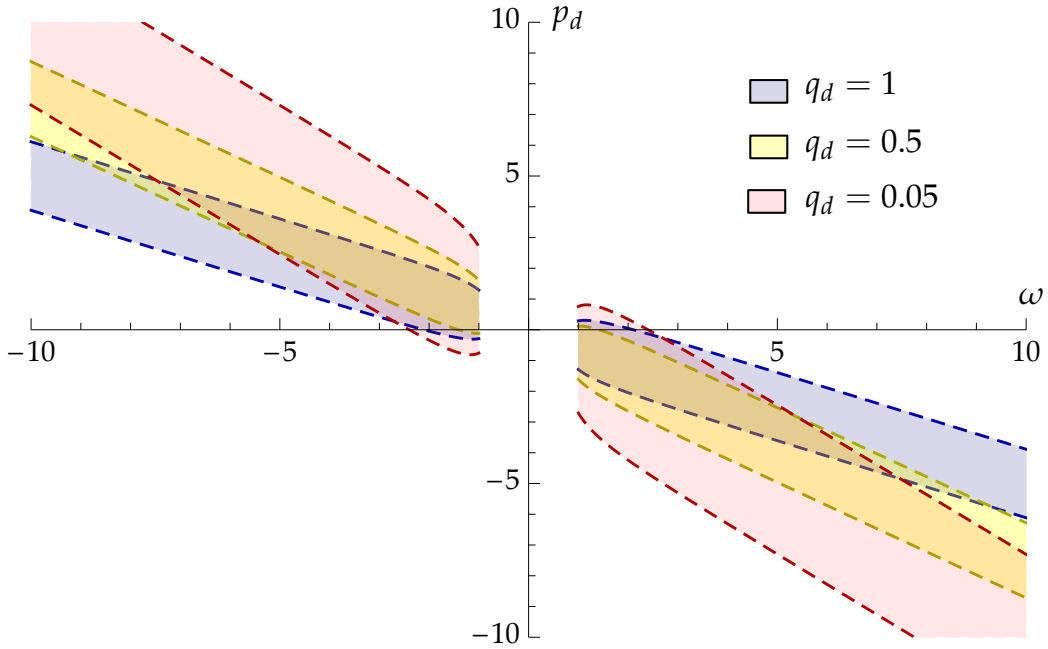


Figure 6.7: Range of ω and p_d over which the court prefers to adopt the dissenting opinion with policy $p^*_{c,d}$ and quality $q^*_{c,d}$ when $|\omega| > 1$

$\frac{2}{3} \leq q_d \leq 1$ for any value of ω or, if the quality of the dissent is lower (i.e., $0 < q_d < \frac{2}{3}$), the expected bias of the future court is sufficiently small such that $\{-\sqrt{\frac{1}{2q_d(2-3q_d)}} \leq \omega \leq -1\}$ or $\{1 \leq \omega \leq \sqrt{\frac{1}{2q_d(2-3q_d)}}\}$.

$$\omega < -1,\ 2\omega q_d + \frac{1}{2\omega q_d} - 2\omega + \frac{1}{\omega} \leq p_d \leq p'_d \tag{6.27}$$

$$\omega > 1,\ p'_d \leq p_d \leq 2\omega q_d + \frac{1}{2\omega q_d} - 2\omega + \frac{1}{\omega} \tag{6.28}$$

When either of these two conditions are met, the court prefers to adopt dissent, setting the policy of its own opinion at $p^*_{c,d} = p_d - \frac{1}{2\omega q_d}$ with quality $q^*_{c,d} = \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d - \frac{2}{\omega^2} + 2$. As illustrated in Figure 6.8, the court is more willing to adopt dissent for a wider range of p_d when the quality of the dissent is relatively low. This is due to the fact that high quality opinions serve to bind the adopting court to that opinion's policy position. As a result, courts will only adopt high-quality dissent when that dissent's policy position is comparatively close to its own.

Taken together, these conditions produce the following equilibrium space when the

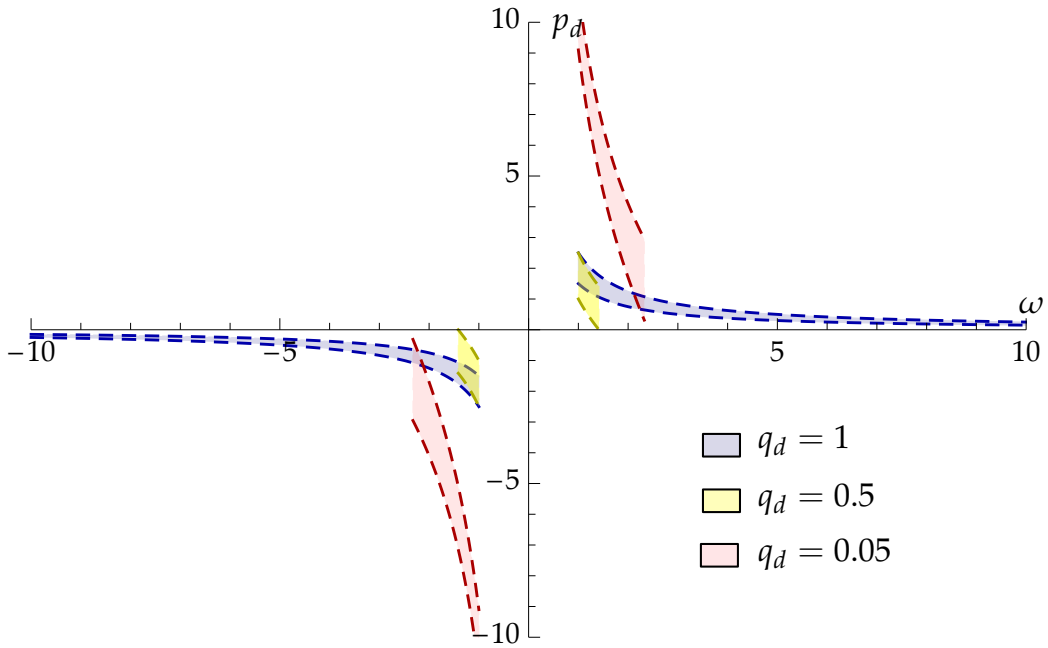


Figure 6.8: Range of ω and p_d over which the court prefers to adopt the dissenting opinion with policy p_c^* and quality q_c^* when $|\omega| > 1$

court has chosen to discard precedent (see Figure 6.9). When $-1 \leq \omega \leq 1$, the court will prefer to adopt no opinion, choosing ($p_{c,\sim a} = -\frac{\omega}{2}$, $q_{c,\sim a} = 0$) unless $\frac{q\omega}{2} - \omega - \frac{\sqrt{\left(\frac{1}{q}+4\right)\omega^2}}{2\sqrt{2}} \leq p_d \leq \frac{q\omega}{2} - \omega + \frac{\sqrt{\left(\frac{1}{q}+4\right)\omega^2}}{2\sqrt{2}}$ (illustrated by the orange-shaded area). In this space, the court prefers to adopt dissent, choosing $p_{c,d}^* = \frac{p_d(4q_d-1)+\omega(q_d-1)}{4q_d+1}$ and $q_{c,d}^* = 0$.

When $|\omega| > 1$, the court will adopt dissent when $\frac{\omega q_d}{2} - \omega - \frac{\sqrt{\frac{(2\omega^2-1)(4q_d+1)}{\omega^2 q_d}}}{2\sqrt{2}} \leq p_d \leq \frac{\omega q_d}{2} - \omega + \frac{\sqrt{\frac{(2\omega^2-1)(4q_d+1)}{\omega^2 q_d}}}{2\sqrt{2}}$. When this is true, the court will adopt the dissent, choosing policy $p_{c,d}^*$ and quality $q_{c,d}^*$ (illustrated by the blue-shaded area). The court will also prefer to adopt dissent when $\{\omega < -1, 2\omega q_d + \frac{1}{2\omega q_d} - 2\omega + \frac{1}{\omega} \leq p_d \leq p_d'\}$ or $\{\omega > 1, p_d' \leq p_d \leq 2\omega q_d + \frac{1}{2\omega q_d} - 2\omega + \frac{1}{\omega}\}$. However, these only hold when $\frac{2}{3} \leq q_d \leq 1$, or, if $0 < q_d < \frac{2}{3}$), when $\{-\sqrt{\frac{1}{2q_d(2-3q_d)}} \leq \omega \leq -1\}$ or $\{1 \leq \omega \leq \sqrt{\frac{1}{2q_d(2-3q_d)}}\}$ (the yellow-shaded area).

6.2.3 When will the court discard precedent?

As discussed above, if the court chooses to discard precedent ($\sim M$), it knows which policy and quality it will choose for all possible values of p_d, q_d, and ω. With this knowledge, the

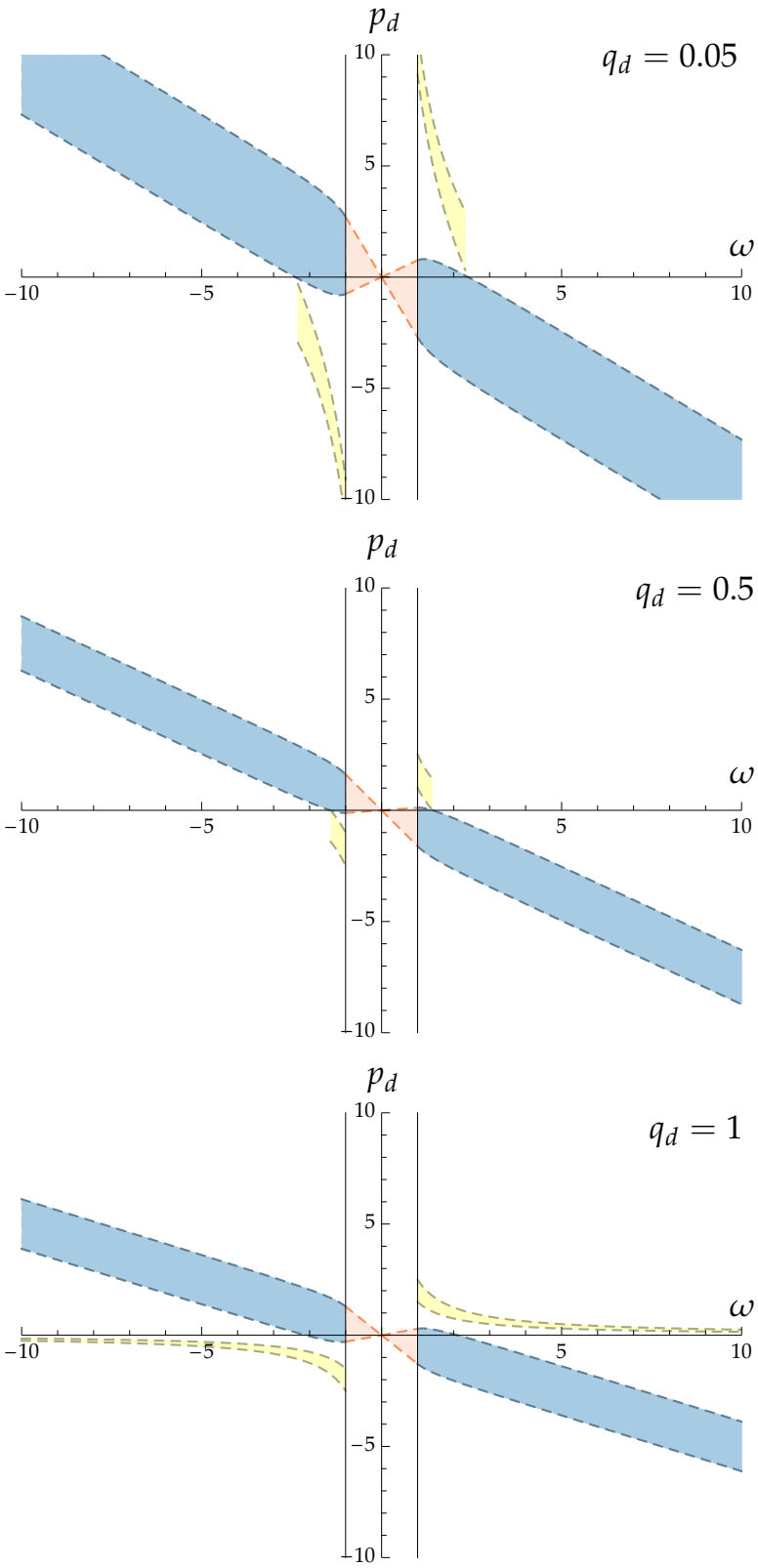


Figure 6.9: Equilibrium space when the court has decided to discard precedent

court will maintain precedent (M) when $EU(M) \geq EU(\sim M)$. As discussed above, the court receives the following utility when maintaining precedent:

$$U(M) = -(p_{m,\mu} + \omega(1 - q_{m,\mu}) - i_c)^2 - q_c - q_m(p_m - p_c)^2 \tag{6.29}$$

The functional form of the court's utility when adopting dissent (A_d) or no opinion ($\sim A$) differs only in that the court incurs a cost α for breaking from precedent (see Equations 6.30 and 6.31).

$$U(\sim M,\ A_d) = -(p_{d,\mu} + \omega(1 - q_{d,\mu}) - i_c)^2 - q_c - q_d(p_d - p_c)^2 \tag{6.30}$$

$$U(\sim M,\ \sim A) = -(p_c + \omega(1 - q_c) - i_c)^2 - q_c - (p_c - i_c)^2 \tag{6.31}$$

Thus, generically speaking, the court will prefer to discard precedent when one of the following conditions hold (see Equations 6.32 and 6.33). Each of these conditions is given in the proof in Appendix C.

$$\begin{aligned} U(M) &\geq U(\sim M,\ A_d) \\ \alpha &\geq -\frac{1}{4}\left(p_d - \omega\left(q_d + q_c - 2\right) + p_c\right)^2 - q_d\left(p_d - p_c\right)^2 \\ &\quad + \frac{\left((t-1)p_m + \omega\left(t\left(-q_m\right) + q_m - q_c + t\right) + p_c\right)^2}{t^2} + q_m\left(p_m - p_c\right)^2 \end{aligned} \tag{6.32}$$

$$\begin{aligned} U(M) &\geq U(\sim M,\ \sim A) \\ \alpha &\geq -\left(i_c - p_c\right)^2 + \frac{\left((t-1)p_m + \omega\left(t\left(-q_m\right) + q_m - q_c + t\right) + p_c\right)^2}{t^2} \\ &\quad + q_m\left(p_m - p_c\right)^2 - \left(p_c + \omega\left(-q_c\right) + \omega\right)^2 \end{aligned} \tag{6.33}$$

Chapter 7

An Empirical Analysis of Dissent Adoption

In the previous chapter, I presented a formal theory of the conditions under which an appellate court will decide to overrule an existing majority opinion and adopt a dissenting opinion. This chapter proposes to empirically test several hypotheses derived from this model. In particular, I examine the extent to which the dissent's *quality*, as measured by its embeddedness in existing precedent, predicts adoption. More importantly, I find evidence supporting the general proposition that the manner in which previous courts have treated an opinion influences decision-making. Through continued use, the dissent is able to transmit more and higher quality information information and are more attractive to future ideologically similar courts as a result.

7.1 Hypotheses Derived from the Model

The model presented in the preceding chapter generates predictions for when a court will discard precedent and, conditional on that decision, whether to adopt the observed dissent or adopt no opinion. The empirical test conducted in this chapter assesses just a few hypotheses derived from one part of the model. Specifically, the empirical tests presented here examine the Supreme Court's decision to discard precedent and the conditions under which the Court decides to adopt the observed dissent.

On this point, the model's results are counterintuitive. Opinion quality is assumed to constrain the ability of a judge to write "around" the legal and policy positions in an opinion. The more well-structured, well-reasoned, and well-supported an opinion, the less able those who cite to it will be to distort its logic or stretch its conclusions. A poorly reasoned or imprecise opinion, on the other hand, lends itself to misuse (at least in the eyes of the opinion's author) by a future court. In other words, opinion quality is constraining; the greater the quality of the opinion, the less able the court adopting the opinion will be able to deviate from that opinion's policy position.

As a result, a dissent's quality is not predicted to independently induce adoption; rather increasing levels of quality narrow the policy range over which the current court is willing to adopt dissent. For example, a liberal majority coalition will be more likely to adopt a conservative dissenting opinion, holding all else equal, only if that opinion is of relatively low quality. Only then will the majority coalition be able to write around the conservative conclusion of the opinion. As a result, the model predicts that *lower* quality will increase the range over which the Court prefers to adopt dissent.

Hypothesis 1. Holding all else equal, as the quality of the dissenting opinion decreases, the policy range over which the court will prefer to adopt dissent will increase.

Predictions about adoption are complicated by the fact that the current Court worries about implementation by a future, potentially biased court. In other words, when writing its own opinions, the Court will take into account how these opinions will be treated by a sophisticated actor with its own policy preferences. Although the model conceptualizes this as an interpreting Court, almost any interpreting or implementing institution could be substituted. However, when the Court is not particularly concerned about institutional strength and when compliance is, on average, assured, the Court prefers to adopt opinions close to its ideal point as opposed to those farther away.

Hypothesis 2. When the expected bias of the future court is low, the court will strictly prefer to adopt a dissenting opinion closer to its ideal point, holding all else equal.

This is not always predicted to be the case, however, when the expected bias of the future court is high. Under high levels of bias, the structure of the Court's quadratic loss

function induces the Court to prefer to adopt dissenting opinions farther from its ideal point than those that are closer. As a result, the court is trying to bind the future court to a position closer to its own ideal point by adopting a relatively distant ideal point in the opposite direction from the preferences of the future court to counter-balance the expected bias. In other words, as the liberal bias of the future court increases, the current court prefers to adopt increasingly conservative positions, and vice versa.

Hypothesis 3. When the liberal (conservative) bias of the future court increases relative to the preferences of the current court, the court prefers to adopt increasingly conservative (liberal) opinions, holding all else equal.

The hypotheses about bias of future courts is actually quite difficult to test, and the dynamic is most likely oversimplified by the formal model. The primary problem with conceptualizing future treatment in this way rests in the decentralized nature of both the federal judiciary. There is no single implementing actor whose preferences the Court should take into account. For example, the Court's decisions will always be interpreted by federal district courts and courts of appeals. However, there are 94 different districts, over which 677 judges preside,[1] and 13 circuits, populated by 179 judges.[2] The idea that there is any unified ideological predisposition for either the district or circuit courts is difficult to defend, at least across a long time period.[3]

To the extent that this effect exists, it is tempered by the quality of the observed dissent. As discussed in the previous chapter, opinion quality serves to bind the adopting court to its policy position. The higher the quality of the adopted opinion, the less able the adopting court will be to write around it. The dissent's quality has a binding effect on the promulgated policy. As a result, when opinion quality is high, the court will prefer less extreme positions in the face of high bias than when observing a lower quality dissent.

Hypothesis 4. Holding all else constant, the court will be less willing to adopt a high-quality dissent with a relatively extreme policy position than a low-quality dissent with a

[1]Note, however, that as of April 9, 2015, 50 (7.4%) of the 677 were vacant. This 677 figure also includes judgeships in U.S. territories, such as the District of the Northern Mariana Islands and Guam.

[2]As of April 9, 2015, 5 (3.0%) of the 167 circuit judgeships were vacant.

[3]Such an proposition may be easier to defend across a shorter period of time. For an illustration of this, see Kastellec 2011.

relatively extreme policy position.

7.2 Data and Methods

To test the predictions of the formal model, I employ a "most likely case" research design. In other words, if the Supreme Court is *ever* going to cite a dissenting opinion, it is most likely to do so when it is overruling the decision against which the dissent was issued. For example, when the Court first considered the issue of subjecting juveniles to capital punishment in *Stanford v. Kentucky*,[4] the Court determined, "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."[5] Justice Brennan issued a strong dissent, stating, "I believe that to take the life of a person as punishment for a crime committed before the age of 18 is cruel and unusual punishment and hence is prohibited by the Eighth Amendment."[6] If the Court will ever cite Brennan's dissent, it will do so in this case.

Using the Congressional Research Service's *United States Constitution: Analysis and Interpretation* (referred to as *Constitution Annotated* or, simply, *CONAN*),[7] and the Supreme Court Compendium[8] I constructed a list of opinion-dyads, in which one decision (referred to throughout as the "overruling" case) overturned a prior decision (the "overruled" case) that was, at the time of announcement, accompanied by dissent. If the Court were ever to substantively cite dissent, this would be the place. The unit of observation is at the opinion level. In other words, each dissenting opinion accompanying the overruled decision is paired with the overruling majority opinion as a single observation in the dataset; as a result, some cases appear twice. Using these two sources, I compiled a list of 148 Supreme

[4] 492 U.S. 361 (1989).

[5] *Stanford*, 492 U.S. at 381.

[6] *Stanford*, 492 U.S. at 382 (Brennan, J., dissenting).

[7] To compile this table (*Supreme Court Decisions Overruled by Subsequent Decision*), the editors of the *Constitution Annotated* rely primarily on four historical sources to identify overruling-overruled opinion dyads: Justice Brandies's dissenting opinion *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393 , 406–09 nn.1–4; Wilson 1945, 254 n.17, 265; Douglas 1949, 756–58; and Blaustein and Field 1958, 184–94

[8] Relevant case pairs were listed in Table 2-17: Supreme Court Decisions Overruled by Subsequent Decisions.

Court decisions in which the Court overruled a prior decision with dissent, resulting in 288 opinion-dyads. Of these 288 opinion-dyads, I was able to collect data on independent variables for 180; limitations on measures of judicial ideology restrict the analysis to opinion pairs in which both the overruling and overruled decisions were released after 1945.[9]

The "most likely case" design is adopted from the literature on interstate conflict. In this literature, potential conflicting states or coalition partners are paired in state-dyads. Scholars have used a variety of criteria to identify such dyads, including geographic proximity (Sarkees and Wayman 2010) and whether the state is a "great power" (Gleditch and Ward 2001).[10] These types of designs and the criteria on which states are matched recognize the reality that smaller, weaker states are less likely to engage in conflict with each other or form alliances. As a result, the behavior that international relations scholars seek to measure is best captured by structuring the unit of analysis to those states that are "most likely" to exhibit the behavior of interest.

As its name suggests, the test is designed to test the easiest case—if the phenomenon exists at all, it will reveal itself in this test. Although overruling-overruled opinion dyads present the cleanest "most likely case," there are other research designs that would have constituted an "easy case." For example, opinion dyads could have been selected based on issue or area of law. For example, I could have taken a random of sample of Supreme Court decisions from 1946 through the present and discarded all but those accompanied by dissent. I then could have paired those dissents with future decisions interpreting the same statute, state law, or provision of the U.S. Constitution. For example, Justice Brennan's 1989 *Stanford* dissent could have been paired with all Supreme Court decisions interpreting the Eighth Amendment from 1989 through the present. A "hard case" design could have been created by randomly sampling Supreme Court decisions, filtering the results for decisions with dissent, and pairing with another random sample of future Supreme Court cases.

In each of these alternate research designs, the opinion dyads are less likely to touch substantively on the same issue than in the design employed in this chapter. For example, Brennan's *Stanford* dissent addresses the execution of juveniles. Such a dissent is much less

[9] To measure ideology, I use Martin-Quinn scores, *see* Martin and Quinn 2002, which are only available from 1946 forward.

[10] For an application of this, see Wolford and Ritter 2015.

likely to be cited in a death penalty case involving the constitutionality of a lethal injection drug cocktail, as in *Baze v. Rees*[11] or a totally unrelated case, such as the *Daimler AG v. Bauman*,[12] which restricted the federal court's general jurisdiction to locations in which the corporation is truly "at home."[13]

The goal, however, of the analysis presented in this chapter is to demonstrate that there are at least some conditions under which opinion quality influences adoption. Choosing overruling-overruled opinion dyads restricts the subject area to the narrowest point and selects pairs in which the court has changed its mind. A more permissive pairing, such as the issue area pairing described above would not only pair Justice Brennan's dissent with *Roper v. Simmons*, the decision in which the Court overruled *Stanford*, but also many death penalty cases that had nothing to do with juvenile and in which a citation would be unlikely. This would obscure the causal mechanism of interest by creating unnecessary noise in the data. More importantly, by creating a dataset of less-likely cases, the noise may result in a Type II error.

The "most likely case" design employing overruling-overruled dyads reflects the theoretical foundations of the model presented in the previous chapter. The ability of opinion adoption to reduce the cost of opinion-writing only makes sense if the adopted opinion addresses the same topics at issue in the case under consideration. Absent this assumption, it is unclear why judges would ever adopt or cite prior opinions.

7.2.1 Independent Variables

The hypotheses derived from the formal model indicate the primacy of ideology, opinion quality, and the costs associated with both opinion-writing and breaking from precedent.

Ideology. The model (and common sense) suggests that dissent adoption is a function, in part, of ideological similarity with the overruling court. To measure this, I use Martin-Quinn (2002) scores to calculate the absolute distance between the median of the overruling majority coalition and the paired dissent coalition.[14] Summary statistics dis-

[11] 128 S.Ct. 1520 (2008).

[12] 134 S.Ct. 746 (2014)

[13] Writing for the majority, Justice Ginsburg defined "at home" to mean the location in which the firm is incorporated and the firm's principal place of business. *Daimler*, 134 S.Ct. at 760.

[14] One might argue that this alone, however, is an inadequate measure. Imagine a situation in which the

played Table 7.1 indicate that, on average, the Justices who dissent in cases that are eventually overturned are more liberal than the majority coalitions that eventually overturn the case. The average difference between the dissent median and the overruling coalition median is statistically significant in a two-tailed t-test at $p < 0.001$.[15]

Table 7.1: Summary Statistics for Ideology

	Mean	Median	Min	Max	Std. Dev.
Dissenters (D_{t-1})	-0.616	-0.384	-6.543	4.359	2.256
Overruling Majority (M_t)	0.210	0.569	-1.51	2.502	1.111
Ideological Distance ($\|D_{t-1} - M_t\|$)	1.569	1.172	0.020	7.325	1.415

Note: Statistics summarize the median members of overruling majority and paired dissent coalitions using Martin-Quinn scores. Calculated for the sample used in the analysis (N=180).

Opinion Quality. The formal model assumes that courts care not just about policy location of the paired dissent but also that dissent's quality. Opinion quality can be thought as having *static* and *dynamic* components. Static quality reflects the opinion writer's efforts and choices—that is, the manner in which he has chosen to structure the argument. The full extent to which an opinion is able to communicate a policy position, however, is conditional on its *dynamic quality*, as well. Dynamic quality is defined as an opinion's ability to transmit information resulting from factors beyond the author's direct control.

Static Quality. Opinion authors are directly in control of how the opinion is written. This includes the opinion's *readability* and *embeddedness in the law*. As discussed in Chapter 4, opinion clarity holds special importance in administering the law. Clear statutes and opinions are normatively desirable, because they provide fair notice to those expected to

median voter of the dissenting coalition is more extreme than both the median voter of the overruling and overruled majority coalition, such that $M_t \geq M_{t-1} \geq D_{t-1}$ or $D_{t-1} \geq M_{t-1} \geq M_t$ where M_{t-1} is the median of the overruled majority coalition, M_t is the median of the overruling coalition, and D_t is the median of the paired dissent coalition. This actually occurs in 25 (13.8%) of the 180 opinion-dyads for which ideology data is available. However, I think that the ideology data is too coarse for the inclusion of this additional, relatively fine-grained measure. This assumption is confirmed by robustness checks, which indicate that it is not significant.

[15] t=-5.6936, df =179, N = 180.

comply with the law[16] and specificity, meaning that it gives guidance to those who are *enforcing* the law.[17] From this perspective, clarity in the law can be efficient because it allows all parties involved to create reasonable expectations about what the law requires and plan accordingly.

From a functionalist perspective, however, clarity in the Court's opinions or the law itself may not always be desirable. For example, vagueness could help the Court institutionally by permitting lower interpreting courts to engage in "creative non-compliance" (Benesh 2000) or to "resolve core tradeoffs associated with judicial policymaking," including permitting "judges to deal with their limited policymaking abilities in an uncertain world" (Staton and Vanberg 2008). This aspect of clarity is not an element of opinion quality as I have conceptualized it. Recall that, as assumed in the model presented in the previous chapter, the higher the quality of the opinion, the more that opinion *binds* those who adopt it to its policy position.

To capture clarity, I employ two measures of language complexity: Flesch Reading Ease (FRE) (Flesch 1949) and the Coleman-Liau Index (CLI) scores (Coleman and Liau 1975). These measures, first presented in Chapter 4 measure the *readability* of the opinion text. The FRE is scaled from 0 to 100, with 0 indicating a college-graduate reading level and 100 representing a 4th grade reading level. Language complexity under this measure is calculated using weighted measures of the ratios of words to sentences and syllables to words (see eq. 7.1).

$$FRE = 206.835 - 1.015 * \left(\frac{words}{sentences}\right) - 84.6 * \left(\frac{syllables}{words}\right) \tag{7.1}$$

The CLI score corresponds to reading grade level, with higher values indicating more complex linguistically texts. Similar to the FRE, the CLI uses a weighted ratio of letters to words and sentences to words (see eq. 7.2).

[16] *See* McBoyle v. United States, 238 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, if what the law intends to do if a certain line is passed.").

[17] *See* City of Chicago v. Morales, 537 U.S. 41 (1999) (finding that a city ordinance that permitted police to arrest individuals determined to be in a place with "no apparent purpose" was unconstitutionally vague).

$$CLI = 5.88 * \left(\frac{letters}{words}\right) - 29.6 * \left(\frac{sentences}{words}\right) - 15.8 \tag{7.2}$$

To code these measures, I wrote perl scripts that processed the dissent text (as stored in plain text files) and calculated the number of letters, syllables, words, and sentences for each dissent. I then used these counts to calculate the FRE and CLI scores. Summary statistics of these two measures are presented in Table 7.2.[18]

Another aspect of opinion quality, *legal embeddedness*—or the extent to which the opinion relies on precedent—has less to do with the way a legal argument is structured than how it is supported. Citing precedent is the primary method used by judges to legitimate their policy decisions (see, e.g., Knight and Epstein 1996), and the norm of *stare decisis* is a "fundamental" component of the American legal system (Segal and Spaeth 2002, 6, see also *Hilton v. South Carolina Public Railways Commission* (1991) at 201–03). In other words, "adherence to precedent sends a signal to the legal community and mass public that the Court's legal interpretations contain considerable continuity and do not change simply because of membership change on the Court" (Bartels 2009, 475). This predicability, in turn, arguably fosters compliance; deviation from the norm of *stare decisis* may be viewed by those charged with interpreting and implementing the Court's decisions to be illegitimate (Epstein and Knight 1998, 163–65). Any resulting resistance would hinder the Court's ability to achieve its policy goals. Deference to precedent—that is, respecting the norm of *stare decisis*—thus helps Justices to justify their current policy choices and enhances the influence of their opinions (Hansford and Spriggs 2006, 16–17, 22). As a result, a dissent that is well-embedded in the law enhances its quality and value to a judge considering whether to cite it.

Legal embeddedness is important not simply for normative reasons, but for functional reasons, as well. Relying on existing case law helps judges create an intellectual framework for their opinion and provide guidance for future courts. Over time, judges develop an understanding of how existing case law should be applied, and relying on these opinions as authorities efficiently transmits information about the proper application of the judge's

[18] For a more extensive discussion of the connection between opinion clarity and these measures, see Chapter 4.6.

intellectual framework in future cases (Bueno de Mesquita and Stephenson 2002). As a result, future judges can rely on well-understood interpretations of existing case law to communicate their reasoning efficiently and effectively.

Legal embeddedness, as a measure of *static* quality, is simply the number of authorities cited by the dissenting opinion. To collect these data, I pulled the text for each dissent in the dataset from Westlaw and hand coded the number of authorities for each. Summary statistics for these citation counts are provided in Table 7.2, as well as summary statistics for log number of authorities cited.

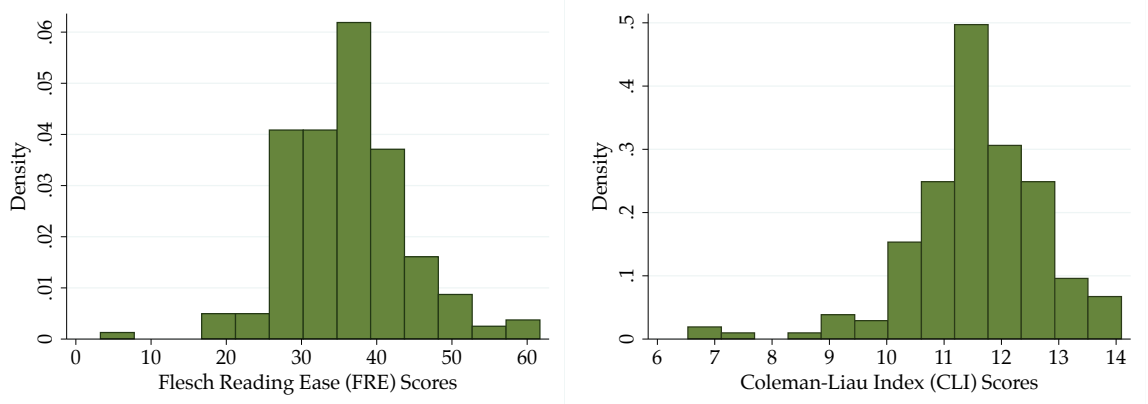
Table 7.2: Summary Statistics for Static Quality Measures

	Mean	**Median**	**Min**	**Max**	**Std. Dev.**
FRE	36.244	36.487	3.284	61.700	7.890
CLI	11.572	11.553	6.536	14.094	1.164
Num. Authorities	13.13	8	0	134	16.95
Logged Adj. Num. Authorities	2.11	2.2	0	4.91	1.09

Note: N=180. Only those opinions included in the analysis are included in this table.

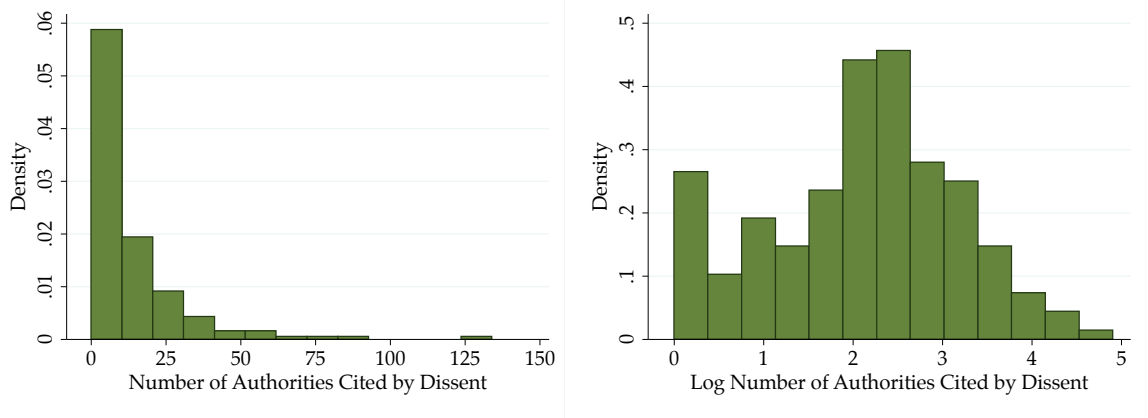
The summary statistics presented in Table 7.2 suggest wide variability in both complexity of the opinion's language and density of legal authority on which the dissenting justice or coalition relies. Both the CLI and FRE scores are both roughly normally distributed (see Figure 7.1). The two scores are highly, though not perfectly, correlated at $\rho = -0.7381$.

Figure 7.1: Distribution of FRE and CLI Scores



The number of authorities invoked by the dissenting coalition ranges from 0 to 134, and the distribution has a long right tail (see Figure 7.2). Taking the log of the number of authorities generates a normal distribution. This transformation is appropriate when distributions are truncated at zero and are right-skewed. This transformation helps preserve the linearity of the relationship between this measure and the independent variable.[19] Although Table 7.2 includes only those observations used in the analysis below, I collected these data for all paired dissents (N=288); 76 written dissents were coded and are not included in the analysis. Notably, there is no statistical difference between the number of dissent authorities included in the sample (meaning the dissent was issued during or after the 1946 term) or excluded from it (promulgated before the 1946 term).[20]

Figure 7.2: Distribution of Number of Dissent Authorities and Log Authorities



Dynamic Quality. When a dissent is initially published, it is able to convey only those qualities within the direct control of the judge, namely its clarity and legal embeddedness. However, as time passes, that opinion may be able to convey more or less information based on whether and how subsequent opinions cite it. From this perspective, each opinion can be thought of as a hub in a network. The opinion is then connected to each opinion it cites, as well as opinions citing it (Fowler et al. 2006; Fowler and Jeon 2007). Over time, the network will become relatively more dense (if the opinion is cited extensively) or less dense (if the opinion is ignored). The more connections an opinion has, the more informa-

[19]Note that $log(0)$ is not defined. To adjust for this without losing data, I transformed the data linearly by adding 1 to each count of authorities before taking its log.

[20]t=-0.4802, p=0.6315, df=254, two-tailed t-test.

tion it can convey to a judge trying to determine whether and how to use it.

The same is also true for an opinion's authorities. Just like the dissent, its authorities may be frequently cited or relatively disused. If the authority on which the dissent is based is infrequently cited, then the legal embeddedness of the dissent may erode over time as alternate lines of reasoning gain dominance.

Dynamic and static quality are related concepts. In particular, an opinion's informational value captured by its static quality may change over time. Just as an opinion's informational value may wax and wane depending on its age, vitality, and usage by lower and future courts, so too may the informational value of an opinion's authorities (the existing case law supporting the opinion's reasoning). As an opinion's authorities grow in age, realize higher levels of vitality, and are frequently cited by the Court, the greater the amount of information an opinion relying on those authorities is able to transmit. Conversely, negative or limited treatment of the authorities on which an opinion relies diminishes its potential influence.

To assess the changing level of information an opinion can convey, I measure the both the *frequency* with which an opinion (and its authorities) are cited and the *depth of treatment* of those citations. I did so by collecting two levels of data. First, I coded all instances in which the paired dissent was cited between the time of its promulgation and overruling opinion's decision date. This required conducting a search for the dissenting opinion in Westlaw's database of Supreme Court cases and, within the search results, locating any reference to that dissent in majority, plurality, concurring, and dissenting opinions. To conduct this search, I used Westlaw Classic's search feature that allowed for searches of terms in the same paragraph as the case citation. To search for the relevant dissents, I searched for the dissenting Justice's name and included a wild card term for dissent. For example, when searching for references Brennan's dissent in *Stanford*, I searched for "`Brennan & dissent!`" in the same paragraph as an opinion's citation to *Stanford*. I counted treatment in separate opinions in the same case as different citations. For example, if a dissent were cited by both the majority opinion and a concurring opinion, this was coded as two citations.

I also recorded depth of treatment data based on Westlaw's star system. Since Westlaw

does not provide this information for dissenting opinions, I searched for such references by hand and manually coded the opinion's treatment according to the criteria found in Table 7.3. This required reading each opinion referencing the dissent and evaluating whether an opinion's citation of the the dissent was merely a string citation ("mentioned"); less than a paragraph of treatment ("cited"); more than a paragraph of discussion but less than a printed page ("discussed"); or was greater than a page ("examined").

Table 7.3: Westlaw KeyCite "Depth of Treatment" Stars (Criteria Used for *Legal Embeddedness* and *Frequency* Variables)

Symbol	Definition	Description
$****$	*Examined*	Extended discussion of the cited case, usually more than a printed page
$***$	*Discussed*	Substantial discussion of the cited case, usually more than a paragraph but less than a printed page
$**$	*Cited*	Some discussion of the cited case, usually less than a paragraph
$*$	*Mentioned*	A brief reference to the cited case, usually in a string citation

Note: This table is taken verbatim from the Westlaw website, `http://www2.westlaw.com/CustomerSupport/Knowledgebase/Technical/WestlawCreditCard/WebHelp/KeyCite_Depth_of_Treatment_Stars.htm`

An opinion's *vitality* is related to its frequency and depth of treatment. This concept is defined as the "extent to which [precedents] maintain legal authority" (Hansford and Spriggs 2006, 23). In other words, how an opinion has been treated, whether positively or negatively, affects that case's informational value. Positive treatment includes extending the ruling or identifying a broad class of cases controlled by the ruling; negative treatment of a case includes limiting the case's ruling to a narrow set of facts or, in the extreme, overturning the case's holding entirely. Positive treatment of a case with a negative history may send conflicting signals to interpreting populations and result in less successful implementation of the judge's mandate. However, both the age and vitality of the ruling may be unimportant if the case is rarely cited or applied. If an old and positively treated opinion is used infrequently by prior Justices, then the Supreme Court's use of that authority may provide little guidance to interpreting populations. As a result, when collecting frequency and depth of treatment data, I distinguished positive and negative treatments.

Finally, an opinion's age *age* may also affect its ability to effectively communicate a

judge's policy decision (Bueno de Mesquita and Stephenson 2002).[21] Middle-aged opinions may be more likely to be cited than the very young or very old. Very young precedents may not be able to transmit enough information to be informative, and so are more easily discarded. Very old opinions may be vulnerable because the world around them has changed. For example, in *Edwards v. California*,[22] the majority observed,

> Whether an able-bodied but unemployed person like Duncan is a pauper within the historical meaning of the term is open to considerable doubt. . . . But assuming that the term is applicable to him and to persons similarly situated, we do not consider ourselves bound by the language referred to. *City of New York v. Miln* was decided in 1836. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a moral pestilence. Poverty and immorality are not synonymous.

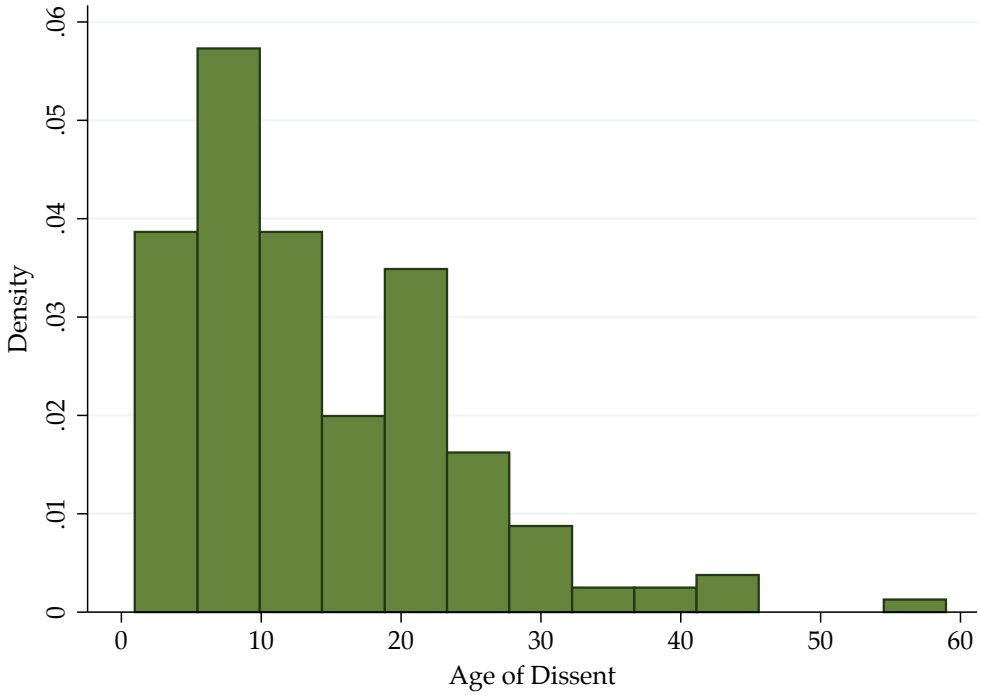
The informational value of age is conditional on both the vitality and the utilization of the case law cited by the opinion. To code age, I subtracted the year the dissent was promulgated from the year it was cited by the overruling case. For example, Justice Brennan's dissent in *Stanford* was published in 1989 and was 17 years old when the Court overruled *Stanford* with *Roper v. Simmons* in 2005.

As suggested by Figure 7.3, there is a good deal of variation in dissent age, and its distribution is right-skewed. The oldest dissent in the dataset is Justice Frankfurter's 1947 minority opinion in *International Salt Co. v. U.S.*,[23] a decision that was overruled 59 years later by the Court's 2006 decision in *Illinois Tool Works v. Independent Ink*.[24] Five dissents tied as the youngest; in these opinion-pairs, the original majority opinion was overruled only one year after promulgation.[25]

To calculate the dissent's dynamic quality, I created standardized scores using these indicators (frequency of citation, depth of treatment, vitality, and age). Because of this

[21] Hansford and Spriggs (2006, 24) argue that the age of the precedent should not determine its treatment. First, the age of the precedent cannot be manipulated or changed by any judge and, as a result, "is not of theoretical interest." Second, the effect of age is unclear. Age may enhance a precedent's utility through veneration or diminish it to irrelevance. These criticisms are well-taken, but the relationship between the treatment or utility of precedent and its age are conditional on the other characteristics of the case, as discussed

Figure 7.3: Distribution of Dissent Age



variation in age and, as a result, disparate opportunity for more citations by the Court, standardization is necessary. The first score provides a measure of positive citing references standardized by age. I refer to this score as the *unweighted* standardized measure of dynamic quality because it does not account for the *depth of treatment* of the citations (see eq. 7.3). I construct a second measure that accounts for depth of treatment by *weighting* the number of citations by their treatment depth, before summing and dividing by the dissent's age (see eq. 7.4).

$$q_{d,\text{unweighted}} = \frac{\Sigma_{i=1}^{N} Citing\ References_i}{Age} \tag{7.3}$$

below.

[22]314 U.S. 160 (1941).

[23]332 U.S. 392.

[24]547 U.S. 28.

[25]These decisions were: *Kinsella v. Krueger*, 351 U.S. 470 (1956) (joint dissent by Warren, Black, and Douglas), overruled by *Reid v. Covert*, 354 U.S. 1 (1957); *Reid v. Covert*, 351 U.S. 487 (1956) (joint dissent by Warren, Black, and Douglas), overruled by *Reid v. Covert*, 354 U.S. 1 (1957); and *Robbins v. California*, 453 U.S. 420 (1981) (separate dissents by Stevens, Blackmun, and Rehnquist), overruled by *United States v. Ross*, 456 U.S. 798 (1982).

Table 7.4: Summary Statistics of Standardized Weighted and Unweighted Dyanmic Quality for Paired Dissents

	Mean	Median	Min	Max	Std. Dev.
Unweighted					
Positive	0.258	0.167	0.028	1.125	0.249
Negative	0.006	0	0	.2	0.024
Weighted					
Positive	0.548	0.36	0.043	2.2	0.516
Negative	0.013	0	0	0.4	0.055

Note: N=119.

$$q_{d,\text{weighted}} = \frac{\Sigma_{i=1}^{4} Depth_i * \Sigma_{j=1}^{N} Citing\ References_{ij}}{Age} \tag{7.4}$$

Summary statistics for these measures are provided in Table 7.4. Notably, only 119 of the dissenting opinions appearing in the 180 opinion-dyads were cited by any other Supreme Court opinion between promulgation and the overruling date. The data also reveal that, if dissents are cited, they are normally cited positively rather than negatively. This makes sense intuitively. Since dissents possess no precedential value, there is no need to address them. Yet, some dissents are cited negatively. This may be the case if the dissent is particularly compelling or, alternatively, is used by the majority opinion to support a line of reasoning.

I repeated this data collection process for each of the dissent's authorities, starting from the time of the authority's promulgation to the year of overruling. Whereas collecting information on the citation of the dissents themselves provided a first-order perspective on the dissent's treatment over time, collecting data on the Court's treatment of their *authorities* provides additional second-order information about the quality of the dissent.

For every Supreme Court decision cited by a dissent, I pulled Westlaw's KeyCite report for that authority from the time of its promulgation to the time of overruling. In the case of a dissent that cited a minority opinion, such as a concurrence or dissent, I used Westlaw Classic's search feature that allowed me to locate search terms in the same paragraph citing the authority of interest. For example, Justice Burger's dissent in *Thornburgh*

v. American College of Pediatrics[26] cited as his own concurrence in *Doe v. Bolton*,[27] a companion case to *Roe v. Wade*.[28] This concurrence was cited two additional times between its original promulgation and 1992, when the Court overturned *Thornburg* in *Planned Parenthood of S.E. Pennsylvania v. Casey*.[29] Because this authority was a minority opinion, I used Westlaw Classic's targeted search feature and visually checked the text of all the KeyCite results to determine whether Burger's concurrence was mentioned. In total, the dissents in 162 overruling-overruled opinion dyads cited 3,451 authorities; 18 cited no authorities. Of these 3,451 authorities, 413 were minority opinions. Taken in total, these 3,451 authorities were themselves cited 119,962 times between their original promulgation and the opinion-dyad's overruling.

For each of these 3,451 authorities, I coded whether treatment was positive or negative and the depth of treatment. When the authority was a minority opinion (413 of 3,451 authorities), I read the citing reference to determine whether its treatment of the authority was positive/neutral or negative and hand coded depth of treatment using Westlaw's schema (see Table 7.3). Using these indicators, I calculated both unweighted and weighted measures of the dynamic quality of a dissent's authorities (see eqs. 7.3 and 7.4). Summary statistics for these variables are displayed in Table 7.5.

Table 7.5: Summary Statistics of Standardized Weighted and Unweighted Dyanmic Quality for Dissent Authorities (Sum)

	Mean	Median	Min	Max	Std. Dev.
Unweighted					
Positive	21.778	9.725	0.175	235.091	35.787
Negative	0.269	.107	0	5.558	0.632
Weighted					
Positive	45.039	20.255	0.296	471.395	74.147
Negative	0.775	0.328	0	11.313	1.424

Note: N=162.

Expected Bias of Future Courts. As discussed above, the expected bias of the future

[26] 476 U.S. 747 (1986)
[27] 410 U.S. 179 (1973).
[28] 410 U.S. 113 (1973).
[29] 505 U.S. 833.

implementing court has major implications for the model's predictions. It is also the most difficult to measure accurately. Given high rates of compliance among circuit courts (**?**; Benesh 2000) and high levels of institutional prestige enjoyed by the modern Supreme Court,[30] it is not altogether clear that expected bias is especially large. Moreover, in a system characterized with multiple circuits with varying distributions of ideology, one could argue that, in expectation, interpretation bias is effectively zero.

At the same time, it is prudent to account for potential bias—especially given the long time period over which the model is estimated. I account for bias by conceptualizing it as a lower or future court's willingness to deviate from precedent. Courts are especially likely to do so in important, or *salient*, cases (*see, e.g.*, Benesh 2000). To capture this, I use Epstein and Segal's (2000) measure: whether the overruling case was featured on the front page of the *New York Times*. Of the 180 overruling decisions used in the analysis, 98 (54.4%) were salient according to this measure.

Costs of Writing High-Quality Opinions. In order to craft an opinion capable of binding a future court, a judge must create clear rules, comprehensively address the issues presented by litigants, and propose a persuasive legal argument. This intellectual framework will guide the interpretation and implementation of that opinion across a variety of lower courts, as well as federal, state, and local administrative agencies. By providing clear guidance through high quality opinions, judges can increase the possibility that these actors will choose policies that reflect the judge's preferences.

Constructing a well-reasoned rule, however, can be challenging; doing so for each case would be extremely costly. The number of cases heard by any court represents a considerable constraint by imposing opportunity costs and, at the very least, forces prioritization. Scholars of judicial behavior have generally viewed workload as a meaningful limitation on judges' pursuit of their policy goals (Howard 1968; Baum 1997; Benesh 2000; Maltzman, Spriggs and Wahlbeck 2000; Epstein, Knight and Shvetsova 2001; Lax and Cameron 2007).[31] Given these constraints, I predict that higher workload—measured as the number of decisions per term—will make the adoption of dissent more likely, *ceteris paribus*.

[30] *See supra* Chapter 4.

[31] This is true even in the Supreme Court, despite efforts by Chief Justices to distribute the workload equally among the Justices (O'Brien 2000).

Specifically, I use the workload data available in the Supreme Court Compendium until 2006; I then supplement for 2007 through 2009 from the SCOTUSBlog's StatPacks.

Table 7.6: Summary of Independent Variable Measures and Sources

Variable	Coding	Source
Ideological Distance	$\lvert D_{t-1} - M_t \rvert$	Martin and Quinn (2002)
Static Quality Measures		
(1) CLI	$5.88 * \left(\frac{letters}{words}\right) - 29.6 * (\frac{sentences}{words}) - 15.8$	custom perl script based on Flesch (1949), DuBay (2004)
(1) Authorities	$\Sigma_{i=1}^{N} Authorities_i$	Westlaw, Lexis
Dynamic Quality Measures		
(1) Weighted, standardized positive treatment of dissent	$\frac{\Sigma_{i=1}^{4} Depth_i * \Sigma_{j=1}^{N} Citing\ References_{ij}}{Age}$	Westlaw, Lexis
(2) Unweighted, standardized positive treatment of dissent	$\frac{\Sigma_{i=1}^{N} Citing\ References_i}{Age}$	Westlaw, Lexis
Costs and Bias		
Workload	Merits decisions per term	Epstein, Segal, Spaeth, and Walker 2012
Salience	1 if appeared on NYT front page 0 if otherwise	Epstein and Segal 2000*b*

Notes: "Depth" used to calculate weight was based on Westlaw's KeyCite Depth of Treatment Star system. For an explanation, see supra Table D.2.

7.2.2 Dependent Variables and Model

The hypotheses derived by the formal model and tested in this chapter predict treatment of dissent by the overruling court. To measure treatment, I construct three different dependent variables. The first is a dichotomous variable indicating simple citation, coded as 1 if the dissent is cited and 0 if otherwise. The second is a depth of treatment variable. Unlike the *depth of treatment* variable used to measures of opinion quality of the dissent, this depth measure is continuous. For each overruling majority opinion, I counted the number of words the overruling majority opinion devoted to the dissenting opinion. Summary statistics are provided in Table 7.7.

As indicated in Table 7.7, 39.4% of the overruling opinions cited the paired dissent in some way, although treatment varied widely. The distribution of the number of words

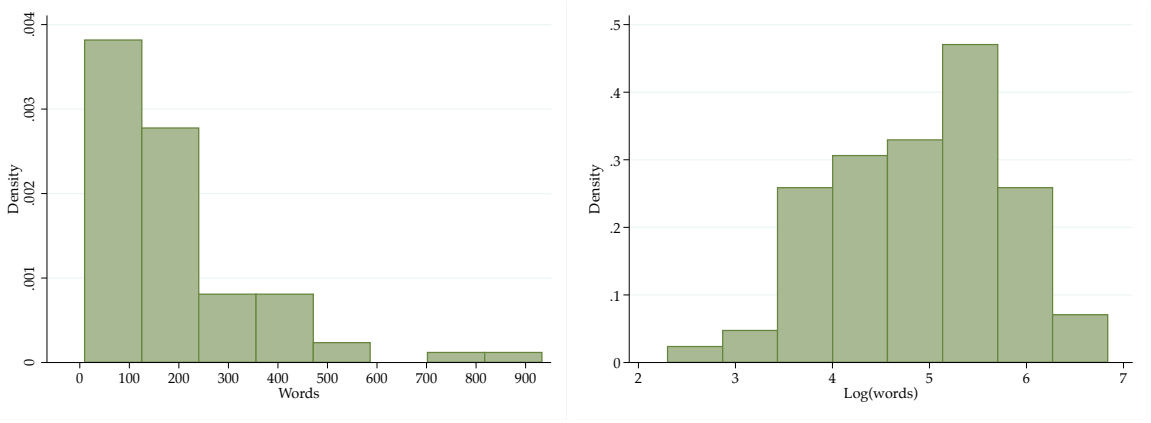
Table 7.7: Summary Statistics of Dependent Variables

	Mean	Median	Min	Max	Std. Dev.	N
Cited	0.394	0	0	1	0.490	180
Number of Words	192.84	162	10	933	171.603	75
Log(Words)	4.893	5.088	2.303	6.838	0.911	75

Note: Data included here is only for those opinion-pairs included in the analysis.

devoted to each of the 75 paired opinions cited is heavily right-skewed (see Figure 7.4). To correct for this and preserve the linear relationship between the dependent and independent variables, I created a log depth of treatment variable.

Figure 7.4: Distribution of Depth of Treatment (*Words* and *Log(Words)*)



Note: Only data actually cited by the overruling majority opinion are included (N=75).

To account for the two-stage nature of this process, I estimate hurdle models. Hurdle models are appropriate when estimating a process with a "corner solution" outcome. A corner solution occurs when, under some conditions, the equilibrium choice is $y = 0$ (Wooldridge 2002, 518). Under such conditions, truncating an OLS regression to a subsample of $y_i > 0$ is inconsistent because the variable driving the zero-process is essentially omitted (Wooldridge 2002, 524). The most common type of model used to estimate corner solution model is the Tobit model. While easily employed and interpreted, Tobit models have one major shortcoming: they constrain the zero-process and the generation of the continuous variable to the same data-generating mechanism (Burke 2009, 584). Cragg's tobit alternative model (Cragg 1971) relaxes this assumption, permitting the fitting of a

probit model as the hurdle and a truncated normal regression to estimate $y_i > 0$.

Cragg's tobit alternative model is fitted in two tiers. The first tier estimates the "hurdle," which in this case, is the overruling majority's decision to cite the paired dissent. To do this, the first stage is estimated with a probit model, with standard errors clustered on overruling year. Next, the second stage is fitted using a truncated regression to estimate the effect of the independent variables on the depth of treatment given to those dissents cited. An error term, σ, is also generated and is used to estimate partial effects (Wooldridge 2002, 524).

Although the construction of such sterile dependent variables is necessary to estimate the Cragg's tobit alternative model, the manner in which the Court actually cites to and uses the dissenting opinion to support its reasoning (or not) is actually quite rich. Of the 180 opinion-dyads in the dataset, 74 overruling majority opinions cite the paired dissent. Of these 74 citations, 46 (62.2%) are positive, 2 (2.7%) are negative, and 26 (35.1%) are neutral. The two negative citations to precedent explicitly rejected the dissent's reasoning. For example, in *Vieth v. Jubelirer*,[32] the plurality "reject[ed] the standard suggested by Justice Powell in *Bandemer*,"[33] noting that "the standard proposed in his opinion . . . falls short of the mark."[34]

A little over a third of the citations were neutral in nature. Neutral statements include citing the dissent for a factual statement, such as a historical, sociological, or scientific fact. For example, in *Roper v. Simmons*,[35] Justice Kennedy, writing for the overruling majority, cited Brennan's dissenting opinion in *Stanford v. Kentucky*[36] support the proposition that juveniles are "vulnerabl[e] and [have] a comparative lack of control over their immediate surroundings," suggesting that they are inherently less culpable than adults.[37] An overruling majority opinion may also simply use neutral statements to recognize that the overruled decision was split. For example, Justice Rehnquist, writing for the majority in *Payne v. Tennessee*,[38] referred to dissents by Justices O'Connor and Scalia in *South Carolina*

[32] 541 U.S. 267 (2004).
[33] 541 U.S. at 283.
[34] 541 U.S. at 291.
[35] 543 U.S. 551 (2005).
[36] 492 U.S. 361 (1989).
[37] 543 U.S. at 553.
[38] 501 U.S. 808 (1991).

v. Gathers[39] by noting, "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."

Over 60% of the citations to dissent are positive; this is no surprise. Since dissent holds no precedential value, there is no requirement to cite it in order to make an argument credible. As a result, when a dissent is cited, the overruling majority opinion writer tends to use the dissent to support her own argument. In some cases, the majority opinion writer uses the dissent to undermine the logic of the overruled decision. In *State Land Board v. Corvallis Sand & Gravel*,[40] Justice Rehnquist cited to Justice Stewart's dissenting opinion in *Bonelli Cattle v. Arizona*[41] to demonstrate how illogical the Court's prior approach had been.[42] In these cases, although the Court used the dissent for support and cited it in a positive way, the overruling majority did not explicitly adopt the dissent's reasoning.

In other instances, the Court also fell short of adopting the dissent's reasoning where it indicated that the dissent's reasoning or predictions were correct. For example, in *California v. Acevedo*,[43] a Fourth Amendment decision overruling *Sanders v. Arkansas*,[44] Justice Blackmun, writing for the Court, noted that "*Sanders* was explicitly undermined [by later cases] . . . and the existence of the dual regimes for automobile searches that uncover containers has proved as confusing as the . . . *Sanders* dissenters predicted."[45]

On at least 15 occasions, the Court indicated that the reasoning of the dissent was correct and implicitly or explicitly adopted it as its own. In *Payne v. Tennessee*, Justice Rehnquist adopted by implication Justice White's dissent in *Booth v. Maryland*,[46] writing,

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm

[39] 409 U.S. 805, 829 (1989).
[40] 429 U.S. 363, 378 (1977).
[41] 414 U.S. 313 (1973).
[42] In particular, Rehnquist noted, "The contrary approach would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be constrained by the equal-footing doctrine to apply the federal common-law rule, which may result in property law determinations antithetical to the desires of that State. See, *Bonelli*, 414 U.S. at 332–333, 94 S.Ct. at 529 (Stewart, J., dissenting)" (378).
[43] 500 U.S. 565 (1991).
[44] 442 U.S. 753 (1979).
[45] 500 U.S. at 579.
[46] 482 U.S. 496 (1987)

> caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S. at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted).[47]

In at least 9 of these 15 decisions, however, the adoption was explicit. For example, in *Lawrence v. Texas*,[48] which struck down state sodomy laws using a rational-basis-with-bite analysis, Justice Kennedy fully adopted Justice Stevens's dissent from the overruled majority opinion in *Bowers v. Hardwick*[49], arguing,

> The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers*, Justice Stevens came to these conclusions:
>
> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons. 478 U.S. at 216, 106 S.Ct. 2841 (footnotes and citations omitted).
>
> Justice Stevens'[s] analysis, in our view, should have been controlling in *Bowers* and should control here.
>
> *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now

[47] 501 U.S. at 811.
[48] 539 U.S. 558 (2003)
[49] 478 U.S. 186 (1986).

is overruled.[50]

Table 7.8: Usage of Cited Dissent by the Overruling Majority Opinion

Type of Citation	**Number**
Positive	46
Neutral	26
Negative	2
Total	**74**

7.3 Analysis

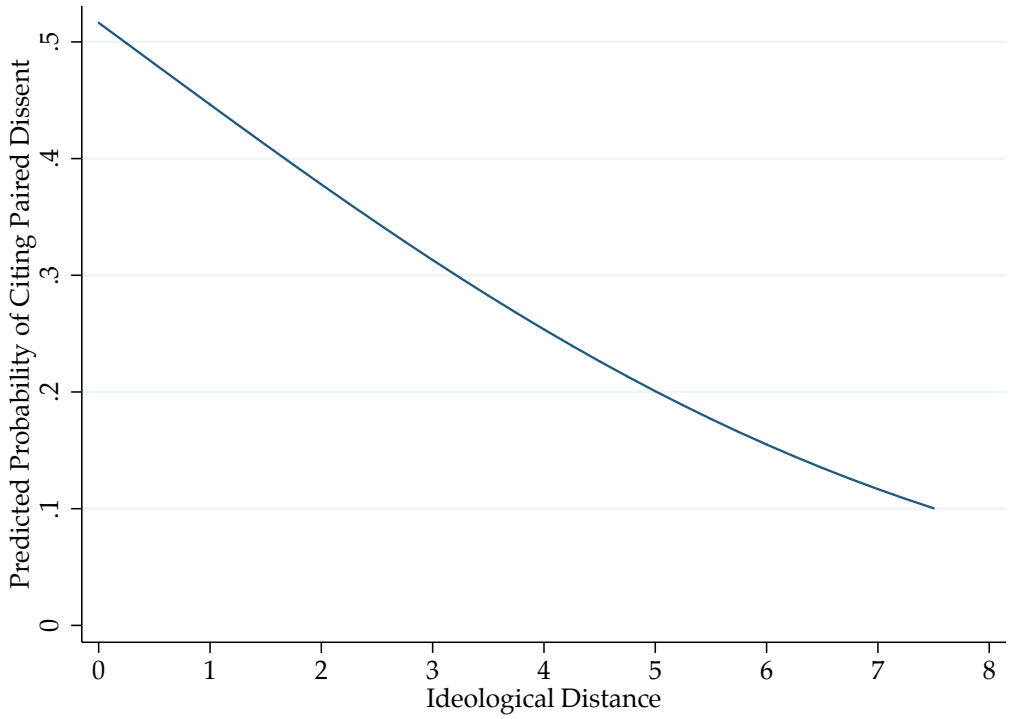
The results of Models 1 and 2 are presented in Table 7.9. These two models differ in that the dynamic quality measure in Model 1 is weighted by citing references' depth of treatment of the dissent and its authorities over time, whereas Model 2's dynamic quality measures are unweighted. In each model, I use the dissent's CLI score as a measure of the dissent's linguistic complexity; note, however, that model results are robust to using the FRE score.

A few points immediately come to notice. First, the estimates appear robust to different specifications of *dynamic quality*. Also notable is the statistical significance of *ideological distance* in the first tier (the simple citation hurdle) but not the second tier (truncated regression). Generally, this means that ideology may be more important when determining whether or not to cite a dissent than when deciding how deeply to discuss it. The model is highly interactive, and the coefficient for ideology may be interpreted as the *marginal* effect of ideology when all of the independent variable with which it is interacted are held to 0. In the first tier, ideology is interacted with both static quality measures and both dynamic quality measures. In other words, the coefficient is the effect of ideological distance when neither the dissent nor its authorities have ever been cited and the opinion is the least complex (CLI = 0). This would be akin to a simple statement of "I dissent."

The predicted probability that the overruling majority across *ideological distance* will cite the paired dissent is plotted in Figure 7.5. Holding all other variables at their means, this graph demonstrates the effect of changes in ideological distance on the probability of citing to the paired dissent.

[50] 539 U.S. at 577–78.

Figure 7.5: Predicted Probability of *Ideological Distance* Citation by Overruling Majority



This is confirmed in Figure 7.6, which demonstrates that the marginal effect of *ideological distance* on dissent citation is *always* negative; an increase in ideological distance always has a negative effect on the probability of citation. The question is, however, "How negative?" As indicated by both Figures 7.5 and 7.6, the slope of the predicted probability line is decreasing in distance. In other words, at the extreme, a unit increase in ideological distance has a decreasingly negative effect on the probability of citation.

Note also that the conditional CLI variable ($distance * cli$) is statistically significant in the first hurdle. The negative sign indicates that as the opinion's linguistic complexity increases, the likelihood that the court will cite the paired dissent decreases, *ceteris paribus*. This is confirmed by Figure 7.7, which plots the predicted probability that the overruling majority will cite the dissent.

In addition, in the first tier, both *treatment of authorities* and its interaction term with *ideological distance* were statistically significant in the expected direction. The positive sign on the coefficient for *treatment of authorities* indicates that, when ideological distance is

Figure 7.6: Marginal Effect of *Ideological Distance* on $Pr(y > 0)$

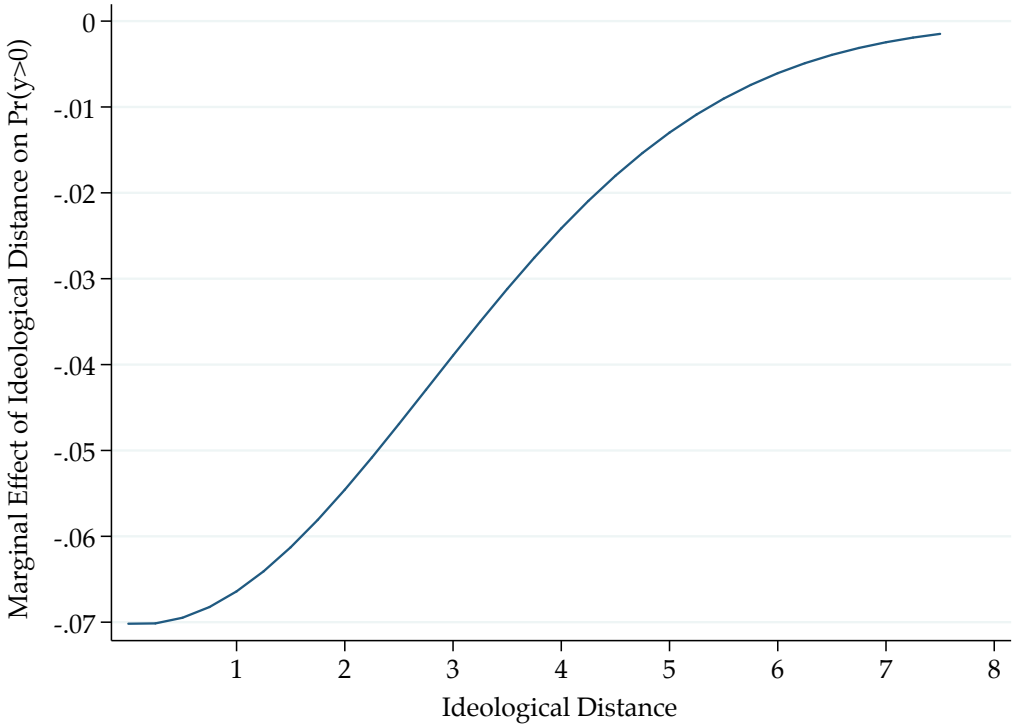
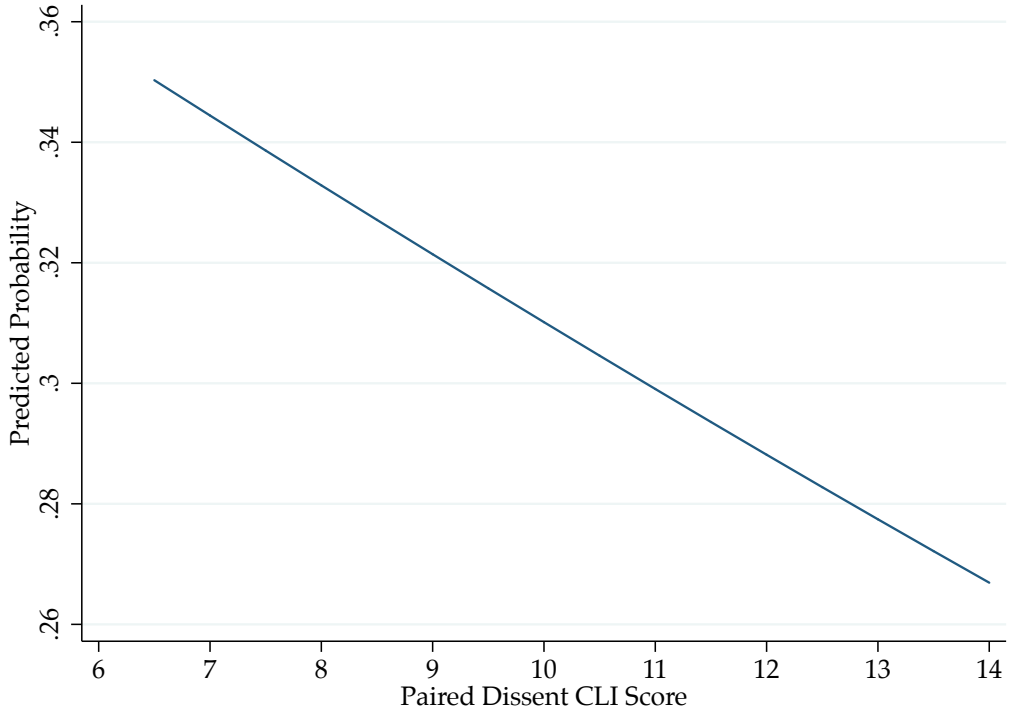


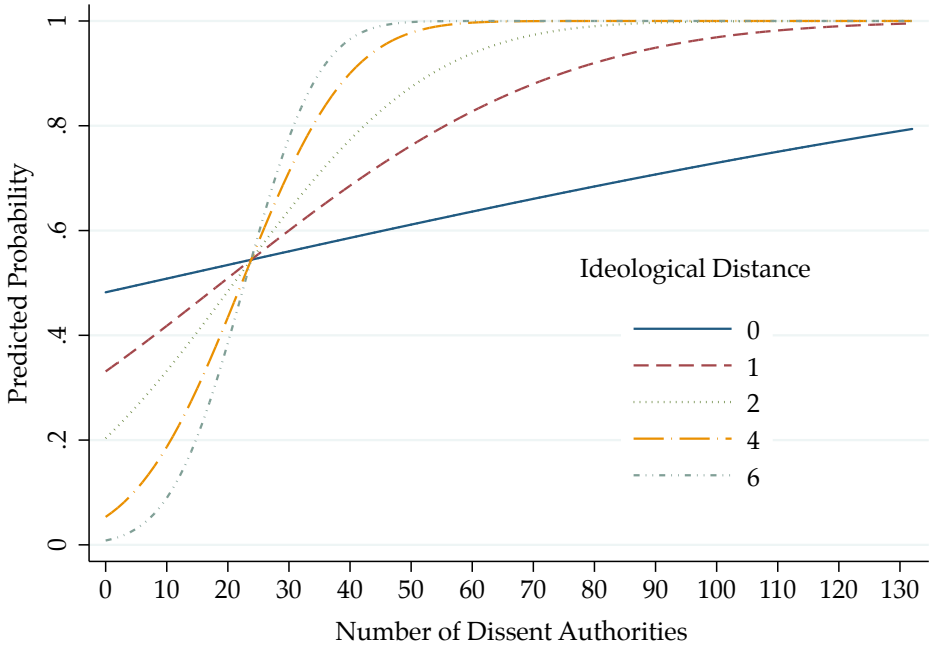
Figure 7.7: Predicted Probability of *Dissent CLI* on $Pr(y > 0)$



equal to zero, the more frequently the dissent's authorities are positively cited (i.e., the authorities' *dynamic opinion quality*), the more likely the overruling majority will be to cite the dissent.

This would seem to provide some support for the formal model's hypothesis. But a closer examination suggests that one of the model's central hypotheses—namely that ideologically distant courts are less likely to cite high quality opinions because they will find it difficult to write around the dissent's policy position—cannot be confirmed. Figure 7.8 displays the predicted probabilities that overruling majority will cite the dissent, conditional on several different values of ideological distance.

Figure 7.8: Predicted Probability of Citation Across Number of Dissent Authorities, by Ideological Distance



Note: All values for continuous variables were held at their means; all dichotomous variable, their modes.

When the dissenting Justice and the majority coalition have the same estimated ideal point, the Court will adopted a dissent with very few authorities with a roughly 0.5 probability. This probability decreases as the ideological distance increases. When the ideo-

logical distance increases to 1 (illustrated by the dashed red line), the probability that the majority coalition will cite the dissent drops to approximately 0.35.

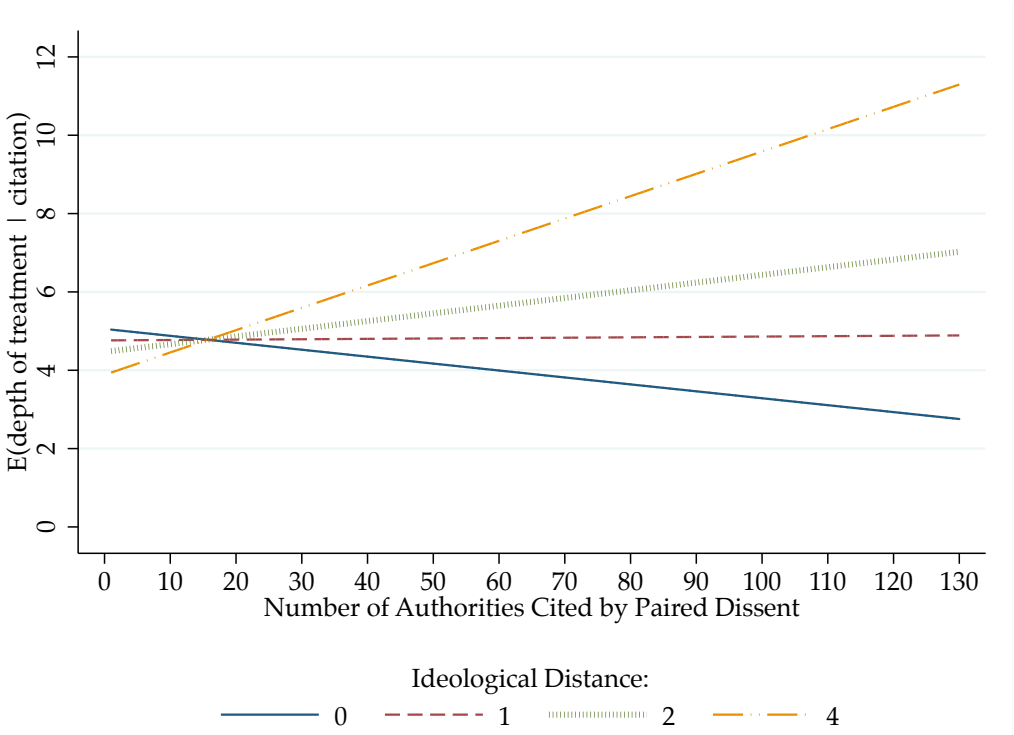
However, as the number of authorities cited by the dissent increases, so too does the probability that the overruling majority will cite the paired dissent. This increase is most dramatic when the ideological distance between the overruling majority coalition and the paired dissent is large. When a dissent cites 24 or more authorities, the predicted probability of citation is increasing in ideological distance. This does not seem to support the model's hypothesis that when the dissent's quality was low, the overruling court would preferred to adopt dissent over a greater range of policy positions.

The number of authorities cited by the paired dissent, as well as the interaction term between authorities and ideological distance, are also statistically significant in the second tier, which estimates the overruling majority's depth of treatment as measured by the log number of words discussing the cited dissent. As Figure 7.9 illustrates, when the ideological distance between the majority opinion coalition and the paired dissent writer is 0, the predicted number of words is decreasing in the number of authorities. However, as ideological distance grows, the estimated conditional depth of treatment is *increasing* in number of authorities, as indicated by the positive slopes of the red dashed, green dotted, and yellow dashed and dotted lines.

Unlike the estimates derived from the first tier of the model, these results seem to be more in line with the model's predictions. When the ideological preferences of the overruling majority and the paired dissent are aligned, there may be no reason to spend time exploring or writing around the policy position of the dissent. As a result, a closely aligned overruling majority will let a high-quality paired dissent stand on its own, as opposed to devoting time and energy to reconciling its position with the overruling majority's position. However, as ideological distance increases, the overruling majority will devote more time and energy to discussing the cited dissent.

In addition to number of authorities (a measure of *static* quality), two indicators of *dynamic* quality—the treatment of the paired dissent by other courts over time (*treatment of dissent*) and the interaction term between ideological distance and other courts' treatment of the paired dissent's authorities over time (*distance*treatment of authorities*)—are statisti-

Figure 7.9: Conditional Estimated Log Number of Words Used to Discuss the Paired Dissent



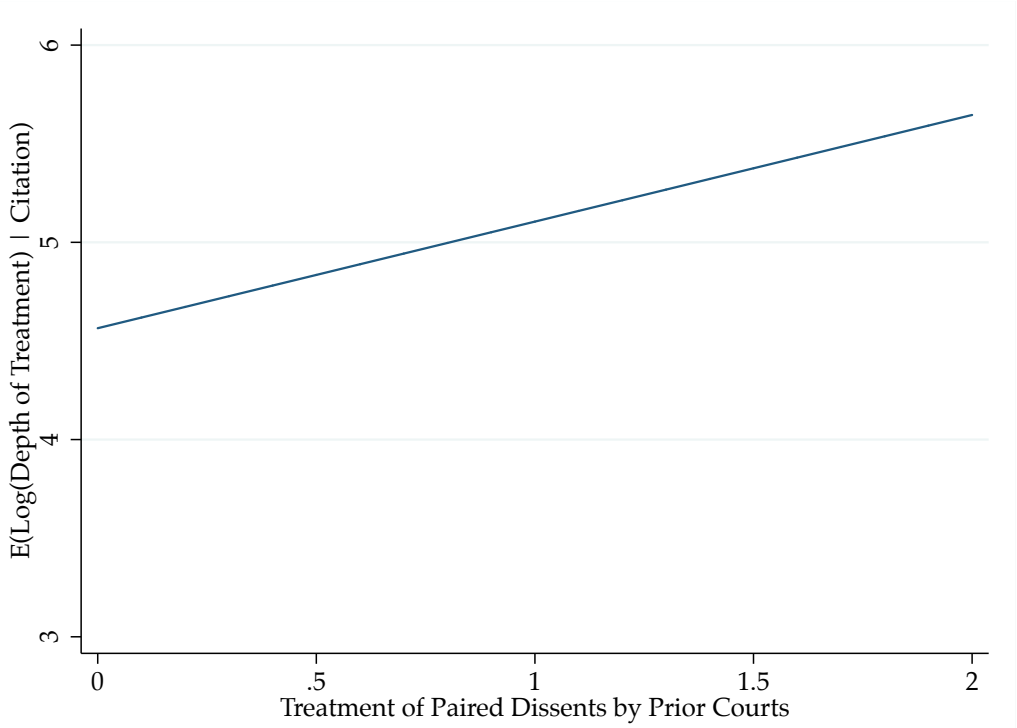
Note: All continuous variables are held at their mode; dischotomous variables, at their mean.

cally significant. The conditional estimate of log words used by the overruling majority is plotted against lower court treatment of the paired dissent (i.e., a weighted and standardized measure of dynamic quality).[51] Although not extremely steep, the slope of the conditional estimate across the dynamic quality measure is positive (see Figure 7.10). This provides additional support for the idea that citing courts give more attention to higher quality dissents.

Finally, the coefficient for the interaction between ideological distance and the standardized measures of prior courts' treatment of the dissent's *authorities* over time is statistically significant. The negative direction of this coefficient, however, appears to cut against the model's predictions. When the ideological distance is 0, the overruling majority's depth of discussion is increasing very slightly in this measure of dynamic quality.

[51] All continuous variables were held at their mean; dichotomous variables, at their mode.

Figure 7.10: Conditional Estimated Log Number of Words Across Prior Court Treatment of Dissent (Standardized Dynamic Quality Measure)



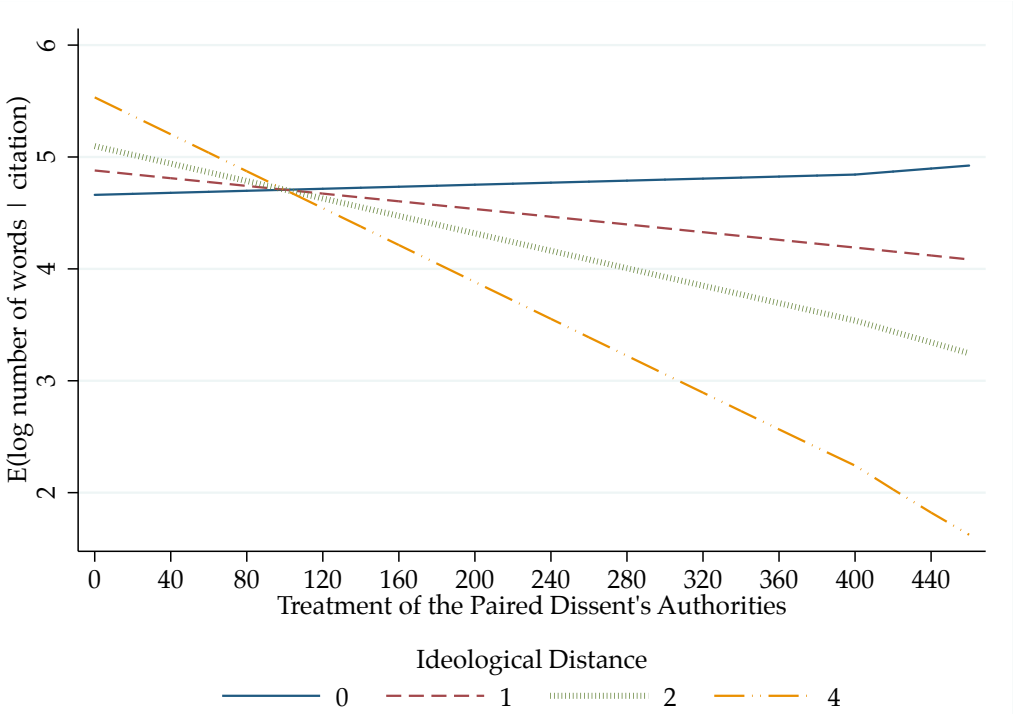
Note: All continuous variables are held at their mean; dichotomous variables, at their mode.

However, as indicated in Table 7.9, the coefficient for the interaction term *distance*treatment of authorities* is negative. As ideological distance grows, the slope of the conditional effect estimate becomes negative. Substantively, this means that the overruling majority is spending less space discussing the paired dissent in the opinion as dynamic quality increases.

7.4 Discussion

All in all, the empirical test provides mixed results for the hypotheses derived by the formal model. Perhaps the most interesting finding is the general point that the dissent's linguistic clarity, number of authorities, and treatment over time impacts how the Court views the dissent and the extent to which it both cites and discusses it. This finding is itself novel and adds to scholarly discussion of both minority opinions (*see, e.g.*, Corley

Figure 7.11: Conditional Estimated Log Number of Words Across Prior Court Treatment of Dissent (Standardized Dynamic Quality Measure)



Note: All continuous variables are held at their mean; dichotomous variables, at their mode.

2008 and Corley, Steigerwalt and Ward 2014) and the importance of legal influences on judicial decision-making. Importantly, however, whereas much of the literature in this area focuses on *first-order* factors of policy, this study presents preliminary evidence that *second-order* factors comprising the quality of the opinion have an independent effect on a court's citation and treatment of an opinion. In a general sense, this empirical test confirms that, through continued citation, dissents do indeed influence future outcomes.

Table 7.9: Cragg's Tobit Alternative Model Estimates (N=180)

	Model (1): Weighted Quality	Model (2): Unweighted Quality
Decision to Adopt (Tier 1)		
(DV = 1 if cited, 0 if otherwise)		
Ideological Distance	1.634*	1.671*
	(0.745)	(0.751)
Static Quality		
CLI	0.206	0.215
	(0.142)	(0.143)
Distance*CLI	-0.152*	-0.157*
	(0.067)	(0.067)
Authorities	0.007	0.005
	(0.015)	(0.015)
Distance*Authorities	0.016	0.020
	(0.012)	(0.013)
Dyanmic Quality		
Treatment of Dissent	0.0178	0.098
	(0.377)	0.762
Distance*Treatment of Dissent	0.245	0.412
	(0.223)	(0.416)
Treatment of Authorities	0.008*	0.016*
	(0.003)	(0.007)
Distance*Treatment of Authorities	-0.008*	-0.019*
	(0.004)	(0.008)
Costs and Bias		
Workload	0.003	0.004
	(0.004)	(0.004)
Salience	0.137	0.155
	(0.302)	(0.300)
Depth of Treatment (Tier 2)		
(DV=Log Number of Words)		
Ideological Distance	0.326	0.321
	(0.912)	(0.921)
Static Quality		
CLI	0.026	0.172
	(0.141)	0.199
Distance*CLI	0.169	-0.035
	(0.194)	(0.086)
Authorities	-0.0178†	-0.020*
	(0.010)	(0.010)
Distance*Authorities	0.019*	0.199*
	(0.009)	(0.008)
Dynamic Quality		
Treatment of Dissent	0.598†	1.089†
	(0.312)	(0.631)
Distance*Treatment of Dissent	0.001	-0.212
	(0.002)	(0.233)
Treatment of Authorities	0.001	0.003
	(0.002)	(0.003)
Distance*Treatment of Authorities	-0.003†	-0.006†
	(0.005)	(0.004)
Costs and Bias		
Workload	-0.006	-0.006
	(0.191)	(0.005)
Salience	-0.146	-0.101
	(0.337)	(0.341)
σ	0.826**	0.841**
	(0.540)	(0.058)
Wald χ^2	26.60	24.43
Log-pseudolik.	-197.99853	-199.40303

Chapter 8

Conclusion

Why do Justices dissent? As demonstrated throughout this project, there is no single answer to this question. Whether and how dissent occurs is a function, in part, of the Court's institutional needs. In its earliest years, the Court, nominally coequal, struggled to find its place in the new republic. In the old order, the monarch passed his power through the courts. The bench and bar were a close-knit and powerful community, with a great deal of prestige stemming from the closed and undemocratic nature of the law. This level of power and prestige fell away at the birth of the nation. The locus of political power rested with the people and the people's representatives, Congress. With no voice and no constituency, the Court had little power of its own.

During the pre-Marshall era, the Court found that old practices—namely the writing of opinions seriatim—were a poor fit the political realities of the nation. The Court's lack of a unified voice hindered its institutional growth. At a time when Congress and the President spoke clearly to the people, the Court could not or would not. Throughout this early period, however, there were signs of the changes to come: the increasingly common references to the Court as an institution and the development of a nascent opinion of the Court. Throughout its first ten years, the Supreme Court was slowly finding its place.

Enter Chief Justice John Marshall. Marshall, a dyed-in-the-wool Federalist assumed control of the Court in 1801. Although the Chief is considered the "first among equals," his possession of the Court was nothing short of dominating. Marshall shaped both the content and the structure of the Court's decisions to federal supremacy in the inescapable

conflict over the distribution of power between the national government and the states. Marshall solidified the practice of producing an institutional opinion to project a unified voice for the Court. With Jefferson and similarly orientated states' rights advocates in office for most of his tenure, Marshall's court was under near-constant attack, with Justices facing both impeachment and outright noncompliance by both state and federal authorities.

Although Marshall actively suppressed dissent as part of his program to increase the Court's prestige, some Justices—such as Jefferson appointee William Johnson—resisted. When Justices engaged in dissent, they would only do so in the most important cases, including the interpretation of treaties and admiralty law during times of war or issues of constitutional interpretation. Given the Marshall Court's severe federal power orientation, this should be unsurprising. Just as unsurprising was the Jeffersonian Republican/Jacksonian Democratic resistance to the exercise of this power and the institution that tried to enforce it.

After Marshall's death in 1835, Jacksonian Democrats finally had their chance. The appointment of Roger Taney (Jackson's Attorney General), in addition to five others across a six-year period, seemed to bring the Democrats around to the Court. Suddenly, the Court was enjoying wide support by the Democrats on expectation that the newly constituted Taney Court would be less hostile to states' interests. At the same time, the allegiance of federal power advocates was not so easily shaken by the suspicion that the Taney Court would be an unfriendly one. Chief Justice Taney, however, neither rose to the expectations of Democrats or sunk to the fears of Whigs. His moderate path between these two camps resulted in growth of the Court's prestige over time, which in turn, resulted in an increase in dissensus on the Court. Justices began voting in minority blocs for the first time, dissenting at higher rates and on less important issues. With less external pressure on the Court, the Justices felt freer to express their opinions and protect their own reputations.

But this heightened institutional prestige was not to endure. The issue of state power—that is, slavery—was on the verge of consuming the country. With few political options left, the country turned to the Court, which in turn had the hubris to believe that it could achieve a final settlement to the dispute. The fall out after this effort—the *Dred Scott* decision—damaged the Court's prestige and, under Taney, it never quite recovered. The en-

suing backlash to *Dred Scott* also dampened the free expression to which members of the Court had become accustomed. After 1857 through the end of the Taney Court, Justices dissented less frequently. The increasingly common practice of joining dissenting blocs also diminished as the Court sought to rebuild its reputation.

Following the Civil War, the Court began to regain its institutional footing. Seeming to disavow themselves (and the federal government) of protecting the rights of newly freed slaves, the Court turned its energies toward fostering commerce and business interest. Massive industrialization had provoked a populist movement to emerge—a movement that began to amass great strength in the halls of states' legislatures. But big business had found their guardians, and the Court grew again in stature.

During this time, not surprisingly, the practice of dissent surged. But the Courts were subject to a variety of threats from the Congress. In response, the Court again altered the rate at which it dissented, suggesting that dissents were seen as an institutional indulgence, as opposed to a personal imperative.

Throughout the late 19th and early 20th century, the Court's jurisprudence grew increasingly hostile to the exercise of federal and state power to regulate business. This overly binding jurisprudence ran headlong against the New Deal, and President Roosevelt—though the most prominent court-curbing enthusiast—was by no means the only one.

The Court saw the tide was turning. In 1937, the Court abruptly began embracing an interpretation of the Constitution that permitted an expansive federal power to regulate the economy. Whether this was in response to Roosevelt's plan to restructure the Court is questionable. Around the same time as the Court was coming into line with the rest of the country, the dissent rate on the Court exploded. Although Chief Justice Stone's resistance to suppressing dissent may have played a role, the massive shift in both the constitutional landscape and popular understanding of the law itself surely played an important role.

After this point, the Court was less responsive institutionally to threats against it. This is not to make any claim about the content of the Court's opinions; rather, it is an observation about the structure of those opinions. Since the 1940s, the Court's dissent rate has hovered around 60%. Although the dissent *rate* has remained relatively constant over

the past 70 years, dissent *writing* has continued to evolve. As discussed above, one Justices' dissent is more likely to be joined by others, and it would be highly unusual for a Justice to dissent without opinion. Moreover, since the 1940s, divided decisions have become much more so, with 5–4 decisions becoming more and more common over time.

In the modern era, it seems clear that Justices' dissent behavior no longer contracts and expands in response to institutional threats. This does not mean that dissents no longer serve an institutional purpose. Justices, themselves, have commented that dissents—or even the threat of them—improves the quality of the majority opinion by forcing its author to respond to the contrary arguments posed by the circuated dissent.

Dissents may also serve a larger institutional end by both providing evidence that the Court is a deliberative institution and demonstrating that minority interests receive representation within it, even if those views do not prevail. Dissenting opinions may provide some form of second-order representation to political minorities by giving voice to issues and concerns that would otherwise go unacknowledged.

Finally, dissents can preserve alternate lines of legal reasoning for use by future courts. By documenting these ideas and arguments, Justices lend credibility and provide a road map for future Supreme Courts that want to choose a different legal path. In particular, dissents signal to the political system that a decision is contentious or close; these minority opinions essentially put society on notice that there are serious and reasonable disagreements with the majority's decision. This signal smooths the way for constitutional change if the Court decides to change course at some future point.

The communicative nature of dissents—in particular, how the dissent is written and the legal authority on which it relies—can make the dissent more or less useful to a future court. The analysis in Chapter 7 suggests that these factors are, indeed, influential in determining whether and to what extent a dissenting opinion will be adopted.

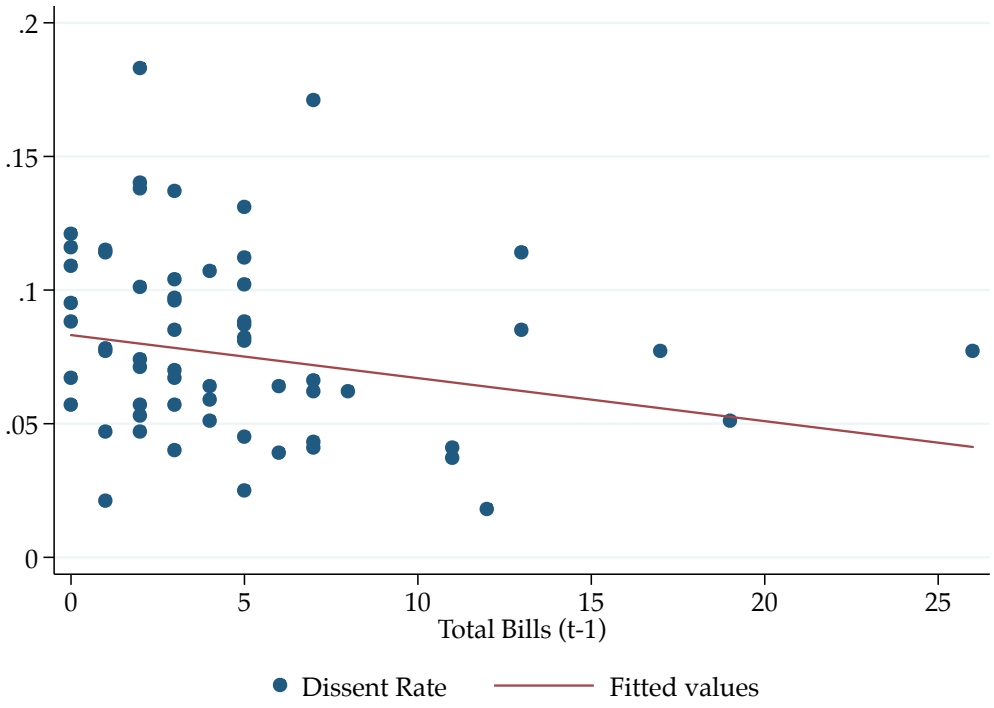
This project is a first step in understanding the institutional implications of dissent. The insights gleaned from Chapter 3 about the role of dissent in the early history of the Court have important implications for other young constitutional or national courts in new democracies. The discussion of various functions of dissent in the modern era in Chapter 5 provide a starting point for understanding the role of judicial opinions generally and dis-

sent specifically in a deliberative democracy. Finally, the empirical analysis presented in Chapter 7 provides a first glimpse into how the construction and treatment of dissenting opinions by courts over time can be influential in shaping the law.

Appendix A

Robustness Analyses for 1877–1937 Period

Figure A.1: Relationship between Dissent Rate and Total Court-Curbing Bills, 1877–1937 (per year)



Source: Clark (2011), Appendix B: Court-Curbing Bills, 1877–2008; Supreme Court Compendium.
Note: Fitted values weighted by total number of cases.

Table A.1: Ordinary Least Squares Regression Estimates for Dissent Rate Per Term, 1877-1937

	(1)	(2)	(3)	(4)
		High Density		
	Total Bills$_{t-1}$	Period$_{t-1}$	Statutes$_{t-1}$	Amendments$_{t-1}$
Court-curbing$_{t-1}$	-0.002**	-0.025**	-0.003**	-0.000
	(0.001)	(0.008)	(0.001)	(0.003)
Opposing Congress	0.002	-0.003	-0.004	0.011
	(0.016)	(0.013)	(0.017)	(0.012)
Court-curbing$_{t-1}$	0.001	0.039**	0.003	-0.003
X opposing Congress	(0.002)	(0.013)	(0.003)	(0.003)
Total Cases	-0.001*	-0.0004	-0.001**	-0.0004
	(0.000)	(0.0001)	(0.0001)	(0.0001)
Number Salient	0.003	0.003	0.002	0.003
	(0.002)	(0.002)	(0.002)	(0.002)
Prop. Republican	0.037	0.044	0.047	-0.001
	(0.049)	(0.042)	(0.045)	(0.051)
R^2	0.489	0.427	0.498	0.446
$F(21d.f.)$	42.61	.	34.54	27.94

Notes: $N = 60$, $^{**} = p < 0.01$, $^{*} = p < 0.05$, $^{\dagger} = p < 0.1$ (two-tailed test). Estimates for Chief Justices (not significant) and the constant term (significant at $p < 0.01$) are omitted from the table. Errors are clustered on natural court.

Sources: Court-curbing legislation and measure of opposing Congress from Clark (2009, 2011); total cases and dissent from the Supreme Court Compendium; number of salient cases per term from Savage (Savage 2011*c*); and proportion Republican calculated using natural court data from the Supreme Court Compendium and presidential appointment information from the Federal Judicial Biographical Database (FJC website).

Table A.2: Negative Binomial Regression Estimates for Total Number of Dissents (Logistic Transformation of Court-Curbing Bills), 1877-1937

	(1) Total Bills$_{t-1}$	(2) Statutes$_{t-1}$	(3) Amendments$_{t-1}$	(4)
Court-curbing$_{t-1}$	-7.05e-07*	-3.42e-06*	-3.42e-06*	
	(3.20e-07)	(1.39e-06)	(1.39e-06)	
Opposing Congress	0.115	0.132	0.131	
	(0.121)	(0.132)	(0.132)	
Court-curbing$_{t-1}$	-0.001	-0.004	-0.004	
X opposing Congress	(0.0004)	(0.008)	(0.008)	
Total Cases	-0.001	-0.001	-0.001	
	(0.001)	(0.001)	(0.001)	
Number Salient	0.025	0.023	0.023	
	(0.024)	(0.025)	(0.025)	
Prop. Republican	-0.213	-0.298	-0.298	
	(0.644)	(0.609)	(0.609)	
$ln(\alpha)$	-3.371	-3.337	-3.34	
	(0.426)	(0.418)	(0.417)	
α	0.034	0.036	0.036	
	(0.015)	(0.015)	(0.015)	

Notes: $N = 60$, $^{**} = p < 0.01$, $^{*} = p < 0.05$, $^{\dagger} = p < 0.1$ (two-tailed test). Estimates for Chief Justices (not significant) and the constant term (significant at $p < 0.001$) are omitted from the table. Errors are clustered on natural court.

Sources: Court-curbing legislation and measure of opposing Congress from Clark (2009, 2011); total cases and dissent from the Supreme Court Compendium; number of salient cases per term from Savage (Savage 2011*c*); and proportion Republican calculated using natural court data from the Supreme Court Compendium and presidential appointment information from the Federal Judicial Biographical Database (FJC website). The number of Court-curbing bills has been transformed using a logistic transformation: $0.5 + (exp((-1 * bills)/2))^{(-1)}$ to account for the potentially non-linear effect of Court-curbing legislation. Clark (2011, 171) explains: "[T]he raw number of Court-curbing bills introduced each year is a less than ideal measure for several reasons. The first difficulty is that it seems unlikely that each additional Court-curbing bill introduced has a similar effect on the Court. Rather, it is most likely the case that the first few Court-curbing bills have little impact; further increases, however, will likely have a larger impact. Finally, once a given threshold has been met, it is unlikely that additional Court-curbing should not increase linearly in the number of Court-curbing bills; rather, there should be a difference between judicial decision making when there is little or no Court-curbing and judicial decisions making when there is a lot of Court-curbing. This type of relationship describes the *logistic* function, which has an 'S' shape."

Appendix B

Additional Analysis of Changes in Dissent in the Modern Era

Table B.1: Closely Divided Decisions and Unique Coalitions by Natural Court, 1946–2013 Terms

Natural Court	**Total Decisions**	**5–4 Decisions**	**Unique Coalitions**
Vinson 1 (1946–48 Terms)	379	81 (0.214)	28 (0.346)
Vinson 3 (1949–52 Terms)	407	35 (0.086)	28 (0.743)
Warren 1 (1953 Term)	87	9 (0.103)	8 (0.889)
Warren 3 (1954–56 Terms)	150	15 (0.100)	8 (0.533)
Warren 4 (1956 Term)	49	6 (0.122)	4 (0.667)
Warren 5 (1956–58 Terms)	230	36 (0.157)	10 (0.278)
Warren 6 (1958–61 Terms)	455	80 (0.176)	18 (0.225)
Warren 8 (1962–64 Terms)	468	38 (0.081)	18 (0.474)
Warren 9 (1965–66 Terms)	282	40 (0.142)	12 (0.300)
Warren 10 (1967–68 Terms)	286	8 (0.028)	6 (0.750)
Burger 2 (1969–70 Terms)	169	28 (0.166)	15 (0.536)
Burger 4 (1971–75 Terms)	649	99 (0.153)	23 (0.232)
Burger 6 (1975–80 Terms)	943	125 (0.133)	33 (0.264)
Burger 7 (1981–85 Terms)	821	144 (0.175)	33 (0.229)
Rehnquist 1 (1986 Term)	160	42 (0.262)	13 (0.310)
Rehnquist 3 (1987–89 Terms)	411	88 (0.214)	19(0.216)
Rehnquist 4 (1990 Term)	821	144 (0.175)	33 (0.229)
Rehnquist 5 (1991–92 Terms)	238	33 (0.139)	20 (0.606)
Rehnquist 6 (1993 Term)	94	13 (0.138)	6 (0.462)
Rehnquist 7 (1994–2004 Terms)	960	188 (0.196)	38 (0.202)
Roberts 1 (2005 Term)	25	2 (0.08)	2 (1.000)
Roberts 2 (2005–08 Terms)	289	68 (0.235)	14 (0.206)
Roberts 3 (2009 Term)	92	16 (0.174)	8 (0.5)
Roberts 4 (2010–13 Terms)	314	52 (0.166)	11 (0.212)
Total	336.79	52.83 (0.157)	16.17 (0.306)

Source: Supreme Court Database. Decision types 1 (opinions of the Court), 2 (per curiam opinions following oral argument), 6 (per curiam opinion not accompanied by oral argument), and 7 (judgments of the Court) were included in this calculation.

Appendix C

Proof

Structure of the Model

Sequence of Moves

- Stage 1: The court observes a precedent with a policy p_m and quality q_m and a minority opinion with policy p_d and quality q_d.
- Stage 2: The court determines whether to maintain precedent (M) or break from it $(\sim M)$.
  - Stage 2(a): If the court breaks from precedent $(\sim M)$, the court must then decide whether to adopt an observed dissenting opinion (A_d) or non-adoption $(\sim A)$.
- Stage 3: The court selects a policy (p_s) and quality (q_s).

Utility Functions

This model is an extension of the baseline model. In addition to discarding precedent $(\sim M)$ and writing an opinion from scratch, a court choosing to discard precedent may adopt an observed minority opinion (A_d). The court's utility function when choosing $\sim M,\ A_d$ is: $-\left(p_{d\mu} + \omega\left(1 - q_{d\mu}\right) - i_s\right)^2 - q_s - \alpha - q_d(p_d - p_s)$. When adopting a minority opinion opinion, the court incurs a penalty α disrupting precedent, as well as paying the costs of straying from an opinion it has adopted.

Additionally, the court cannot unilaterally set the policy observed by the next court. Instead, the policy location of the opinion adopted by the court is averaged with the policy of the adopted opinion, such that $p_{d\mu} = \frac{p_d + p_s}{2}$. Additionally, the quality of the newly established precedent is the average of the adopted opinion and the court's opinion, such that $q_{d\mu} = \frac{q_d + q_s}{2}$.

Just as in the baseline model, the court's utility function when maintaining precedent $(M,\ A_m)$ is: $-\left(p_{m\mu} + \omega\left(1 - q_{m\mu}\right) - i_s\right)^2 - q_s - q_m(p_m - p_s)$, where $p_{m\mu} = \frac{p_m(t-1) + p_s}{t}$ and $q_{m\mu} = \frac{q_m(t-1) + q_s}{t}$. The court's utility function when breaking from precedent and adopting no opinion $(\sim M,\ \sim A)$ is $-(p_s + \omega(1 - q_s) - i_s)^2 - q_s - (p_s - i_s) - \alpha$.

Stage 3: The court chooses an optimal policy (p_s) and quality (q_s) given the decision to maintain precedent (M) or break from it ($\sim M$) and which opinion to adopt, if any (A_m, A_d, $\sim A$).

Optimal p_m and p_s given the court has decided to maintain precedent (M, A_m)

First Order Conditions

$$D\left[-\left(\left(\frac{(p_m * (t-1)) + p_s}{t}\right) + \left(\omega * \left(1 - \frac{(q_m * (t-1)) + q_s}{t}\right)\right) - 0\right)^2 - q_s - q_m (p_s - p_m)^2 - \gamma(-q_s) - \delta(q_s - 1), p_s\right]$$

$$-2(-p_m + p_s) q_m - \frac{2\left(\frac{(-1+t) p_m + p_s}{t} + \omega\left(1 - \frac{(-1+t) q_m + q_s}{t}\right)\right)}{t}$$

$$D\left[-\left(\left(\frac{(p_m * (t-1)) + p_s}{t}\right) + \left(\omega * \left(1 - \frac{(q_m * (t-1)) + q_s}{t}\right)\right) - 0\right)^2 - q_s - q_m (p_s - p_m)^2 - \gamma(-q_s) - \delta(q_s - 1), q_s\right]$$

$$-1 + \gamma - \delta + \frac{2\omega\left(\frac{(-1+t) p_m + p_s}{t} + \omega\left(1 - \frac{(-1+t) q_m + q_s}{t}\right)\right)}{t}$$

Solving for p_s and q_s using the complementary slackness conditions

Solve for the possibility of the boundary solution $q_s = 0$

$$\text{FullSimplify}\left[\text{Solve}\left[-1 + \gamma - 0 + \frac{2\omega\left(\frac{(-1+t) p_m + p_s}{t} + \omega\left(1 - \frac{(-1+t) q_m + q_s}{t}\right)\right)}{t} == 0, \gamma\right]\right]$$

$$\left\{\left\{\gamma \to \frac{t\left(t - 2\omega^2\right) + 2\omega(-(-1+t) p_m - p_s + \omega((-1+t) q_m + q_s))}{t^2}\right\}\right\}$$

```
FullSimplify[Solve[(t (t - 2 ω^2) + 2 ω (-(-1 + t) p_m - p_s + ω ((-1 + t) q_m + q_s)))/t^2 * (-q_s) == 0 &&
  -2 (-p_m + p_s) q_m - (2 ((-1+t) p_m+p_s)/t + ω (1 - (-1+t) q_m+q_s)/t))/t == 0, {p_s, q_s}]]
```

$$\left\{\left\{p_s \to \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\left(1 - t + t^2 q_m\right)}{1 + t^2 q_m},\ q_s \to 0\right\},\right.$$
$$\left.\left\{p_s \to p_m - \frac{1}{2\,\omega\,q_m},\ q_s \to t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right\}\right\}$$

Solve for the possibility of the boundary solution $q_s = 1$

```
FullSimplify[Solve[-1 + 0 - δ + (2 ω ((-1+t) p_m+p_s)/t + ω (1 - (-1+t) q_m+q_s)/t))/t == 0, δ]]
```

$$\left\{\left\{\delta \to \frac{-t\left(t - 2\,\omega^2\right) + 2\,\omega\left((-1+t)\,p_m + p_s - \omega\left((-1+t)\,q_m + q_s\right)\right)}{t^2}\right\}\right\}$$

```
FullSimplify[Solve[-2 (-p_m + p_s) q_m - (2 ((-1+t) p_m+p_s)/t + ω (1 - (-1+t) q_m+q_s)/t))/t == 0 &&
  (-t (t - 2 ω^2) + 2 ω ((-1 + t) p_m + p_s - ω ((-1 + t) q_m + q_s)))/t^2 * (q_s - 1) == 0, {p_s, q_s}]]
```

$$\left\{\left\{p_s \to \frac{(-1+t)\,\omega\,(-1+q_m) + p_m\left(1 - t + t^2 q_m\right)}{1 + t^2 q_m},\ q_s \to 1\right\},\right.$$
$$\left.\left\{p_s \to p_m - \frac{1}{2\,\omega\,q_m},\ q_s \to t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right\}\right\}$$

Summary of possible boundary and interior solutions for p_s, q_s

(1) $p_s \to \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\left(1 - t + t^2 q_m\right)}{1 + t^2 q_m},\ q_s \to 0$

(2) $p_s \to \frac{(-1+t)\,\omega\,(-1+q_m) + p_m\left(1 - t + t^2 q_m\right)}{1 + t^2 q_m},\ q_s \to 1$

(3) $p_s \to p_m - \frac{1}{2\,\omega\,q_m},\ q_s \to t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m$

Solving for conditions under which the interior solution for the optimal quality $q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m$ exceeds the bounds of $q_s \in [0, 1]$.

The interior solution for the optimal quality exceeds the bounds of acceptable values of q_s under some conditions. What are these conditions?

The interior solution produces an opinion quality such that $q_s > 1$ when $q_m \neq 0$ and:

$$\omega < 0 \text{ and } 2\,(\omega + p_m) < \frac{t^2 + 2\,\omega^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}, \text{ OR}$$

$$\omega > 0 \text{ and } 2\,(\omega + p_m) > \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}.$$

The interior solution produces an opinion quality such that $q_s < 0$ when $q_m \neq 0$:

$$\omega < 0 \text{ and } 2\,(\omega + p_m) > \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}, \text{ OR}$$

$$\omega > 0 \text{ and } 2\,(\omega + p_m) < \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}.$$

```
FullSimplify[Reduce[0 < t - t^2/(2 ω^2) + (t p_m)/ω - 1/(2 ω^2 q_m) - (-1 + t) q_m < 1 &&
    t > 0 && Element[t, Integers] && 0 ≤ q_m ≤ 1, p_m, Reals]]
```

$$t \in \text{Integers} \;\&\&\; t \geq 1 \;\&\&\; 0 < q_m \leq 1 \;\&\&\; \left(\left(\omega > 0 \;\&\&\; \frac{t + \frac{1}{t\,q_m} + 2\,\omega^2\,q_m}{\omega} < 2\left(\omega + p_m + \frac{\omega\,q_m}{t}\right) \;\&\&\right.\right.$$

$$\left.t\,\omega\,q_m\left(1 + q_m\left(t^2 - 2\,(-1+t)\,\omega^2 - 2\,t\,\omega\,p_m + 2\,(-1+t)\,\omega^2\,q_m\right)\right) > 0\right) \;||$$

$$\left(t\,\omega\,q_m\left(1 + q_m\left(t^2 - 2\,(-1+t)\,\omega^2 - 2\,t\,\omega\,p_m + 2\,(-1+t)\,\omega^2\,q_m\right)\right) < 0 \;\&\&\right.$$

$$\left.\left.\frac{t + \frac{1}{t\,q_m} + 2\,\omega^2\,q_m}{\omega} > 2\left(\omega + p_m + \frac{\omega\,q_m}{t}\right) \;\&\&\; \omega < 0\right)\right)$$

```
FullSimplify[Reduce[t - t^2/(2 ω^2) + (t p_m)/ω - 1/(2 ω^2 q_m) - (-1 + t) q_m > 1 &&
    t > 0 && Element[t, Integers] && 0 ≤ q_m ≤ 1, , Reals]]
```

$$t \in \text{Integers} \;\&\&\; t \geq 1 \;\&\&\; q_m > 0 \;\&\&\; q_m \leq 1 \;\&\&$$

$$\left(\left(\omega < 0 \;\&\&\; 2\,(\omega + p_m) < \frac{t^2 + 2\,\omega^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \;||\right.$$

$$\left.\left(\omega > 0 \;\&\&\; 2\,(\omega + p_m) > \frac{t^2 + 2\,\omega^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)\right)$$

```
FullSimplify[Reduce[t - t^2/(2 ω^2) + (t p_m)/ω - 1/(2 ω^2 q_m) - (-1 + t) q_m < 0 &&
    t > 0 && Element[t, Integers] && 0 ≤ q_m ≤ 1, , Reals]]
```

$$t \in \text{Integers} \;\&\&\; t \geq 1 \;\&\&\; q_m > 0 \;\&\&\; q_m \leq 1 \;\&\&\; \left(\left(2\,(\omega + p_m) > \frac{t^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega} \;\&\&\; \omega < 0\right) \;||\; \left(\omega > 0 \;\&\&\; 2\,(\omega + p_m) < \frac{t^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)\right)$$

When the interior solution produces an opinion quality such that $q_s > 1$, the court will choose $p_s \to \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m}$, $q_s \to 1$.

```
FullSimplify[
 Reduce[-((((p_m * (t - 1)) + ((-1+t) ω (-1+q_m)+p_m (1-t+t^2 q_m))/(1+t^2 q_m))/t) + (ω * (1 - ((q_m * (t - 1)) + 1)/t)) - 0)^2 -
   1 - q_m ((((-1 + t) ω (-1 + q_m) + p_m (1 - t + t^2 q_m))/(1 + t^2 q_m)) - p_m)^2 ≥
  -((((p_m * (t - 1)) + ((-t ω+(-1+t) ω q_m+p_m (1-t+t^2 q_m))/(1+t^2 q_m))/t) + (ω * (1 - ((q_m * (t - 1)) + 0)/t)) - 0)^2 -
   0 - q_m ((((-t ω + (-1 + t) ω q_m + p_m (1 - t + t^2 q_m))/(1 + t^2 q_m)) - p_m)^2 && t ∈ Integers &&
  t ≥ 1 && q_m > 0 && q_m ≤ 1 && (((ω < 0 && 2 (ω + p_m) < (t^2 + 2 ω^2 + 1/q_m + 2 (-1 + t) ω^2 q_m)/(t ω)) ||
     (ω > 0 && 2 (ω + p_m) > (t^2 + 2 ω^2 + 1/q_m + 2 (-1 + t) ω^2 q_m)/(t ω))), , Reals]]
```

$$t \in \text{Integers} \;\&\&\; t \geq 1 \;\&\&\; q_m > 0 \;\&\&\; q_m \leq 1 \;\&\&\; \left(\left(\omega < 0 \;\&\&\; 2\,(\omega + p_m) < \frac{t^2 + 2\,\omega^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \;||\; \left(\omega > 0 \;\&\&\; 2\,(\omega + p_m) > \frac{t^2 + 2\,\omega^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)\right)$$

When the interior solution produces an opinion quality such that $q_s < 0$, the court will choose $p_s \to \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m}$, $q_s \to 0$.

```
FullSimplify[
 Reduce[-(((((pm * (t - 1)) + ((-1+t) ω (-1+qm)+pm (1-t+t^2 qm))/(1+t^2 qm))/t) + (ω * (1 - ((qm * (t - 1)) + 1)/t)) - 0)^2 -
   1 - qm (((-1 + t) ω (-1 + qm) + pm (1 - t + t^2 qm))/(1 + t^2 qm)) - pm)^2 ≥
  -(((((pm * (t - 1)) + ((-t ω+(-1+t) ω qm+pm (1-t+t^2 qm))/(1+t^2 qm)))/t) + (ω * (1 - ((qm * (t - 1)) + 0)/t)) - 0)^2 -
   0 - qm (((-t ω + (-1 + t) ω qm + pm (1 - t + t^2 qm))/(1 + t^2 qm)) - pm)^2 && t ∈ Integers &&
  t ≥ 1 && qm > 0 && qm ≤ 1 && ((2 (ω + pm) > (t^2 + 1/qm + 2 (-1 + t) ω^2 qm)/(t ω) && ω < 0) ||
   (ω > 0 && 2 (ω + pm) < (t^2 + 1/qm + 2 (-1 + t) ω^2 qm)/(t ω))), , Reals]]
```

False

Each of these solutions excludes $q_m = 0$. What is the solution when $q_m = 0$?

```
D[-(((((pm * (t - 1)) + ps)/t) + (ω * (1 - ((0 * (t - 1)) + qs)/t)) - 0)^2 -
   qs - 0 (ps - pm)^2 - γ (-qs) - δ (qs - 1), ps]
```

$$-\frac{2\left(\frac{(-1+t)\,p_m+p_s}{t}+\omega\left(1-\frac{q_s}{t}\right)\right)}{t}$$

```
D[-(((((pm * (t - 1)) + ps)/t) + (ω * (1 - ((0 * (t - 1)) + qs)/t)) - 0)^2 -
   qs - 0 (ps - pm)^2 - γ (-qs) - δ (qs - 1), qs]
```

$$-1+\gamma-\delta+\frac{2\,\omega\left(\frac{(-1+t)\,p_m+p_s}{t}+\omega\left(1-\frac{q_s}{t}\right)\right)}{t}$$

```
FullSimplify[Solve[
  -(2 ((((-1+t) p_m+p_s)/t) + ω (1 - q_s/t)))/t == 0 && -1 + 0 - 0 + (2 ω ((((-1+t) p_m+p_s)/t) + ω (1 - q_s/t)))/t == 0, {p_m, q_s}]]
```

```
{}
```

The model is actually indeterminate when $q_m = 0$. The simple thing to do would be to restrict range of q_m such that $q_m \in (0, 1]$. If this is true, then you would have to restrict the quality that could be chosen by the current court for its own opinion, such that whenever the court prefers to choose $q_s = 0$ over another option, the court must choose $q_s = \epsilon$ where $\epsilon \to 0$.

What about when the agent is totally faithful, such that $\omega = 0$

```
D[-(((p_m * (t - 1)) + p_s)/t) + (0 * (1 - ((q_m * (t - 1)) + q_s)/t)) - 0)^2 -
  q_s - q_m (p_s - p_m)^2 - γ (-q_s) - δ (q_s - 1), p_s]
```

$$-\frac{2\,((-1+t)\,p_m + p_s)}{t^2} - 2\,(-p_m + p_s)\,q_m$$

```
D[-(((p_m * (t - 1)) + p_s)/t) + (0 * (1 - ((q_m * (t - 1)) + q_s)/t)) - 0)^2 -
  q_s - q_m (p_s - p_m)^2 - γ (-q_s) - δ (q_s - 1), q_s]
```

$$-1 + \gamma - \delta$$

```
Solve[(1) * (-q_s) == 0, q_s]
```

```
{{q_s → 0}}
```

```
Solve[(1) * (q_s - 1) == 0, q_s]
```

```
{{q_s → 1}}
```

```
FullSimplify[Solve[-(2 ((-1 + t) p_m + p_s))/t^2 - 2 (-p_m + p_s) q_m == 0, p_s]]
```

$$\left\{\left\{p_s \to p_m \left(1 - \frac{t}{1 + t^2\,q_m}\right)\right\}\right\}$$

```
FullSimplify[((-1 + t) 0 (-1 + q_m) + p_m (1 - t + t^2 q_m))/(1 + t^2 q_m)]
```

$$p_m \left(1 - \frac{t}{1 + t^2\,q_m}\right)$$

```
FullSimplify[
 Reduce[-(((((pm * (t - 1)) + (((-1+t) 0 (-1+qm) + pm (1-t+t^2 qm))/(1+t^2 qm)))/t) + (0 * (1 - ((qm * (t - 1)) + 1)/t)) - 0)^2 -
  1 - qm (((((-1 + t) 0 (-1 + qm) + pm (1 - t + t^2 qm))/(1 + t^2 qm)) - pm)^2 ≥
 -(((((pm * (t - 1)) + (((-t 0+(-1+t) 0 qm+pm (1-t+t^2 qm))/(1+t^2 qm)))/t) + (0 * (1 - ((qm * (t - 1)) + 0)/t)) - 0)^2 -
  0 - qm (((((-t 0 + (-1 + t) 0 qm + pm (1 - t + t^2 qm))/(1 + t^2 qm)) - pm)^2 &&
 t ∈ Integers && t ≥ 1 && qm > 0 && qm ≤ 1, , Reals]]
False
```

Summary of decision set given the court has decided to maintain precedent (*M*)

(1) $p_s \to \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m}$, $q_s \to 0$ when $\left\{\omega < 0 \text{ and } 2\,(\omega + p_m) > \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right\}$ OR

$\left\{\omega > 0 \text{ and } 2\,(\omega + p_m) < \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right\}$ OR $\{\omega = 0\}$

(2) $p_s \to \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m}$, $q_s \to 1$ when $\left\{\omega < 0 \text{ and } 2\,(\omega + p_m) < \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right\}$ OR

$\left\{\omega > 0 \text{ and } 2\,(\omega + p_m) > \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right\}$;

(3) $p_s \to p_m - \frac{1}{2\,\omega\,q_m}$, $q_s \to t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m$ if otherwise.

$$\text{EU}\left(p_s \to \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s \to 0\right) = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$\text{EU}\left(p_s \to \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s \to 1\right) = -\frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$$

$$\text{EU}\left(p_s \to p_m - \frac{1}{2\,\omega\,q_m},\ q_s \to t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) = \frac{1}{4}\left(\frac{t\,(t-4\,\omega^2-4\,\omega\,p_m)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

```
FullSimplify[
 -((((pm * (t - 1)) + ((-t ω + (-1 + t) ω qm + pm (1 - t + t^2 qm))/(1 + t^2 qm)))/t) + (ω * (1 - ((qm * (t - 1)) + 0)/t)) - 0)^2 -
  0 - qm ((((-t ω + (-1 + t) ω qm + pm (1 - t + t^2 qm))/(1 + t^2 qm)) - pm)^2]
```

$$-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

```
FullSimplify[
 -((((pm * (t - 1)) + (((-1 + t) ω (-1 + qm) + pm (1 - t + t^2 qm))/(1 + t^2 qm)))/t) + (ω * (1 - ((qm * (t - 1)) + 1)/t)) - 0)^2 -
  1 - qm ((((-1 + t) ω (-1 + qm) + pm (1 - t + t^2 qm))/(1 + t^2 qm)) - pm)^2]
```

$$-\frac{1}{1+t^2\,q_m}\left(1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)\right)$$

```
FullSimplify[-((((pm * (t - 1)) + (pm - 1/(2 ω qm)))/t) +
    (ω * (1 - ((qm * (t - 1)) + (t - t^2/(2 ω^2) + (t pm)/ω - 1/(2 ω^2 qm) - (-1 + t) qm))/t)) - 0)^2 -
  (t - t^2/(2 ω^2) + (t pm)/ω - 1/(2 ω^2 qm) - (-1 + t) qm) - qm ((pm - 1/(2 ω qm)) - pm)^2]
```

$$\frac{1}{4}\left(\frac{t\,\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2}+\frac{1}{\omega^2\,q_m}+4\,(-1+t)\,q_m\right)$$

Optimal p_s and q_s given the court has decided to discard precedent ($\sim M$) and adopt an observed minority opinion (A_d)

First-Order Conditions

```
D[-((ps + pd)/2 + (ω * (1 - (qs + qd)/2)) - 0)^2 - qs - qd (ps - pd)^2 - α - γ (-qs) - δ (qs - 1), ps]
```

$$\frac{1}{2}(-p_d - p_s) - 2(-p_d + p_s)\,q_d - \omega\left(1 + \frac{1}{2}(-q_d - q_s)\right)$$

```
D[-((ps + pd)/2 + (ω * (1 - (qs + qd)/2)) - 0)^2 - qs - qd (ps - pd)^2 - α - γ (-qs) - δ (qs - 1), qs]
```

$$-1 + \gamma - \delta + \omega\left(\frac{1}{2}(p_d + p_s) + \omega\left(1 + \frac{1}{2}(-q_d - q_s)\right)\right)$$

Solving for p_s and q_s using the complementary slackness conditions

Solve for the possibility of the boundary solution $q_s = 0$

```
FullSimplify[Solve[-1 + γ - 0 + ω ((1/2) (pd + ps) + ω (1 + 1/2 (-qd - qs))) == 0, γ]]
```

$$\left\{\left\{\gamma \to \frac{1}{2}\left(2 - 2\omega^2 + \omega\left(-p_d - p_s + \omega\left(q_d + q_s\right)\right)\right)\right\}\right\}$$

```
FullSimplify[Solve[(1/2) (-pd - ps) - 2 (-pd + ps) qd - ω (1 + 1/2 (-qd - qs)) == 0 &&
  ((1/2) (2 - 2 ω^2 + ω (-pd - ps + ω (qd + qs)))) * (-qs) == 0, {ps, qs}]]
```

$$\left\{\left\{p_s \to \frac{\omega(-2 + q_d) + p_d(-1 + 4q_d)}{1 + 4q_d},\ q_s \to 0\right\},\ \left\{p_s \to p_d - \frac{1}{2\omega q_d},\ q_s \to 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right\}\right\}$$

Solve for the possibility of the boundary solution $q_s = 1$

```
FullSimplify[Solve[-1 + 0 - δ + ω ((1/2) (pd + ps) + ω (1 + 1/2 (-qd - qs))) == 0, δ]]
```

$$\left\{\left\{\delta \to \frac{1}{2}\left(2\left(-1 + \omega^2\right) + \omega\left(p_d + p_s - \omega\left(q_d + q_s\right)\right)\right)\right\}\right\}$$

```
FullSimplify[Solve[(1/2) (-pd - ps) - 2 (-pd + ps) qd - ω (1 + 1/2 (-qd - qs)) == 0 &&
  ((1/2) (2 (-1 + ω^2) + ω (pd + ps - ω (qd + qs)))) * (qs - 1) == 0, {ps, qs}]]
```

$$\left\{\left\{p_s \to \frac{\omega(-1 + q_d) + p_d(-1 + 4q_d)}{1 + 4q_d},\ q_s \to 1\right\},\ \left\{p_s \to p_d - \frac{1}{2\omega q_d},\ q_s \to 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right\}\right\}$$

Under some circumstances, the interior solution for q_s exceeds the bounds of $q_s \in [0, 1]$.

The optimal value of q_s will exceed the bounds of $q_s \in [0, 1]$ under some conditions.

$q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d < 0$ when

$\left(p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \text{and } \omega < 0\right) \,||\, \left(\omega > 0 \text{ and } p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right)$

$q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d > 1$ when

$\left(\omega < 0 \text{ and } p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right) \,||\, \left(\omega > 0 \text{ and } p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right)$

When this occurs, the court will choose one of the two boundary solutions ($q_s = 0 \,||\, q_s = 1$). The court will choose $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right\}$ rather than $\left\{p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$ when $\text{EU}(q_s = 1) \geq \text{EU}(q_s = 0)$.

$\text{EU}(q_s = 0) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$

$\text{EU}(q_s = 1) = -\frac{1+\alpha+q_d\left(4+4\,\alpha+\omega^2+(-2\,p_d+\omega\,q_d)\,(-2\,(\omega+p_d)+\omega\,q_d)\right)}{1+4\,q_d}$

When $q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d < 0$, the court will always choose $\left\{p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$.

When $q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d > 1$, the court will always choose $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right\}$.

```
FullSimplify[Reduce[0 ≤ 2 - 2/ω^2 + 2 p_d/ω - 1/(2 ω^2 q_d) - q_d ≤ 1 && 0 ≤ q_d ≤ 1, , Reals]]
```

```
q_d > 0 && q_d ≤ 1 && ((ω < 0 && 4 (ω + p_d) ≤ (4 + 1/q_d + 2 ω^2 q_d)/ω && (4 - 2 ω^2 + 1/q_d + 2 ω^2 q_d)/ω ≤ 4 p_d) ||
  (ω > 0 && 2 (ω + 2 p_d) ≤ (4 + 1/q_d + 2 ω^2 q_d)/ω && (4 - 4 ω^2 + 1/q_d + 2 ω^2 q_d)/ω ≤ 4 p_d))
```

```
FullSimplify[Reduce[2 - 2/ω^2 + 2 p_d/ω - 1/(2 ω^2 q_d) - q_d < 0 && 0 ≤ q_d ≤ 1, , Reals]]
```

```
q_d > 0 && q_d ≤ 1 && ((4 (ω + p_d) > (4 + 1/q_d + 2 ω^2 q_d)/ω && ω < 0) || (ω > 0 && 4 (ω + p_d) < (4 + 1/q_d + 2 ω^2 q_d)/ω))
```

```
FullSimplify[Reduce[2 - 2/ω^2 + 2 p_d/ω - 1/(2 ω^2 q_d) - q_d > 1 && 0 ≤ q_d ≤ 1, , Reals]]
```

```
q_d > 0 && q_d ≤ 1 &&
 ((ω < 0 && 2 (ω + 2 p_d) < (4 + 1/q_d + 2 ω^2 q_d)/ω) || (ω > 0 && 2 (ω + 2 p_d) > (4 + 1/q_d + 2 ω^2 q_d)/ω))
```

```
FullSimplify[(4 + 1/q_d + 2 ω^2 q_d)/ω - 4 ω)/4]
```

$$\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$$

```
FullSimplify[(4 + 1/q_d + 2 ω^2 q_d)/ω - 2 ω)/2]
```

$$\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$$

```
FullSimplify[-((((ω (-2+q_d)+p_d (-1+4 q_d))/(1+4 q_d)) + p_d)/2 + (ω * (1 - (0 + q_d)/2)) - 0)^2 -
  0 - q_d ((((ω (-2 + q_d) + p_d (-1 + 4 q_d))/(1 + 4 q_d)) - p_d)^2 - α)]
```

$$-\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

```
FullSimplify[-((((ω (-1+q_d)+p_d (-1+4 q_d))/(1+4 q_d)) + p_d)/2 + (ω * (1 - (1 + q_d)/2)) - 0)^2 -
  1 - q_d ((((ω (-1 + q_d) + p_d (-1 + 4 q_d))/(1 + 4 q_d)) - p_d)^2 - α)]
```

$$-\frac{1+\alpha+q_d\left(4+4\,\alpha+\omega^2+(-2\,p_d+\omega\,q_d)\,(-2\,(\omega+p_d)+\omega\,q_d)\right)}{1+4\,q_d}$$

```
FullSimplify[Reduce[-(1 + α + q_d (4 + 4 α + ω^2 + (-2 p_d + ω q_d) (-2 (ω + p_d) + ω q_d))/(1 + 4 q_d)) ≥
    -(α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d))/(1 + 4 q_d)) && q_d > 0 && q_d ≤ 1 &&
   ((4 (ω + p_d) > (4 + 1/q_d + 2 ω^2 q_d)/ω && ω < 0) || (ω > 0 && 4 (ω + p_d) < (4 + 1/q_d + 2 ω^2 q_d)/ω)), , Reals]]
```

False

```
FullSimplify[Reduce[-(1 + α + q_d (4 + 4 α + ω^2 + (-2 p_d + ω q_d) (-2 (ω + p_d) + ω q_d))) / (1 + 4 q_d) ≥
  -(α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d))) / (1 + 4 q_d) &&
 q_d > 0 && q_d ≤ 1 && ((ω < 0 && 2 (ω + 2 p_d) < (4 + 1/q_d + 2 ω^2 q_d) / ω) ||
  (ω > 0 && 2 (ω + 2 p_d) > (4 + 1/q_d + 2 ω^2 q_d) / ω)), , Reals]]
```

```
q_d > 0 && q_d ≤ 1 &&
 ((ω < 0 && 2 (ω + 2 p_d) < (4 + 1/q_d + 2 ω^2 q_d) / ω) || (ω > 0 && 2 (ω + 2 p_d) > (4 + 1/q_d + 2 ω^2 q_d) / ω))
```

What about when $\omega = 0$?

```
D[-((p_s + p_d)/2 + (0 * (1 - (q_s + q_d)/2)) - 0)^2 - q_s - q_d (p_s - p_d)^2 - α - γ (-q_s) - δ (q_s - 1), p_s]
```

$$\frac{1}{2}(-p_d - p_s) - 2(-p_d + p_s)\,q_d$$

```
D[-((p_s + p_d)/2 + (0 * (1 - (q_s + q_d)/2)) - 0)^2 - q_s - q_d (p_s - p_d)^2 - α - γ (-q_s) - δ (q_s - 1), q_s]
```

$$-1 + \gamma - \delta$$

```
FullSimplify[Solve[1/2 (-p_d - p_s) - 2 (-p_d + p_s) q_d == 0 && (1) * (-q_s) == 0, {p_s, q_s}]]
```

$$\left\{\left\{p_s \to p_d\left(1 - \frac{2}{1 + 4\,q_d}\right),\ q_s \to 0\right\}\right\}$$

```
FullSimplify[Solve[1/2 (-p_d - p_s) - 2 (-p_d + p_s) q_d == 0 && (1) * (q_s - 1) == 0, {p_s, q_s}]]
```

$$\left\{\left\{p_s \to p_d\left(1 - \frac{2}{1 + 4\,q_d}\right),\ q_s \to 1\right\}\right\}$$

```
FullSimplify[(0 * (-1 + q_d) + p_d (-1 + 4 q_d)) / (1 + 4 q_d)]
```

$$p_d\left(1 - \frac{2}{1 + 4\,q_d}\right)$$

Summary of decision set given that the court has chosen to discard precedent and adopt an observed minority opinion ($\sim M$, A_d)

The optimal value of q_s will exceed the bounds of $q_s \in [0, 1]$ under some conditions.

$$\left\{p_s = \frac{\omega(-2+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 0\right\} \text{ when}$$
$$\left(p_d > \frac{1}{4}\left(-4\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right) \text{ and } \omega < 0\right) \| \left(\omega > 0 \text{ and } p_d < \frac{1}{4}\left(-4\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)\right) \| \omega = 0;$$

$$\left\{p_s = \frac{\omega(-1+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 1\right\} \text{ when}$$
$$\left(\omega < 0 \text{ and } p_d < \frac{1}{2}\left(-2\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)\right) \| \left(\omega > 0 \text{ and } p_d > \frac{1}{2}\left(-2\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)\right);$$

$$\left\{p_s = p_d - \frac{1}{2\omega q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right\} \text{ when}$$
$$\left(\omega < 0 \text{ and } \frac{1}{2}\left(-2\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)\right) \|$$
$$\left(\omega > 0 \text{ and } \frac{1}{4}\left(-4\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)\right)$$

$$EU(q_s = 0) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2p_d+\omega(-4+q_d))(-2p_d+\omega q_d)\right)}{1+4q_d}$$
$$EU(q_s = 1) = -\frac{1+\alpha+q_d\left(4+4\alpha+\omega^2+(-2p_d+\omega q_d)(-2(\omega+p_d)+\omega q_d)\right)}{1+4q_d}$$
$$EU\left(q_s = 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2p_d}{\omega} + \frac{1}{4\omega^2 q_d} + q_d$$

```
FullSimplify[-((pd - 1/(2 ω qd)) + pd)/2 + (ω * (1 - ((2 - 2/ω^2 + 2 pd/ω - 1/(2 ω^2 qd) - qd) + qd)/2)) - 0)^2 -
 (2 - 2/ω^2 + 2 pd/ω - 1/(2 ω^2 qd) - qd) - qd ((pd - 1/(2 ω qd)) - pd)^2 - α]
```

$$-2 - \alpha + \frac{1}{\omega^2} - \frac{2p_d}{\omega} + \frac{1}{4\omega^2 q_d} + q_d$$

Optimal p_s and q_s given the court has decided to discard precedent ($\sim M$) and adopt no opinion ($\sim A$)

First-Order Conditions

```
D[-(ps + (ω * (1 - qs)) - 0)^2 - qs - (ps - 0)^2 - α - γ (-qs) - δ (qs - 1), ps]
```

$$-2p_s - 2(p_s + \omega(1 - q_s))$$

```
D[-(ps + (ω * (1 - qs)) - 0)^2 - qs - (ps - 0)^2 - α - γ (-qs) - δ (qs - 1), qs]
```

$$-1 + \gamma - \delta + 2\omega(p_s + \omega(1 - q_s))$$

Solving for p_s and q_s using the complementary slackness conditions

Solve for the possibility of the boundary solution $q_s = 0$

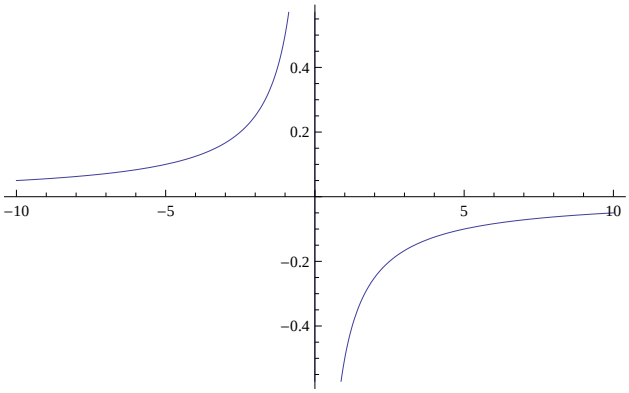
```
FullSimplify[Solve[-1 + γ - 0 + 2 ω (p_s + ω (1 - q_s)) == 0, γ]]
```

$$\{\{\gamma \to 1 - 2\,\omega^2 - 2\,\omega\,p_s + 2\,\omega^2\,q_s\}\}$$

```
FullSimplify[
 Solve[-2 p_s - 2 (p_s + ω (1 - q_s)) == 0 && (1 - 2 ω^2 - 2 ω p_s + 2 ω^2 q_s) * (-q_s) == 0, {p_s, q_s}]]
```

$$\left\{\left\{p_s \to -\frac{1}{2\,\omega},\ q_s \to 1 - \frac{1}{\omega^2}\right\},\ \left\{p_s \to -\frac{\omega}{2},\ q_s \to 0\right\}\right\}$$

```
Plot[-1/(2 ω), {ω, -10, 10}]
```



Solve for the possibility of the boundary solution $q_s = 1$

```
FullSimplify[Solve[-1 + 0 - δ + 2 ω (p_s + ω (1 - q_s)) == 0, δ]]
```

$$\{\{\delta \to -1 + 2\,\omega^2 + 2\,\omega\,(p_s - \omega\,q_s)\}\}$$

```
FullSimplify[
 Solve[-2 p_s - 2 (p_s + ω (1 - q_s)) == 0 && (-1 + 2 ω^2 + 2 ω (p_s - ω q_s)) * (q_s - 1) == 0, {p_s, q_s}]]
```

$$\left\{\{p_s \to 0,\ q_s \to 1\},\ \left\{p_s \to -\frac{1}{2\,\omega},\ q_s \to 1 - \frac{1}{\omega^2}\right\}\right\}$$

Summary of possible solutions for p_s and q_s

(1) $p_s \to -\frac{\omega}{2},\ q_s \to 0$

(2) $p_s \to 0,\ q_s \to 1$

(3) $p_s \to -\frac{1}{2\,\omega},\ q_s \to 1 - \frac{1}{\omega^2}$

Under some circumstances, the interior solution for q_s exceeds the bounds of $q_s \in [0, 1]$.

The optimal solution for $q_s = 1 - \frac{1}{\omega^2}$ exceeds the boundary conditions, such that $q_s < 0$, when $-1 < \omega < 1$. The interior solution for q_s is never greater than 1. When $q_s^* < 0$, the court prefers to adopt

$\{p_s = -\frac{\omega}{2},\ q_s = 0\}$.

```
FullSimplify[Reduce[0 ≤ 1 - 1/ω^2 ≤ 1, , Reals]]
```

```
ω ≤ -1 || ω ≥ 1
```

```
FullSimplify[Reduce[-(0 + (ω * (1 - 1)) - 0)^2 - 1 - (0 - 0)^2 - α ≥
    -(-ω/2 + (ω * (1 - 0)) - 0)^2 - 0 - (-ω/2 - 0)^2 - α && (ω > -1 && ω < 1), , Reals]]
```

```
False
```

Summary of decision set given the court has decided to discard precedent ($\sim M$)

(1) $p_s \to -\frac{1}{2\omega},\ q_s \to 1 - \frac{1}{\omega^2}$ when $(\omega \le -1 \text{ OR } \omega \ge 1)$

(2) $p_s \to -\frac{\omega}{2},\ q_s \to 0$ when $-1 < \omega < 1$.

$$\text{EU}\left(p_s \to -\frac{1}{2\omega},\ q_s \to 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\omega^2}$$

$$\text{EU}\left(p_s \to -\frac{\omega}{2},\ q_s \to 0\right) = -\alpha - \frac{\omega^2}{2}$$

```
FullSimplify[-(-1/(2 ω) + (ω * (1 - (1 - 1/ω^2))) - 0)^2 - (1 - 1/ω^2) - (-1/(2 ω) - 0)^2 - α]
```

$$-1 - \alpha + \frac{1}{2\omega^2}$$

```
-(-ω/2 + (ω * (1 - (0))) - 0)^2 - (0) - (-ω/2 - 0)^2 - α
```

$$-\alpha - \frac{\omega^2}{2}$$

Summary of decision sets of optimal policies given selection of $\{M, \sim M\}$ and $\{A_m, A_d, \sim A\}$

Summary of decision set given the court has decided to maintain precedent (M)

(1) $\left\{p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\,(1 - t + t^2\,q_m)}{1 + t^2\,q_m},\ q_s = 0\right\}$ when

(1.a) $\omega < 0$ and $p_m > \frac{1}{2}\left(-2\,\omega + \frac{t^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)$, or

(1.b) $\omega > 0$ and $p_m < \frac{1}{2}\left(-2\,\omega + \frac{t^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)$.

(1.c) $\omega = 0$

(2) $\left\{p_s = \frac{(-1+t)\,\omega\,(-1+q_m) + p_m\,(1 - t + t^2\,q_m)}{1 + t^2\,q_m},\ q_s = 1\right\}$ when

(2.a) $\omega < 0$ and $p_m < \frac{1}{2}\left(-2\,\omega + \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)$, or

(2.b) $\omega > 0$ and $p_m > \frac{1}{2}\left(-2\,\omega + \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)$.

(3) $\left\{p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right\}$ when

(3.a) $\omega < 0$ and $\frac{1}{2}\left(-2\,\omega + \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \le p_m \le \frac{1}{2}\left(-2\,\omega + \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)$, or

(3.b) $\omega > 0$ and $\frac{1}{2}\left(-2\,\omega + \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \le p_m \le \frac{1}{2}\left(-2\,\omega + \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)$.

$$\mathrm{EU}\left(M,\ A_m,\ p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 0\right) = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$\mathrm{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$\mathrm{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$

$$\frac{1}{4}\left(\frac{t\,(t-4\,\omega^2-4\,\omega\,p_m)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

Summary of decision set given that the court has chosen to discard precedent and adopt an observed minority opinion ($\sim M$, A_d)

The optimal value of q_s will exceed the bounds of $q_s \in [0, 1]$ under some conditions.

(1) $\left\{p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$ when

(1.a) $\omega < 0$ and $p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(1.b) $\omega > 0$ and $p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(1.c) $\omega = 0$

(2) $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right\}$ when

(2.a) $\omega < 0$ and $p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(2.b) $\omega > 0$ and $p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$;

(3) $\left\{p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$ when

(3.a) $\omega < 0$ and $\frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(3.b) $\omega > 0$ and $\frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$.

$$\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega(-1+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2p_d+\omega(-4+q_d))(-2p_d+\omega q_d)\right)}{1+4q_d}$$

$$\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega(-1+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 1\right) = -\frac{1+\alpha+q_d\left(4+4\alpha+\omega^2+(-2p_d+\omega q_d)(-2(\omega+p_d)+\omega q_d)\right)}{1+4q_d}$$

$$\text{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\omega q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2p_d}{\omega} + \frac{1}{4\omega^2 q_d} + q_d$$

Summary of decision set given the court has decided to discard precedent and adopt no opinion ($\sim M,\ \sim A$)

(1) $p_s = -\frac{1}{2\omega},\ q_s = 1 - \frac{1}{\omega^2}$ when $(\omega \le -1 \text{ OR } \omega \ge 1)$

(2) $p_s = -\frac{\omega}{2},\ q_s = 0$ when $-1 < \omega < 1$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{1}{2\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\omega^2}$$

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

Stage 2a: Deciding whether to adopt an opinion (A_d or $\sim A$) given the decision to discard precedent ($\sim M$)

Given the decision to break from precedent ($\sim M$), when will the court choose to adopt the observed minority opinion?

(1) $-1 < \omega < 1$

If the court chooses $\sim M,\ \sim A$ in this state of the world, the court will choose $\left\{p_s = -\frac{\omega}{2},\ q_s = 0\right\}$.

(1.a) $\omega < 0,\ p_d > \frac{1}{4}\left(-4\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)$

```
Expand[1/4 (-4 ω + (4 + 1/q + 2 ω^2 q)/ω)]
```

$$\frac{1}{\omega} + \frac{1}{4\,q\,\omega} - \omega + \frac{q\,\omega}{2}$$

```
Expand[(ω (-1 + q_d) + p_d (-1 + 4 q_d))/(1 + 4 q_d)]
```

$$-\frac{\omega}{1+4\,q_d} - \frac{p_d}{1+4\,q_d} + \frac{\omega\,q_d}{1+4\,q_d} + \frac{4\,p_d\,q_d}{1+4\,q_d}$$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s = \frac{\omega(-1+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 0\right\}$. The court will choose to A_d when

$\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A)$.

$$\mathrm{EU}\left(A_d,\ p_s = \frac{\omega(-2+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2p_d+\omega(-4+q_d))(-2p_d+\omega q_d)\right)}{1+4q_d}$$

$$\mathrm{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

$\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A) \rightarrow \frac{\omega^2-4\left(\omega^2+2p_d(2\omega+p_d)\right)q_d+8\omega(\omega+p_d)q_d^2-2\omega^2 q_d^3}{2+8q_d} \geq 0$. This is true when $\frac{1}{4}\left(-\sqrt{2}\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\omega(-2+q_d)\right) \leq p_d \leq \frac{1}{4}\left(\sqrt{2}\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\omega(-2+q_d)\right)$. ***Note: The lower constraint on this interval is always the binding lower constraint since $\frac{1}{4}\left(-\sqrt{2}\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\omega(-2+q_d)\right) \geq \frac{1}{4}\left(-4\omega+\frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)$ when $\omega \in (-1, 0)$.

```
FullSimplify[-(α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d)))/(1 + 4 q_d) - (-α - ω^2/2)]
```

$$\frac{\omega^2 - 4\left(\omega^2 + 2p_d(2\omega+p_d)\right)q_d + 8\omega(\omega+p_d)q_d^2 - 2\omega^2 q_d^3}{2+8q_d}$$

```
FullSimplify[
  Reduce[-(α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d)))/(1 + 4 q_d) - (-α - ω^2/2) ≥ 0 &&
    0 < q_d ≤ 1 && -1 < ω < 0 && p_d > 1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

$$-1 < \omega < 0 \;\&\&\; 0 < q_d \leq 1 \;\&\&\; 4\omega + 4p_d + \sqrt{2}\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} \geq 2\omega q_d \;\&\&$$

$$\sqrt{2}\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\omega q_d \geq 4(\omega + p_d)$$

```
FullSimplify[Reduce[1/4 (-Sqrt[2] Sqrt[ω^2 (4 + 1/q_d)] + 2 ω (-2 + q_d)) ≥ 1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) &&
    -1 < ω < 0 && 0 < q_d ≤ 1, , Reals]]
```

$$-1 < \omega < 0 \;\&\&\; 0 < q_d \leq 1$$

```
FullSimplify[(2 ω q_d - √2 √(ω^2 (4 + 1/q_d)) - 4 ω)/4]
```

$$\frac{1}{4}\left(-\sqrt{2}\ \sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right)$$

```
FullSimplify[(√2 √(ω^2 (4 + 1/q_d)) + 2 ω q_d - 4 ω)/4]
```

$$\frac{1}{4}\left(\sqrt{2}\ \sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right)$$

(1.b) $\omega > 0,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2 q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s = \frac{\omega(-1+q_d)+p_d(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$. The court will choose A_d when $\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A)$.

$$\mathrm{EU}\left(A_d,\ p_s = \frac{\omega(-2+q_d)+p_d(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\mathrm{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

$\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A) \ \rightarrow\ \frac{\omega^2-4\left(\omega^2+2\,p_d(2\,\omega+p_d)\right)q_d+8\,\omega(\omega+p_d)\,q_d^2-2\,\omega^2\,q_d^3}{2+8\,q_d} \geq 0$. This is true when

$$\frac{1}{4}\left(-\sqrt{2}\ \sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right) \leq p_d \leq \frac{1}{4}\left(\sqrt{2}\ \sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right).$$

```
Expand[1/4 (-√2 √(ω^2 (4 + 1/q)) + 2 ω (-2 + q))]
```

$$-\omega + \frac{q\,\omega}{2} - \frac{\sqrt{\left(4+\frac{1}{q}\right)\omega^2}}{2\sqrt{2}}$$

```
FullSimplify[Reduce[1/4 (√2 √(ω^2 (4 + 1/q_d)) + 2 ω (-2 + q_d)) ≤ 1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) &&
    0 < q_d ≤ 1 && 0 < ω < 1, , Reals]]
```

```
0 < ω < 1 && 0 < q_d ≤ 1
```

(1.c) $\omega < 0$ **and** $p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right\}$. The court will choose A_d when $\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A)$. However, in this state of the world, $\mathrm{EU}(\sim A) > \mathrm{EU}(A_d)$, so the court will always choose $\sim A$ if it breaks from precedent.

$$\mathrm{EU}\left(A_d,\ p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right) = -\frac{1+\alpha+q_d\left(4+4\,\alpha+\omega^2+(-2\,p_d+\omega\,q_d)\,(-2\,(\omega+p_d)+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\mathrm{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

```
FullSimplify[Reduce[-(1 + α + q_d (4 + 4 α + ω^2 + (-2 p_d + ω q_d) (-2 (ω + p_d) + ω q_d)))/(1 + 4 q_d) ≥ -α - ω^2/2 &&
    0 < q_d ≤ 1 && -1 < ω < 0 && p_d < 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

```
False
```

(1.d) $\omega > 0$ **and** $p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right\}$. The court will choose A_d when $\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A)$. However, in this state of the world, $\mathrm{EU}(\sim A) > \mathrm{EU}(A_d)$, so the court will always choose $\sim A$ if it breaks from precedent.

$$\mathrm{EU}\left(A_d,\ p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 1\right) = -\frac{1+\alpha+q_d\left(4+4\,\alpha+\omega^2+(-2\,p_d+\omega\,q_d)\,(-2\,(\omega+p_d)+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\mathrm{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

```
FullSimplify[Reduce[-(1 + α + q_d (4 + 4 α + ω^2 + (-2 p_d + ω q_d) (-2 (ω + p_d) + ω q_d)))/(1 + 4 q_d) ≥ -α - ω^2/2 &&
    0 < q_d ≤ 1 && 0 < ω < 1 && p_d > 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

```
False
```

(1.e) $\omega < 0$ **and** $\frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will select $\left\{p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$. The court will choose A_d when $\mathrm{EU}(A_d) \geq \mathrm{EU}(\sim A)$. However, in this state of the world, $\mathrm{EU}(\sim A) > \mathrm{EU}(A_d)$, so the court will always choose $\sim A$ if it breaks from precedent.

$$\text{EU}\left(A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

$$\text{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

```
FullSimplify[Reduce[-2 - α + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d ≥ -α - ω^2/2 && 0 < q_d ≤ 1 && -1 < ω < 0 &&
    α > 0 && 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) ≤ p_d ≤ 1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

```
False
```

(1.f) $\omega > 0$ **and** $\frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will select $\left\{p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$. The court will choose A_d when $\text{EU}(A_d) \ge \text{EU}(\sim A)$. However, in this state of the world, $\text{EU}(\sim A) > \text{EU}(A_d)$, so the court will always choose $\sim A$ if it breaks from precedent.

$$\text{EU}\left(A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

$$\text{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

```
FullSimplify[Reduce[-2 - α + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d ≥ -α - ω^2/2 && 0 < q_d ≤ 1 && 0 < ω < 1 &&
    α > 0 && 1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) ≤ p_d ≤ 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

```
False
```

(1.g) $\omega = 0$

In this state of the world, if the court chooses to discard precedent and adopt the observed minority opinion, the court will select $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$. However, the court will only prefer A_d to $\sim A$ only when $p_d = 0$. Otherwise, the court would rather choose A_d.

$$\text{EU}\left(A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\,\left(4\,\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\text{EU}\left(\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

```
FullSimplify[Reduce[-(α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d))/(1 + 4 q_d)) ≥ -α - ω^2/2 &&
    α > 0 && 0 < q_d ≤ 1 && ω == 0, , Reals]]
```

```
p_d == 0 && 0 < q_d ≤ 1 && α > 0 && ω == 0
```

(2) $\omega \leq -1,\ \omega \geq 1$

If the court chooses $\sim M,\ \sim A$ in this state of the world, the court will choose $\left\{p_s \to -\frac{1}{2\,\omega},\ q_s \to 1 - \frac{1}{\omega^2}\right\}$.

(2.a) $\omega < 0,\ p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s = \frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$. The court will choose to A_d when $\text{EU}(A_d) \geq \text{EU}(\sim A)$.

$$\text{EU}\left(A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\,\left(4\,\left(\alpha+\omega^2\right)+\left(-2\,p_d+\omega\,\left(-4+q_d\right)\right)\,\left(-2\,p_d+\omega\,q_d\right)\right)}{1+4\,q_d}$$

$$\text{EU}\left(\sim A,\ p_s \to -\frac{1}{2\,\omega},\ q_s \to 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\,\omega^2}$$

$\text{EU}(A_d) \geq \text{EU}(\sim A) \ \to\ 1 + \alpha - \frac{1}{2\,\omega^2} - \frac{\alpha+q_d\,\left(4\,\left(\alpha+\omega^2\right)+\left(-2\,p_d+\omega\,\left(-4+q_d\right)\right)\,\left(-2\,p_d+\omega\,q_d\right)\right)}{1+4\,q_d} \geq 0$. The court will maintain precedent when $\frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}\right) \leq p_d \leq \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)$.

```
FullSimplify[-(α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d)))/(1 + 4 q_d) - (-1 - α + 1/(2 ω^2))]
```

$$1 + \alpha - \frac{1}{2\,\omega^2} - \frac{\alpha + q_d\,\left(4\,\left(\alpha + \omega^2\right) + \left(-2\,p_d + \omega\,\left(-4 + q_d\right)\right)\,\left(-2\,p_d + \omega\,q_d\right)\right)}{1 + 4\,q_d}$$

```
Expand[Reduce[1 + α - 1/(2 ω^2) - (α + q_d (4 (α + ω^2) + (-2 p_d + ω (-4 + q_d)) (-2 p_d + ω q_d)))/(1 + 4 q_d) ≥ 0 &&
    0 < q_d ≤ 1 && ω ≤ -1, , Reals]]
```

$$0 < q_d \leq 1\ \&\&\ \omega \leq -1\ \&\&\ -\omega + \frac{\omega\,q_d}{2} - \frac{\sqrt{\frac{-1+2\,\omega^2-4\,q_d+8\,\omega^2\,q_d}{\omega^2\,q_d}}}{2\,\sqrt{2}} \leq p_d \leq -\omega + \frac{\omega\,q_d}{2} + \frac{\sqrt{\frac{-1+2\,\omega^2-4\,q_d+8\,\omega^2\,q_d}{\omega^2\,q_d}}}{2\,\sqrt{2}}$$

```
FullSimplify[Sqrt[(-1 + 2 ω^2 - 4 q_d + 8 ω^2 q_d)/(ω^2 q_d)]/(2 Sqrt[2])]
```

$$\frac{\sqrt{\frac{\left(-1+2\,\omega^2\right)\,\left(1+4\,q_d\right)}{\omega^2\,q_d}}}{2\,\sqrt{2}}$$

$$\text{FullSimplify}\left[\text{Reduce}\left[\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\le\frac{\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,\left(1+4\,q_d\right)}{\omega^2\,q_d}}+2\,\omega\,q_d-4\,\omega}{4}\;\&\&\right.\right.$$

$$\left.\left.0<q_d\le 1\;\&\&\;\omega\le -1,\ ,\ \text{Reals}\right]\right]$$

$$\omega\le -1\;\&\&\;0<q_d\le 1$$

(2.b) $\omega>0$, $p_d<\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s=\frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s=0\right\}$. The court will choose to A_d when $\text{EU}(A_d)\ge\text{EU}(\sim A)$.

$$\text{EU}\left(A_d,\ p_s=\frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s=0\right)=-\frac{\alpha+q_d\,\left(4\,\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\text{EU}\left(\sim A,\ p_s\to-\frac{1}{2\,\omega},\ q_s\to 1-\frac{1}{\omega^2}\right)=-1-\alpha+\frac{1}{2\,\omega^2}$$

$$\text{EU}(A_d)\ge\text{EU}(\sim A)\ \to\ 1+\alpha-\frac{1}{2\,\omega^2}-\frac{\alpha+q_d\,\left(4\,\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}\ge 0$$

The court will adopt dissent when

$$\frac{1}{4}\left(2\,\omega\,(-2+q_d)-\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\le p_d\le\frac{1}{4}\left(2\,\omega\,(-2+q_d)+\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}\right).$$

$$\text{FullSimplify}\left[\text{Reduce}\left[1+\alpha-\frac{1}{2\,\omega^2}-\frac{\alpha+q_d\,\left(4\,\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}\ge 0\;\&\&\right.\right.$$

$$\left.\left.0<q_d\le 1\;\&\&\;\omega\ge 1,\ ,\ \text{Reals}\right]\right]$$

$$0<q_d\le 1\;\&\&\;\omega\ge 1\;\&\&\;4\,\omega+4\,p_d+\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,\left(1+4\,q_d\right)}{\omega^2\,q_d}}\ge 2\,\omega\,q_d\;\&\&$$

$$2\,\omega\,q_d+\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,\left(1+4\,q_d\right)}{\omega^2\,q_d}}\ge 4\,(\omega+p_d)$$

$$\text{FullSimplify}\left[\text{Reduce}\left[\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\ge\frac{-\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,\left(1+4\,q_d\right)}{\omega^2\,q_d}}-4\,\omega+2\,\omega\,q_d}{4}\;\&\&\right.\right.$$

$$\left.\left.0<q_d\le 1\;\&\&\;\omega\ge 1,\ ,\ \text{Reals}\right]\right]$$

$$\omega\ge 1\;\&\&\;0<q_d\le 1$$

```
FullSimplify[(-Sqrt[2] Sqrt[((-1+2 ω^2) (1+4 q_d))/(ω^2 q_d)] - 4 ω + 2 ω q_d)/4]
```

$$\frac{1}{4}\left(2\,\omega\,(-2+q_d)-\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)$$

```
Expand[(Sqrt[2] Sqrt[((-1+2 ω^2) (1+4 q_d))/(ω^2 q_d)] - 4 ω + 2 ω q_d)/4]
```

$$-\omega+\frac{\omega\,q_d}{2}+\frac{\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}}{2\,\sqrt{2}}$$

```
Expand[1/4 (2 ω (-2 + q_d) - Sqrt[2] Sqrt[((-1 + 2 ω^2) (1 + 4 q_d))/(ω^2 q_d)])]
```

$$-\omega+\frac{\omega\,q_d}{2}-\frac{\sqrt{\frac{\left(-1+2\,\omega^2\right)\,(1+4\,q_d)}{\omega^2\,q_d}}}{2\,\sqrt{2}}$$

(2.c) $\omega<0$ **and** $p_d<\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s=\frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s=1\right\}$. The court will choose A_d when $\mathrm{EU}(A_d)\geq\mathrm{EU}(\sim A)$. However, in this state of the world, $\mathrm{EU}(\sim A)>\mathrm{EU}(A_d)$, so the court will always choose $\sim A$ if it breaks from precedent.

$$\mathrm{EU}\left(p_s=\frac{\omega\,(-1+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s=1\right)=-\frac{1+\alpha+q_d\left(4+4\,\alpha+\omega^2+(-2\,p_d+\omega\,q_d)\,(-2\,(\omega+p_d)+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\mathrm{EU}\left(\sim A,\ p_s\to-\frac{1}{2\,\omega},\ q_s\to1-\frac{1}{\omega^2}\right)=-1-\alpha+\frac{1}{2\,\omega^2}$$

```
FullSimplify[
  Reduce[-(1 + α + q_d (4 + 4 α + ω^2 + (-2 p_d + ω q_d) (-2 (ω + p_d) + ω q_d)))/(1 + 4 q_d) ≥ -1 - α + 1/(2 ω^2) &&
    0 < q_d ≤ 1 && -1 ≥ ω && p_d < 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

```
False
```

(2.d) $\omega>0$ **and** $p_d>\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will adopt $\left\{p_s = \frac{\omega(-1+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 1\right\}$. The court will choose A_d when $\text{EU}(A_d) \geq \text{EU}(\sim A)$. However, in this state of the world, $\text{EU}(\sim A) > \text{EU}(A_d)$, so the court will always choose $\sim A$ if it breaks from precedent.

$$\text{EU}\left(p_s = \frac{\omega(-1+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s = 1\right) = -\frac{1+\alpha+q_d\left(4+4\alpha+\omega^2+(-2p_d+\omega q_d)(-2(\omega+p_d)+\omega q_d)\right)}{1+4q_d}$$

$$\text{EEU}\left(\sim A,\ p_s \to -\frac{1}{2\omega},\ q_s \to 1-\frac{1}{\omega^2}\right) = -1-\alpha+\frac{1}{2\omega^2}$$

```
FullSimplify[
 Reduce[-(1 + α + q_d (4 + 4 α + ω^2 + (-2 p_d + ω q_d) (-2 (ω + p_d) + ω q_d))/(1 + 4 q_d)
    ≥ -1 - α + 1/(2 ω^2) &&
  0 < q_d ≤ 1 && 1 ≤ ω && p_d > 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω), , Reals]]
```

```
False
```

(2.e) $\omega < 0$ **and** $\frac{1}{2}\left(-2\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right) \leq p_d \leq \frac{1}{4}\left(-4\omega + \frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will select $\left\{p_s = p_d - \frac{1}{2\omega q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right\}$. The court will choose A_d when
$\text{EU}(A_d) \geq \text{EU}(\sim A)$.

$$\text{EU}\left(p_s = p_d - \frac{1}{2\omega q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2p_d}{\omega} - \frac{1}{2\omega^2 q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2p_d}{\omega} + \frac{1}{4\omega^2 q_d} + q_d$$

$$\text{EU}\left(\sim A,\ p_s \to -\frac{1}{2\omega},\ q_s \to 1-\frac{1}{\omega^2}\right) = -1-\alpha+\frac{1}{2\omega^2}$$

Given the conditions of this state of the world, the court will adopt dissent when

$p_d \geq \frac{1}{\omega} - 2\omega + \frac{1}{2\omega q_d} + 2\omega q_d$ and either $\left\{0 < q_d < \frac{2}{3} \text{ and } -\sqrt{\frac{1}{2q_d(2-3q_d)}} \leq \omega \leq -1\right\}$ or $\left\{\frac{2}{3} \leq q_d \leq 1\right\}$.

```
Expand[1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω)]
```

$$\frac{1}{\omega} - \omega + \frac{1}{4\omega q_d} + \frac{\omega q_d}{2}$$

```
Expand[1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω)]
```

$$\frac{2}{\omega} - \omega + \frac{1}{2\,\omega\,q_d} + \omega\,q_d$$

```
FullSimplify[Reduce[
  -2 - α + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d ≥ -1 - α + 1/(2 ω^2) && 0 < q_d ≤ 1 && ω ≤ -1 && α > 0, p_d, Reals]]
```

$$0 < q_d \le 1 \;\&\&\; \omega \le -1 \;\&\&\; \alpha > 0 \;\&\&\; 4\,(\omega + 2\,p_d) \ge \frac{2 + \frac{1}{q_d} + 4\,\omega^2\,q_d}{\omega}$$

```
FullSimplify[((2 + 1/q_d + 4 ω^2 q_d)/ω - 4 ω)/2]
```

$$\frac{1}{\omega} - 2\,\omega + \frac{1}{2\,\omega\,q_d} + 2\,\omega\,q_d$$

```
FullSimplify[
  Reduce[1/ω - 2 ω + 1/(2 ω q_d) + 2 ω q_d ≥ 1/2 (-2 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) && 0 < q_d ≤ 1 && ω ≤ -1, , Reals]]
```

$$\omega \le -1 \;\&\&\; 0 < q_d \le 1$$

```
FullSimplify[
  Reduce[1/ω - 2 ω + 1/(2 ω q_d) + 2 ω q_d ≤ 1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) && 0 < q_d ≤ 1 && ω ≤ -1, , Reals]]
```

$$1 + \omega \le 0 \;\&\&\; \left(\frac{2}{3} \le q_d \le 1 \;||\; \omega + \sqrt{\frac{1}{4\,q_d - 6\,q_d^2}} \ge 0\right)$$

```
Expand[1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω)]
```

$$\frac{1}{\omega} - \omega + \frac{1}{4\,\omega\,q_d} + \frac{\omega\,q_d}{2}$$

(2.f) $\omega > 0$ and $\frac{1}{4}\left(-4\,\omega + \frac{4 + \frac{1}{q_d} + 2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4 + \frac{1}{q_d} + 2\,\omega^2\,q_d}{\omega}\right)$

In this state of the world, if the court chooses to discard precedent and adopt an observed minority opinion, the court will select $\left\{p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$. The court will choose A_d

when $\text{EU}(A_d) \geq \text{EU}(\sim A)$.

$$\text{EU}\left(p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

$$\text{EU}\left(\sim A,\ p_s \to -\frac{1}{2\,\omega},\ q_s \to 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\,\omega^2}$$

Given the conditions of this state of the world, the court will maintain precedent when $p_d \leq \frac{1}{\omega} - 2\,\omega + \frac{1}{2\,\omega\,q_d} + 2\,\omega\,q_d$ and either $\left\{0 < q_d < \frac{2}{3} \text{ and } 1 \leq \omega \leq \sqrt{\frac{1}{2\,q_d(2-3\,q_d)}}\right\}$ or $\left\{\frac{2}{3} \leq q_d \leq 1\right\}$. The court will discard precedent otherwise.

```
FullSimplify[
  Reduce[-2 - α + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d ≥ -1 - α + 1/(2 ω^2) && 0 < q_d ≤ 1 && ω ≥ 1 && α > 0, , Reals]]
```

$$0 < q_d \leq 1 \;\&\&\; \omega \geq 1 \;\&\&\; 4\,(\omega + 2\,p_d) \leq \frac{2 + \frac{1}{q_d} + 4\,\omega^2\,q_d}{\omega} \;\&\&\; \alpha > 0$$

```
FullSimplify[((2 + 1/q_d + 4 ω^2 q_d)/ω - 4 ω)/2]
```

$$\frac{1}{\omega} - 2\,\omega + \frac{1}{2\,\omega\,q_d} + 2\,\omega\,q_d$$

```
FullSimplify[
  Reduce[1/4 (-4 ω + (4 + 1/q_d + 2 ω^2 q_d)/ω) ≤ ((2 + 1/q_d + 4 ω^2 q_d)/ω - 4 ω)/2 && 0 < q_d ≤ 1 && ω ≥ 1, , Reals]]
```

$$\left(0 < q_d < \frac{2}{3} \;\&\&\; 1 \leq \omega \leq \sqrt{\frac{1}{4\,q_d - 6\,q_d^2}}\right) \;||\; \left(\frac{2}{3} \leq q_d \leq 1 \;\&\&\; \omega \geq 1\right)$$

Summary of decision set given the choice to discard precedent ($\sim M$)

(1) A_d, $p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d}$, $q_s = 0$ when

(1.a) $-1 < \omega < 0$, $p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, and

$\frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right) \leq p_d \leq \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)$, or

(1.b) $0 < \omega < 1$, $p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, , or

and $\frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right) \leq p_d \leq \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)$

(1.c)

$\omega \le -1,\ p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, , or

and $\frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right) \le p_d \le \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)$

(1.d)

$\omega \ge 1,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, , or

and $\frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right) \le p_d \le \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)$

(1.e) $\omega = 0$ and $p_d = 0$.

(2) $\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0$ when

(2.a) $-1 < \omega < 0,\ p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(2.b) $-1 < \omega < 0,\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(2.c) $-1 < \omega < 0,\ p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, and

$\left\{p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)\right.$ or $\left.p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)\right\}$, or

(2.d) $0 < \omega < 1,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, ,

$\left\{p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)\right.$ or $\left.p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)\right\}$

or

(2.e) $0 < \omega < 1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\Big\}$

(2.f) $0 < \omega < 1$ and $\left\{p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right.$, or

(2.g) $\omega = 0$ and $p_d \neq 0$.

(3) $\sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}$ when

(3.a)

$\omega \le -1,\ p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, , or

$\left\{p_d < \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right.$ or $\left.p_d > \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$

(3.b) $\omega \le -1$, $p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, or

(3.c)

$\omega \le -1$, $\frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$ and $0 < q_d < \frac{2}{3}$ and $-\sqrt{\frac{1}{4\,q_d - 6\,q_d^2}} > \omega$

(3.d)

$\omega \ge 1$, $p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, , or

$\left\{p_d < \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)(1+4\,q_d)}{\omega^2\,q_d}}\right) \text{ or } p_d > \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$

(3.e)

$\omega \ge 1$, $\left\{\frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right.$ and $0 < q_d < \frac{2}{3}$ and $\left.\omega > \sqrt{\frac{1}{4\,q_d - 6\,q_d^2}}\right\}$, or

(3.f) $\omega \ge 1$ and $p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$.

(4) A_d, $p_s = p_d - \frac{1}{2\,\omega\,q_d}$, $q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d$ when

(4.a) $\omega \le -1$, $\frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$,, or

$\left\{\left(0 < q_d < \frac{2}{3} \text{ and } -\sqrt{\frac{1}{4\,q_d - 6\,q_d^2}} \le \omega \le -1\right) \text{ or } \frac{2}{3} \le q_d \le 1\right\}$

(4.b) $\omega \ge 1$, $\frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, .

$\left\{\left(0 < q_d < \frac{2}{3} \text{ and } 1 \le \omega \le \sqrt{\frac{1}{4\,q_d - 6\,q_d^2}}\right) \text{ or } \frac{2}{3} \le q_d \le 1\right\}$

Stage 2: Deciding whether to discard precedent (M or $\sim M$)

When will the court choose to discard precedent?

As indicated above, if the court chooses to discard precedent, it knows which $\{p_s, q_s\}$ it will choose for all possible values of p_d, q_d, and ω. With this knowledge, the court will maintain precedent when $\text{EU}(M \mid p_s, q_s, p_d, q_d, \omega, \text{ and } \alpha) \ge \text{EU}(\sim M \mid p_s, q_s, p_d, q_d, \omega, \text{ and } \alpha)$. If the court maintains precedent, it chooses from the following decision set:

(1)

$$\omega < 0,\ p_m > \frac{1}{2}\left(-2\,\omega + \frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \to \left\{p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 0\right\},$$

$$\text{EU} = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

When this condition is true, if the court chooses to maintain precedent, it will choose $\left\{p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 0\right\}$.

(1.a)

$$\left\{\omega < 0,\ p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left.\text{and } \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right) \le p_d \le \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$$

$$\to \left\{A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\},\ \text{EU} = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

In this state of the world, when the court discards precedent, it will choose $\left\{A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$. The court prefers to break from precedent when $\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) > \text{EU}\left(M,\ A_m,\ p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 0\right)$. This inequality holds when $\alpha < -\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$.

$$\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\text{EU}\left(M,\ A_m,\ p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 0\right) = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d} > -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m} > \alpha$$

(1.b) $\left\{\omega \le -1,\ \frac{2}{3} \le q_d \le 1,\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$$\left\{-\sqrt{\frac{1}{4\,q_d-6\,q_d^2}} \le \omega \le -1,\ 0 < q_d < \frac{2}{3},\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$$

$$\to \left\{A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\},\ \text{EU} = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

In these states of the world, if the court breaks from precedent, it will choose $\left\{A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$. The court prefers this outcome when

$EU\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) >$. This inequality holds when

$EU\left(M,\ A_m,\ p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\,(1 - t + t^2\,q_m)}{1 + t^2\,q_m},\ q_s = 0\right)$

$\alpha < -2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$.

$EU\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$

$EU\left(M,\ A_m,\ p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\,(1 - t + t^2\,q_m)}{1 + t^2\,q_m},\ q_s = 0\right) = -\frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

$-2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d > -\frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

$\alpha < -2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

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FullSimplify[-2 + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d + q_m (t (ω + p_m) - (-1 + t) ω q_m)^2/(1 + t^2 q_m)]
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$-2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

(1.c) $-1 < \omega < 0,\ p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4 + \frac{1}{q_d} + 2\,\omega^2\,q_d}{\omega}\right)$, **OR**

$-1 < \omega < 0,\ \frac{1}{4}\left(-4\,\omega + \frac{4 + \frac{1}{q_d} + 2\,\omega^2\,q_d}{\omega}\right) < p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4 + \frac{1}{q_d}\right)} + 2\,\omega\,(-2 + q_d)\right)$, **OR**

$-1 < \omega < 0,\ p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4 + \frac{1}{q_d}\right)} + 2\,\omega\,(-2 + q_d)\right)$

$\rightarrow \left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\},\ EU = -\alpha - \frac{\omega^2}{2}$

In these states of the world, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\}$. The court prefers this outcome when

$EU\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) > EU\left(M,\ A_m,\ p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\,(1 - t + t^2\,q_m)}{1 + t^2\,q_m},\ q_s = 0\right)$. This inequality holds when $\alpha < -\frac{\omega^2}{2} + \frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$.

$EU\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$

$EU\left(M,\ A_m,\ p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\,(1 - t + t^2\,q_m)}{1 + t^2\,q_m},\ q_s = 0\right) = -\frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

$-\alpha - \frac{\omega^2}{2} > -\frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

$\alpha < -\frac{\omega^2}{2} + \frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$

$$\texttt{FullSimplify}\left[-\frac{\omega^2}{2}-\left(-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}\right)\right]$$

$$-\frac{\omega^2}{2}+\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

(1.d) $\left\{\omega\le -1,\ p_d<\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{\omega<-\sqrt{\frac{1}{4\,q_d-6\,q_d^2}}\le -1,\ 0<q_d<\frac{2}{3},\ \frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\le p_d\le\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{\omega\le -1,\ \frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)<p_d<\frac{1}{4}\left(2\,\omega\,(-2+q_d)-\sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$, **OR**

$\left\{\omega\le -1,\ p_d>\frac{1}{4}\left(2\,\omega\,(-2+q_d)+\sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$.

$\to\left\{\sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right\},\ \mathbf{EU}=-1-\alpha+\frac{1}{2\,\omega^2}$

In these states of the world, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right\}$. The court prefers this outcome when $\mathrm{EU}\left(\sim M,\ \sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right)>\mathrm{EU}\left(M,\ A_m,\ p_s=\frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s=0\right)$. This inequality holds when $\alpha<-1+\frac{1}{2\,\omega^2}+\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$.

$$\mathrm{EU}\left(\sim M,\ \sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right)=-1-\alpha+\frac{1}{2\,\omega^2}$$

$$\mathrm{EU}\left(M,\ A_m,\ p_s=\frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s=0\right)=-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-1-\alpha+\frac{1}{2\,\omega^2}>-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$\alpha<-1+\frac{1}{2\,\omega^2}+\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$\texttt{FullSimplify}\left[-1+\frac{1}{2\,\omega^2}-\left(-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}\right)\right]$$

$$-1+\frac{1}{2\,\omega^2}+\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$(2)\ \omega < 0,\ p_m < \frac{1}{2}\left(-2\,\omega + \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \rightarrow$$

$$\left\{p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right\},$$

$$\text{EU} = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

When this condition is true, if the court chooses to maintain precedent, it will choose $\left\{p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right\}$.

(2.a)

$$\left\{\omega < 0,\ p_d > \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left.\text{and } \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)(1+4\,q_d)}{\omega^2\,q_d}}\right) \le p_d \le \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$$

$$\rightarrow \left\{A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\},\ \text{EU} = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

In this state of the world, the court will choose to break from precedent when $\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) > \text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right)$. This inequality holds when $\alpha < -\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$

$$\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$-\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d} > -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$\alpha < -\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

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FullSimplify[-(qd (-2 (ω + pd) + ω qd)^2)/(1 + 4 qd) +
  1/(1 + t^2 qm) (1 + qm (t^2 + (-1 + t)^2 ω^2 + (t pm - (-1 + t) ω (-2 + qm)) (t pm - (-1 + t) ω qm)))]
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$$-\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{1}{1+t^2\,q_m}\left(1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)\right)$$

(2.b) $\left\{\omega \le -1,\ \frac{2}{3} \le q_d \le 1,\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{-\sqrt{\frac{1}{4\,q_d - 6\,q_d^2}} \le \omega \le -1,\ 0 < q_d < \frac{2}{3},\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$

$\to \left\{A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$, $\mathbf{EU} = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$

In these states of the world, the court wil discard precedent when

$\mathrm{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) >$. This is true when

$\mathrm{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right)$

$\alpha > -2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$.

$\mathrm{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$

$\mathrm{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$

$-2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d > -\frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$

$-2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m} > \alpha$

```
FullSimplify[-2 + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d +
  1/(1 + t^2 q_m) (1 + q_m (t^2 + (-1 + t)^2 ω^2 + (t p_m - (-1 + t) ω (-2 + q_m)) (t p_m - (-1 + t) ω q_m)))]
```

```
-2 + 1/ω^2 - 2 p_d/ω + 1/(4 ω^2 q_d) + q_d +
  1/(1 + t^2 q_m) (1 + q_m (t^2 + (-1 + t)^2 ω^2 + (t p_m - (-1 + t) ω (-2 + q_m)) (t p_m - (-1 + t) ω q_m)))
```

(2.c) $-1 < \omega < 0,\ p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, **OR**

$-1 < \omega < 0,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) < p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)$, **OR**

$-1 < \omega < 0,\ p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)$

$\to \left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\}$, $\mathbf{EU} = -\alpha - \frac{\omega^2}{2}$

Under these conditions, the court will break from precedent when

$\mathrm{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) > \mathrm{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right)$. This inequality holds

when $\alpha < -\frac{\omega^2}{2} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$.

$\text{EU}\left(\sim M,\ \sim A,\ \ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$

$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$

$-\alpha - \frac{\omega^2}{2} > -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$

$-\frac{\omega^2}{2} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m} > \alpha$

```
FullSimplify[
 -ω^2/2 + 1/(1 + t^2 q_m) (1 + q_m (t^2 + (-1 + t)^2 ω^2 + (t p_m - (-1 + t) ω (-2 + q_m)) (t p_m - (-1 + t) ω q_m)))]
-ω^2/2 + 1/(1 + t^2 q_m) (1 + q_m (t^2 + (-1 + t)^2 ω^2 + (t p_m - (-1 + t) ω (-2 + q_m)) (t p_m - (-1 + t) ω q_m)))
```

(2.d) $\left\{\omega \le -1,\ p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{\omega < -\sqrt{\frac{1}{4\,q_d-6\,q_d^2}} \le -1,\ 0 < q_d < \frac{2}{3},\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{\omega \le -1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) < p_d < \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$, **OR**

$\left\{\omega \le -1,\ p_d > \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$.

$\to \left\{\sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right\},\ \text{EU} = -1 - \alpha + \frac{1}{2\,\omega^2}$

Under these conditions, the court will discard precedent when $\text{EU}\left(\sim M,\ \sim A,\ \ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) > \text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right)$. This inequality holds when $\alpha < -1 + \frac{1}{2\,\omega^2} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$.

$\text{EU}\left(\sim M,\ \sim A,\ \ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\,\omega^2}$

$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$

$-1 - \alpha + \frac{1}{2\,\omega^2} > -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$

$\alpha < -1 + \frac{1}{2\,\omega^2} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$

```
FullSimplify[-1 + 1/(2 ω^2) +
  1/(1 + t^2 q_m) (1 + q_m (t^2 + (-1 + t)^2 ω^2 + (t p_m - (-1 + t) ω (-2 + q_m)) (t p_m - (-1 + t) ω q_m)))]
-1 + 1/(2 ω^2) +
  1/(1 + t^2 q_m) (1 + q_m (t^2 + (-1 + t)^2 ω^2 + (t p_m - (-1 + t) ω (-2 + q_m)) (t p_m - (-1 + t) ω q_m)))
```

$$(3)\ \omega<0,\ \frac{1}{2}\left(-2\omega+\frac{t^2+2\omega^2+\frac{1}{q_m}+2(-1+t)\omega^2 q_m}{t\omega}\right)\le p_m\le\frac{1}{2}\left(-2\omega+\frac{t^2+\frac{1}{q_m}+2(-1+t)\omega^2 q_m}{t\omega}\right)$$

$$\to\left\{p_s=p_m-\frac{1}{2\omega q_m},\ q_s=t-\frac{t^2}{2\omega^2}+\frac{t p_m}{\omega}-\frac{1}{2\omega^2 q_m}-(-1+t)q_m\right\},$$

$$\text{EU}=\frac{1}{4}\left(\frac{t(t-4\omega^2-4\omega p_m)}{\omega^2}+\frac{1}{\omega^2 q_m}+4(-1+t)q_m\right)$$

When this condition is true, if the court chooses to maintain precedent, it will choose $\left\{p_s=p_m-\frac{1}{2\omega q_m},\ q_s=t-\frac{t^2}{2\omega^2}+\frac{t p_m}{\omega}-\frac{1}{2\omega^2 q_m}-(-1+t)q_m\right\}$.

(3.a)

$$\left\{\omega<0,\ p_d>\frac{1}{4}\left(-4\omega+\frac{4+\frac{1}{q_d}+2\omega^2 q_d}{\omega}\right),\right.$$

$$\left.\text{and }\frac{1}{4}\left(2\omega(-2+q_d)-\sqrt{2}\sqrt{\frac{(-1+2\omega^2)(1+4q_d)}{\omega^2 q_d}}\right)\le p_d\le\frac{1}{4}\left(2\omega(-2+q_d)+\sqrt{2}\sqrt{\frac{(-1+2\omega^2)(1+4q_d)}{\omega^2 q_d}}\right)\right\}$$

$$\to\left\{A_d,\ p_s=\frac{\omega(-2+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s=0\right\},\ \text{EU}=-\frac{\alpha+q_d\left(4(\alpha+\omega^2)+(-2p_d+\omega(-4+q_d))(-2p_d+\omega q_d)\right)}{1+4q_d}$$

Under these conditions, if the court breaks from precedent, it will choose $\left\{A_d,\ p_s\ \frac{\omega(-2+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s=0\right\}$. The court prefers this outcome when

$\text{EU}\left(\sim M,\ A_d,\ p_s\ \frac{\omega(-2+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s=0\right)>$. This inequality holds when

$$\text{EU}\left(M,\ A_m,\ p_s=p_m-\frac{1}{2\omega q_m},\ q_s=t-\frac{t^2}{2\omega^2}+\frac{t p_m}{\omega}-\frac{1}{2\omega^2 q_m}-(-1+t)q_m\right)$$

$$\alpha<\frac{1}{4}\left(\frac{t(-t+4\omega^2+4\omega p_m)}{\omega^2}-\frac{4q_d(-2(\omega+p_d)+\omega q_d)^2}{1+4q_d}-\frac{1}{\omega^2 q_m}-4(-1+t)q_m\right).$$

$$\text{EU}\left(\sim M,\ A_d,\ p_s\ \frac{\omega(-2+q_d)+p_d(-1+4q_d)}{1+4q_d},\ q_s=0\right)=-\frac{\alpha+q_d\left(4(\alpha+\omega^2)+(-2p_d+\omega(-4+q_d))(-2p_d+\omega q_d)\right)}{1+4q_d}$$

$$\text{EU}\left(M,\ A_m,\ p_s=p_m-\frac{1}{2\omega q_m},\ q_s=t-\frac{t^2}{2\omega^2}+\frac{t p_m}{\omega}-\frac{1}{2\omega^2 q_m}-(-1+t)q_m\right)=$$

$$\frac{1}{4}\left(\frac{t(t-4\omega^2-4\omega p_m)}{\omega^2}+\frac{1}{\omega^2 q_m}+4(-1+t)q_m\right)$$

$$-\frac{\alpha+q_d\left(4(\alpha+\omega^2)+(-2p_d+\omega(-4+q_d))(-2p_d+\omega q_d)\right)}{1+4q_d}>\frac{1}{4}\left(\frac{t(t-4\omega^2-4\omega p_m)}{\omega^2}+\frac{1}{\omega^2 q_m}+4(-1+t)q_m\right)$$

$$-\frac{q_d\left(4\,\omega^2+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}-\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2}+\frac{1}{\omega^2\,q_m}+4\,(-1+t)\,q_m\right)>\alpha$$

```
FullSimplify[-(qd (4 ω^2 + (-2 pd + ω (-4 + qd)) (-2 pd + ω qd))/(1 + 4 qd)) -
  1/4 (t (t - 4 ω^2 - 4 ω pm)/ω^2 + 1/(ω^2 qm) + 4 (-1 + t) qm)]
```

$$\frac{1}{4}\left(\frac{t\left(-t+4\,\omega^2+4\,\omega\,p_m\right)}{\omega^2}-\frac{4\,q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d}-\frac{1}{\omega^2\,q_m}-4\,(-1+t)\,q_m\right)$$

(3.b) $\left\{\omega\le -1,\ \frac{2}{3}\le q_d\le 1,\ \frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\le p_d\le\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$$\left\{-\sqrt{\frac{1}{4\,q_d-6\,q_d^2}}\le\omega\le -1,\ 0<q_d<\frac{2}{3},\ \frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\le p_d\le\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$$

$$\to\left\{A_d,\ p_s=p_d-\frac{1}{2\,\omega\,q_d},\ q_s=2-\frac{2}{\omega^2}+\frac{2\,p_d}{\omega}-\frac{1}{2\,\omega^2\,q_d}-q_d\right\},\ \text{EU}=-2-\alpha+\frac{1}{\omega^2}-\frac{2\,p_d}{\omega}+\frac{1}{4\,\omega^2\,q_d}+q_d$$

In this state of the world, if the court discards precdent, it will select $\left\{A_d,\ p_s=p_d-\frac{1}{2\,\omega\,q_d},\ q_s=2-\frac{2}{\omega^2}+\frac{2\,p_d}{\omega}-\frac{1}{2\,\omega^2\,q_d}-q_d\right\}$. The court prefers this outcome when

$$\text{EU}\left(\sim M,\ A_d,\ p_s=p_d-\frac{1}{2\,\omega\,q_d},\ q_s=2-\frac{2}{\omega^2}+\frac{2\,p_d}{\omega}-\frac{1}{2\,\omega^2\,q_d}-q_d\right)>$$. This is true when

$$\text{EU}\left(M,\ A_m,\ p_s=p_m-\frac{1}{2\,\omega\,q_m},\ q_s=t-\frac{t^2}{2\,\omega^2}+\frac{t\,p_m}{\omega}-\frac{1}{2\,\omega^2\,q_m}-(-1+t)\,q_m\right)$$

$$\alpha<-2+t+\frac{1}{\omega^2}-\frac{t^2}{4\,\omega^2}-\frac{2\,p_d}{\omega}+\frac{t\,p_m}{\omega}+\frac{1}{4\,\omega^2\,q_d}+q_d-\frac{1}{4\,\omega^2\,q_m}+q_m-t\,q_m.$$

$$\text{EU}\left(\sim M,\ A_d,\ p_s=p_d-\frac{1}{2\,\omega\,q_d},\ q_s=2-\frac{2}{\omega^2}+\frac{2\,p_d}{\omega}-\frac{1}{2\,\omega^2\,q_d}-q_d\right)=-2-\alpha+\frac{1}{\omega^2}-\frac{2\,p_d}{\omega}+\frac{1}{4\,\omega^2\,q_d}+q_d$$

$$\text{EU}\left(M,\ A_m,\ p_s=p_m-\frac{1}{2\,\omega\,q_m},\ q_s=t-\frac{t^2}{2\,\omega^2}+\frac{t\,p_m}{\omega}-\frac{1}{2\,\omega^2\,q_m}-(-1+t)\,q_m\right)=$$

$$\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2}+\frac{1}{\omega^2\,q_m}+4\,(-1+t)\,q_m\right)$$

$$-2-\alpha+\frac{1}{\omega^2}-\frac{2\,p_d}{\omega}+\frac{1}{4\,\omega^2\,q_d}+q_d>\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2}+\frac{1}{\omega^2\,q_m}+4\,(-1+t)\,q_m\right)$$

$$-2+t+\frac{1}{\omega^2}-\frac{t^2}{4\,\omega^2}-\frac{2\,p_d}{\omega}+\frac{t\,p_m}{\omega}+\frac{1}{4\,\omega^2\,q_d}+q_d-\frac{1}{4\,\omega^2\,q_m}+q_m-t\,q_m>\alpha$$

```
FullSimplify[-2 + 1/ω^2 - 2 pd/ω + 1/(4 ω^2 qd) + qd - 1/4 (t (t - 4 ω^2 - 4 ω pm)/ω^2 + 1/(ω^2 qm) + 4 (-1 + t) qm)]
```

$$-2+t+\frac{1}{\omega^2}-\frac{t^2}{4\,\omega^2}-\frac{2\,p_d}{\omega}+\frac{t\,p_m}{\omega}+\frac{1}{4\,\omega^2\,q_d}+q_d-\frac{1}{4\,\omega^2\,q_m}+q_m-t\,q_m$$

(3.c) $-1 < \omega < 0,\ p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$, **OR**

$-1 < \omega < 0,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) < p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)$, **OR**

$-1 < \omega < 0,\ p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)$

$\rightarrow \left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\},\ \mathrm{EU} = -\alpha - \frac{\omega^2}{2}$

When any of these conditions are true, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\}$. The court prefers this outcome when

$$\mathrm{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) > \mathrm{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right).$$

This is true when $\alpha < t - \frac{t^2}{4\,\omega^2} - \frac{\omega^2}{2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m$.

$$\mathrm{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

$$\mathrm{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$

$$\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-\alpha - \frac{\omega^2}{2} > \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$t - \frac{t^2}{4\,\omega^2} - \frac{\omega^2}{2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m > \alpha$$

```
FullSimplify[-ω^2/2 - 1/4 (t (t - 4 ω^2 - 4 ω p_m)/ω^2 + 1/(ω^2 q_m) + 4 (-1 + t) q_m)]
```

$$t - \frac{t^2}{4\,\omega^2} - \frac{\omega^2}{2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m$$

(3.d) $\left\{\omega \le -1,\ p_d < \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{\omega < -\sqrt{\frac{1}{4\,q_d - 6\,q_d^2}} \le -1,\ 0 < q_d < \frac{2}{3},\ \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}$, **OR**

$\left\{\omega \le -1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) < p_d < \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$, **OR**

$\left\{\omega \le -1,\ p_d > \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\}$.

$\rightarrow \left\{\sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right\},\ \mathrm{EU} = -1 - \alpha + \frac{1}{2\,\omega^2}$

In this state of the world, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right\}$. It prefers this outcome when $\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) >$. This is

$$\text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right)$$

true when $\alpha < -1 + t - \frac{-2+t^2}{4\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\,\omega^2}$$

$$\text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$

$$\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-1 - \alpha + \frac{1}{2\,\omega^2} > \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-1 + t - \frac{-2+t^2}{4\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m > \alpha$$

```
FullSimplify[-1 + 1/(2 ω^2) - 1/4 (t (t - 4 ω^2 - 4 ω p_m)/ω^2 + 1/(ω^2 q_m) + 4 (-1 + t) q_m)]
```

$$-1 + t - \frac{-2+t^2}{4\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m$$

(4)

$$\omega > 0,\ p_m < \frac{1}{2}\left(-2\,\omega + \frac{t^2 + \frac{1}{q_m} + 2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \to \left\{p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\left(1 - t + t^2\,q_m\right)}{1 + t^2\,q_m},\ q_s = 0\right\},$$

$$\text{EU} = -\frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$$

In this state of the world, the noise term ω is positive, and if the court maintains precedent, it will choose $\left\{p_s = \frac{-t\,\omega + (-1+t)\,\omega\,q_m + p_m\left(1 - t + t^2\,q_m\right)}{1 + t^2\,q_m},\ q_s = 0\right\}$. Choosing this, the court receives an expected utility of $-\frac{q_m\,(t\,(\omega + p_m) - (-1+t)\,\omega\,q_m)^2}{1 + t^2\,q_m}$.

(4.a) $\omega > 0,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4 + \frac{1}{q_d} + 2\,\omega^2\,q_d}{\omega}\right)$,

$$\frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4 + \frac{1}{q_d}\right)} + 2\,\omega\,(-2 + q_d)\right) \le p_d \le \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4 + \frac{1}{q_d}\right)} + 2\,\omega\,(-2 + q_d)\right)$$

$$\to \left\{A_d,\ p_s = \frac{\omega\,(-2+q_d) + p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\},\ \text{EU} = -\frac{\alpha + q_d\left(4\left(\alpha+\omega^2\right) + (-2\,p_d + \omega\,(-4+q_d))\,(-2\,p_d + \omega\,q_d)\right)}{1+4\,q_d}$$

In this state of the world, if the court discards precedent, it will choose $\left\{A_d,\ p_s = \frac{\omega\,(-2+q_d) + p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$. The court prefers this outcome when

$\text{EU}\left(\sim M,\, A_d,\, p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\, q_s = 0\right) > \text{EU}\left(M,\, A_m,\, p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\, q_s = 0\right)$. This is true when $\alpha < -\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$.

$$\text{EU}\left(\sim M,\, A_d,\, p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\, q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$
$$\text{EU}\left(M,\, A_m,\, p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\, q_s = 0\right) = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d} > -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$
$$-\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m} > \alpha$$

(4.b) $\left\{\omega \geq 1,\, \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\, \frac{2}{3} \leq q_d \leq 1\right\}$, **OR**

$$\left\{1 \leq \omega \leq \sqrt{\frac{1}{4\,q_d-6\,q_d^2}},\, \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\, 0 < q_d < \frac{2}{3}\right\}$$
$$\rightarrow \left\{A_d,\, p_s = p_d - \frac{1}{2\,\omega\,q_d},\, q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\},\, \text{EU} = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

In these states of the world, if the court breaks from precedent, it will choose $\left\{A_d,\, p_s = p_d - \frac{1}{2\,\omega\,q_d},\, q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$. The court prefers this outcome when $\text{EU}\left(\sim M,\, A_d,\, p_s = p_d - \frac{1}{2\,\omega\,q_d},\, q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) >$. This inequality holds when

$$\text{EU}\left(M,\, A_m,\, p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\, q_s = 0\right)$$
$$\alpha < -2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}.$$

$$\text{EU}\left(\sim M,\, A_d,\, p_s = p_d - \frac{1}{2\,\omega\,q_d},\, q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$
$$\text{EU}\left(M,\, A_m,\, p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\, q_s = 0\right) = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d > -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$
$$\alpha < -2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

(4.c)

$$\left\{0<\omega<1 \text{ and } \left\{p_d>\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\},\ \text{or}$$

$$\left\{0<\omega<1,\ \frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\le p_d\le\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\},\ \text{or}$$

$$\left\{0<\omega<1,\ p_d<\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left.\left\{p_d<\frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right)\text{ or }p_d>\frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right)\right\}$$

$$\to\left\{\sim A,\ p_s=-\frac{\omega}{2},\ q_s=0\right\},\ \text{EU}=-\alpha-\frac{\omega^2}{2}$$

In these states of the world, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s=-\frac{\omega}{2},\ q_s=0\right\}$. The court prefers this outcome when

$\text{EU}\left(\sim M,\ \sim A,\ p_s=-\frac{\omega}{2},\ q_s=0\right)>\text{EU}\left(M,\ A_m,\ p_s=\frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s=0\right)$. This inequality holds when $\alpha<-\frac{\omega^2}{2}+\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s=-\frac{\omega}{2},\ q_s=0\right)=-\alpha-\frac{\omega^2}{2}$$

$$\text{EU}\left(M,\ A_m,\ p_s=\frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s=0\right)=-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-\alpha-\frac{\omega^2}{2}>-\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$\alpha<-\frac{\omega^2}{2}+\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

(4.d)

$$\left\{\omega\ge1,\ p_d<\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left.\left\{p_d<\frac{1}{4}\left(2\,\omega\,(-2+q_d)-\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)(1+4\,q_d)}{\omega^2\,q_d}}\right)\text{ or }p_d>\frac{1}{4}\left(2\,\omega\,(-2+q_d)+\sqrt{2}\,\sqrt{\frac{\left(-1+2\,\omega^2\right)(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\},$$

or

$$\left\{\omega\ge1,\ \omega>\sqrt{\frac{1}{4\,q_d-6\,q_d^2}},\ \frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\le p_d\le\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ 0<q_d<\frac{2}{3}\right\},\ \text{or}$$

$$\left\{\omega\ge1 \text{ and } p_d>\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}.$$

$$\to\left\{\sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right\},\ \text{EU}=-1-\alpha+\frac{1}{2\,\omega^2}$$

In these states of the world, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right\}$. The court prefers this outcome when

$\text{EU}\left(\sim M,\ \sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right)>\text{EU}\left(M,\ A_m,\ p_s=\frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s=0\right)$. This inequality

holds when $\alpha < -1 + \frac{1}{2\omega^2} + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{1}{2\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\omega^2}$$
$$\text{EU}\left(M,\ A_m,\ p_s = \frac{-t\,\omega+(-1+t)\,\omega\,q_m+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 0\right) = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$-1 - \alpha + \frac{1}{2\omega^2} > -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$
$$\alpha < -1 + \frac{1}{2\omega^2} + \frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

$$(5)\ \omega > 0,\ p_m > \frac{1}{2}\left(-2\,\omega + \frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right) \rightarrow$$
$$\left\{p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right\},$$
$$\text{EU} = -\frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$$

(5.a) $\omega > 0,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)$,

$$\frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right) \le p_d \le \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right)$$
$$\rightarrow \left\{A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\},\ \text{EU} = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

In this state of the world, the court will choose to break from precedent when $\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) > \text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right)$. This inequality holds when $\alpha < -\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$

$$\text{EU}\left(\sim M,\ A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\,(4\,(\alpha+\omega^2)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d))}{1+4\,q_d}$$
$$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\,(1-t+t^2\,q_m)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$$

$$-\frac{\alpha+q_d\,(4\,(\alpha+\omega^2)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d))}{1+4\,q_d} > -\frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$$
$$\alpha < -\frac{q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} + \frac{1+q_m\,(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m))}{1+t^2\,q_m}$$

(5.b)

$$\left\{\omega \geq 1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ \frac{2}{3} \leq q_d \leq 1\right\},\ \textbf{OR}$$

$$\left\{1 \leq \omega \leq \sqrt{\frac{1}{4\,q_d - 6\,q_d^2}},\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ 0 < q_d < \frac{2}{3}\right\}$$

$$\rightarrow \left\{A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\},\ \textbf{EU} = \frac{1}{4}\left(\frac{t\left(t - 4\,\omega^2 - 4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

In these states of the world, the court wil discard precedent when

$\text{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) >$. This is true when

$$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right)$$

$$\alpha > -2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}.$$

$$\text{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

$$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$-2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d > -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$-2 + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m} > \alpha$$

(5.c)

$$\left\{0 < \omega < 1 \text{ and } \left\{p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\},\ \textbf{or}$$

$$\left\{0 < \omega < 1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\},\ \textbf{or}$$

$$\left\{0 < \omega < 1,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left.\left\{p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right) \text{ or } p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)\right\}$$

$$\rightarrow \left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\},\ \textbf{EU} = -\alpha - \frac{\omega^2}{2}$$

Under these conditions, the court will break from precedent when

$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) > \text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right)$. This inequality holds when $\alpha < -\frac{\omega^2}{2} + \frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$

$$\text{EU}\left(M,\ A_m,\ p_s = \frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ q_s = 1\right) = -\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$-\alpha-\frac{\omega^2}{2}>-\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$-\frac{\omega^2}{2}+\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}>\alpha$$

(5.d)

$$\left\{\omega\geq 1,\ p_d<\frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left\{p_d<\frac{1}{4}\left(2\,\omega\,(-2+q_d)-\sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\ \text{or}\ p_d>\frac{1}{4}\left(2\,\omega\,(-2+q_d)+\sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\},$$

or

$$\left\{\omega\geq 1,\ \omega>\sqrt{\frac{1}{4\,q_d-6\,q_d^2}}\ ,\ \frac{1}{4}\left(-4\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\leq p_d\leq\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ 0<q_d<\frac{2}{3}\right\},\ \text{or}$$

$$\left\{\omega\geq 1\ \text{and}\ p_d>\frac{1}{2}\left(-2\,\omega+\frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}.$$

$$\rightarrow\left\{\sim A,\ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right\},\ \text{EU}=-1-\alpha+\frac{1}{2\,\omega^2}$$

Under these conditions, the court will discard precedent when

$\text{EU}\left(\sim M,\ \sim A,\ \ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right)>\text{EU}\left(M,\ A_m,\ p_s=\frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ \ q_s=1\right)$. This inequality holds when $\alpha<-1+\frac{1}{2\,\omega^2}+\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$.

$$\text{EU}\left(\sim M,\ \sim A,\ \ p_s=-\frac{1}{2\,\omega},\ q_s=1-\frac{1}{\omega^2}\right)=-1-\alpha+\frac{1}{2\,\omega^2}$$

$$\text{EU}\left(M,\ A_m,\ p_s=\frac{(-1+t)\,\omega\,(-1+q_m)+p_m\left(1-t+t^2\,q_m\right)}{1+t^2\,q_m},\ \ q_s=1\right)=-\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$-1-\alpha+\frac{1}{2\,\omega^2}>-\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$\alpha<-1+\frac{1}{2\,\omega^2}+\frac{1+q_m\left(t^2+(-1+t)^2\,\omega^2+(t\,p_m-(-1+t)\,\omega\,(-2+q_m))\,(t\,p_m-(-1+t)\,\omega\,q_m)\right)}{1+t^2\,q_m}$$

$$(6)\ \omega>0,\ \ \frac{1}{2}\left(-2\,\omega+\frac{t^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)\leq p_m\leq\frac{1}{2}\left(-2\,\omega+\frac{t^2+2\,\omega^2+\frac{1}{q_m}+2\,(-1+t)\,\omega^2\,q_m}{t\,\omega}\right)\rightarrow$$

$$\left\{p_s=p_m-\frac{1}{2\,\omega\,q_m},\ q_s=t-\frac{t^2}{2\,\omega^2}+\frac{t\,p_m}{\omega}-\frac{1}{2\,\omega^2\,q_m}-(-1+t)\,q_m\right\},$$

$$\text{EU}=\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2}+\frac{1}{\omega^2\,q_m}+4\,(-1+t)\,q_m\right)$$

(6.a) $\omega > 0,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),$

$$\frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right) \le p_d \le \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)}+2\,\omega\,(-2+q_d)\right)$$

$$\to \left\{A_d,\ p_s = \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\},\ \mathbf{EU} = -\frac{q_m\,(t\,(\omega+p_m)-(-1+t)\,\omega\,q_m)^2}{1+t^2\,q_m}$$

Under these conditions, if the court breaks from precedent, it will choose $\left\{A_d,\ p_s\ \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right\}$. The court prefers this outcome when

$\mathrm{EU}\left(\sim M,\ A_d,\ p_s\ \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) >$. This inequality holds when

$$\mathrm{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right)$$

$$\alpha < \frac{1}{4}\left(\frac{t\left(-t+4\,\omega^2+4\,\omega\,p_m\right)}{\omega^2} - \frac{4\,q_d\,(-2\,(\omega+p_d)+\omega\,q_d)^2}{1+4\,q_d} - \frac{1}{\omega^2\,q_m} - 4\,(-1+t)\,q_m\right).$$

$$\mathrm{EU}\left(\sim M,\ A_d,\ p_s\ \frac{\omega\,(-2+q_d)+p_d\,(-1+4\,q_d)}{1+4\,q_d},\ q_s = 0\right) = -\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d}$$

$$\mathrm{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$

$$\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-\frac{\alpha+q_d\left(4\left(\alpha+\omega^2\right)+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d} > \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-\frac{q_d\left(4\,\omega^2+(-2\,p_d+\omega\,(-4+q_d))\,(-2\,p_d+\omega\,q_d)\right)}{1+4\,q_d} - \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right) > \alpha$$

(6.b)

$$\left\{\omega \ge 1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ \frac{2}{3} \le q_d \le 1\right\},\ \mathbf{OR}$$

$$\left\{1 \le \omega \le \sqrt{\frac{1}{4\,q_d-6\,q_d^2}},\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ 0 < q_d < \frac{2}{3}\right\}$$

$$\to \left\{A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\},\ \mathbf{EU} = \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

In this state of the world, if the court discards precdent, it will select $\left\{A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right\}$. The court prefers this outcome when

$\mathrm{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) >$. This is true when

$$\mathrm{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right)$$

$$\alpha < -2 + t + \frac{1}{\omega^2} - \frac{t^2}{4\,\omega^2} - \frac{2\,p_d}{\omega} + \frac{t\,p_m}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d - \frac{1}{4\,\omega^2\,q_m} + q_m - t\,q_m.$$

$$\mathrm{EU}\left(\sim M,\ A_d,\ p_s = p_d - \frac{1}{2\,\omega\,q_d},\ q_s = 2 - \frac{2}{\omega^2} + \frac{2\,p_d}{\omega} - \frac{1}{2\,\omega^2\,q_d} - q_d\right) = -2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d$$

$$\text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$
$$\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-2 - \alpha + \frac{1}{\omega^2} - \frac{2\,p_d}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d > \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$
$$-2 + t + \frac{1}{\omega^2} - \frac{t^2}{4\,\omega^2} - \frac{2\,p_d}{\omega} + \frac{t\,p_m}{\omega} + \frac{1}{4\,\omega^2\,q_d} + q_d - \frac{1}{4\,\omega^2\,q_m} + q_m - t\,q_m > \alpha$$

(6.c)

$$\left\{\mathbf{0 < \omega < 1 \text{ and } \left\{p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\},\ \text{or}}\right.$$

$$\left\{\mathbf{0 < \omega < 1,\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \le p_d \le \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\},\ \text{or}}\right.$$

$$\left\{\mathbf{0 < \omega < 1,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)},\right.$$

$$\left.\left\{\mathbf{p_d < \frac{1}{4}\left(-\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right) \text{ or } p_d > \frac{1}{4}\left(\sqrt{2}\,\sqrt{\omega^2\left(4+\frac{1}{q_d}\right)} + 2\,\omega\,(-2+q_d)\right)}\right\}\right.$$

$$\left.\mathbf{\rightarrow \left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\},\ \text{EU} = -\alpha - \frac{\omega^2}{2}}\right.$$

When any of these conditions are true, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right\}$. The court prefers this outcome when

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) > \text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right).$$

This is true when $\alpha < t - \frac{t^2}{4\,\omega^2} - \frac{\omega^2}{2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{\omega}{2},\ q_s = 0\right) = -\alpha - \frac{\omega^2}{2}$$
$$\text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$
$$\frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-\alpha - \frac{\omega^2}{2} > \frac{1}{4}\left(\frac{t\left(t-4\,\omega^2-4\,\omega\,p_m\right)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$
$$t - \frac{t^2}{4\,\omega^2} - \frac{\omega^2}{2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m > \alpha$$

(6.d)

$$\left\{\omega \geq 1,\ p_d < \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\right.$$

$$\left\{p_d < \frac{1}{4}\left(2\,\omega\,(-2+q_d) - \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right) \text{ or } p_d > \frac{1}{4}\left(2\,\omega\,(-2+q_d) + \sqrt{2}\,\sqrt{\frac{(-1+2\,\omega^2)\,(1+4\,q_d)}{\omega^2\,q_d}}\right)\right\},$$

or

$$\left\{\omega \geq 1,\ \omega > \sqrt{\frac{1}{4\,q_d - 6\,q_d^2}},\ \frac{1}{4}\left(-4\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right) \leq p_d \leq \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right),\ 0 < q_d < \frac{2}{3}\right\},\ \text{or}$$

$$\left\{\omega \geq 1 \text{ and } p_d > \frac{1}{2}\left(-2\,\omega + \frac{4+\frac{1}{q_d}+2\,\omega^2\,q_d}{\omega}\right)\right\}.$$

$$\rightarrow \left\{\sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right\},\ \text{EU} = -1 - \alpha + \frac{1}{2\,\omega^2}$$

In this state of the world, if the court breaks from precedent, it will choose $\left\{\sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right\}$. It prefers this outcome when $\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) >$. This is

$$\text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right)$$

true when $\alpha < -1 + t - \frac{-2+t^2}{4\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m$.

$$\text{EU}\left(\sim M,\ \sim A,\ p_s = -\frac{1}{2\,\omega},\ q_s = 1 - \frac{1}{\omega^2}\right) = -1 - \alpha + \frac{1}{2\,\omega^2}$$

$$\text{EU}\left(M,\ A_m,\ p_s = p_m - \frac{1}{2\,\omega\,q_m},\ q_s = t - \frac{t^2}{2\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{2\,\omega^2\,q_m} - (-1+t)\,q_m\right) =$$

$$\frac{1}{4}\left(\frac{t\,(t-4\,\omega^2-4\,\omega\,p_m)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-1 - \alpha + \frac{1}{2\,\omega^2} > \frac{1}{4}\left(\frac{t\,(t-4\,\omega^2-4\,\omega\,p_m)}{\omega^2} + \frac{1}{\omega^2\,q_m} + 4\,(-1+t)\,q_m\right)$$

$$-1 + t - \frac{-2+t^2}{4\,\omega^2} + \frac{t\,p_m}{\omega} - \frac{1}{4\,\omega^2\,q_m} - (-1+t)\,q_m > \alpha$$

(7) $\omega = 0 \rightarrow \left\{p_s = p_d\left(1 - \frac{2}{1+4\,q_d}\right),\ q_s = 0\right\},\ \text{EU} = -\frac{t^2\,p_m^2\,q_m}{1+t^2\,q_m}$

In this state of the world, the future court is assumed to be

```
FullSimplify[-(qm (t (0 + pm) - (-1 + t) * 0 * qm)^2)/(1 + t^2 qm)]
```

$$-\frac{t^2\,p_m^2\,q_m}{1 + t^2\,q_m}$$

```
FullSimplify[(0 * (-2 + qd) + pd (-1 + 4 qd))/(1 + 4 qd)]
```

$$p_d\left(1 - \frac{2}{1 + 4\,q_d}\right)$$

(7.a) $p_d = 0 \rightarrow A_d, p_s = 0, q_s = 0,$ EU $= -\alpha$

In this state of the world, the court is indifferent between adopting the observed minority opinion and adopting no opinion. Assuming a weak preference for adopting the minority opinion (A_d) over non-adoption $(\sim A)$, the court will prefer $\{A_d, p_s = 0, q_s = 0\}$ when

EU$(\sim M, A_d, p_s = 0, q_s = 0) >$ EU$(M, A_m, p_s = 0, q_s = 0)$ when $\alpha < \frac{t^2 p_m^2 q_m}{1+t^2 q_m}$.

$$\text{EU}(\sim M, A_d, p_s = 0, q_s = 0) = -\alpha$$
$$\text{EU}(M, A_m, p_s = 0, q_s = 0) = -\frac{t^2 p_m^2 q_m}{1+t^2 q_m}$$

$$-\alpha > -\frac{t^2 p_m^2 q_m}{1+t^2 q_m}$$
$$\frac{t^2 p_m^2 q_m}{1+t^2 q_m} > \alpha$$

(7.b) $p_d \neq 0 \rightarrow \sim A, p_s = 0, q_s = 0$

In this state of the world, the court strictly prefers adoptiong no opinion to adopting the observed minority opinion. Assuming a weak preference for adopting the minority opinion (A_d) over non-adoption $(\sim A)$, the court will prefer $\{A_d, p_s = 0, q_s = 0\}$ when EU$(\sim M, A_d, p_s = 0, q_s = 0) >$ EU$(M, A_m, p_s = 0, q_s = 0)$ when $\alpha < \frac{t^2 p_m^2 q_m}{1+t^2 q_m}$.

$$\text{EU}(\sim M, A_d, p_s = 0, q_s = 0) = -\alpha$$
$$\text{EU}(M, A_m, p_s = 0, q_s = 0) = -\frac{t^2 p_m^2 q_m}{1+t^2 q_m}$$

$$-\alpha > -\frac{t^2 p_m^2 q_m}{1+t^2 q_m}$$
$$\frac{t^2 p_m^2 q_m}{1+t^2 q_m} > \alpha$$

Stage 1: The court observes the current precedent with policy p_m and quality q_m, as well as a minority opinion with policy p_d and quality q_d.

Appendix D

Summary Statistics and Explanation of Measures Used in Chapter 7

Table D.1: Variables Used to Estimate Models 1 and 2

Variable	Coding	Source
Dependent Variables		
Citation of Dissent	1 if cited at all 0 if otherwise	Westlaw, Lexis
Depth of Treatment	Number of words used to discuss dissent	custom perl script
Independent Variables		
Ideological Distance	$\lvert D_{t-1} - M_t \rvert$	Martin and Quinn (2002)
Static Quality Measures		
(1) CLI	$5.88 * \left(\frac{letters}{words}\right) - 29.6 * (\frac{sentences}{words}) - 15.8$	custom perl script based on Flesch (1949), DuBay (2004)
(1) Authorities	$\Sigma_{i=1}^{N} Authorities_i$	Westlaw, Lexis
Dynamic Quality Measures		
(1) Weighted, standardized positive treatment of dissent	$\frac{\Sigma_{i=1}^{4} Depth_i * \Sigma_{j=1}^{N} Citing\ References_{ij}}{Age}$	Westlaw, Lexis
(2) Unweighted, standardized positive treatment of dissent	$\frac{\Sigma_{i=1}^{N} Citing\ References_i}{Age}$	Westlaw, Lexis
Costs and Bias		
Workload	Merits decisions per term	Epstein, Segal, Spaeth, and Walker 2012
Salience	1 if appeared on NYT front page 0 if otherwise	Epstein and Segal 2000*b*

Notes: "Depth" used to calculate weight was based on Westlaw's KeyCite Depth of Treatment Star system. For an explanation, see Table D.2 below.

Table D.2: Westlaw KeyCite "Depth of Treatment" Stars (Criteria Used for *Legal Embeddedness* and *Frequency* Variables)

Symbol	Definition	Description
$****$	*Examined*	Extended discussion of the cited case, usually more than a printed page
$***$	*Discussed*	Substantial discussion of the cited case, usually more than a paragraph but less than a printed page
$**$	*Cited*	Some discussion of the cited case, usually less than a paragraph
$*$	*Mentioned*	A brief reference to the cited case, usually in a string citation

Note: This table is taken verbatim from the Westlaw website, `http://www2.westlaw.com/CustomerSupport/Knowledgebase/Technical/WestlawCreditCard/WebHelp/KeyCite_Depth_of_Treatment_Stars.htm`

Table D.3: Summary Statistics for Variables Used in Models 1 and 2 (N=180)

Variable	**Mean**	**Median**	**Min**	**Max**
Ideological Distance	1.569	1.172	.0200	7.325
Static Quality Measures				
CLI	11.572	11.553	6.536	14.093
Distance*CLI	17.939	13.639	.2379	91.272
Authorities	13.128	8	0	134
Distance*Authorities	19.275	9.667	0	249.508
Dynamic Quality Measures (Model 1)				
Weighted Treatment of Dissent	0.362	0.170	0	2.2
Distance*Weighted Treatment	0.489	0.153	0	8.171
Weighted Treatment of Authorities	40.535	18.440	0	471.395
Distance*Weighted Treatment of Authorities	59.534	17.945	0	1014.934
Dynamic Quality Measures (Model 2)				
Unweighted Treatment of Dissent	0.170	0.1021	0	1.125
Distance*Unweighted Treatment	0.235	0.075	0	4.326
Unweighted Treatment of Authorities	21.778	9.725	0.175	235.091
Distance*Unweighted Treatment of Authorities	28.736	9.374	0	489.695
Costs and Bias				
Total Cases	111.533	110	71	155
Salience	0.544	1	0	1

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