Contesting Legal Truths: Measuring the Tone of U.S. Supreme Court Decisions

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Why do U.S. Supreme Court justices employ caustic rhetoric in their dissenting opinions? In this paper, I test two alternative theories for the use of this rhetoric. The polarization hypothesis suggests that caustic rhetoric is a consequence of increasing polarization on the Court, while the coalition maintenance hypothesis suggests the rhetoric is a shaming mechanism used to impose costs on disagreement and decrease the likelihood of dissensus in future cases. Using an augmented version of the Supreme Court Database, supplemented with Linguistic Inquiry and Word Count (LIWC) data as well as other original data, I find more evidence for the polarization hypothesis than the coalition maintenance hypothesis. While there is some evidence that justices deploy certain forms of rhetoric as shaming mechanisms, the weight of the evidence indicates that contentious rhetoric is more likely to occur in dissenting opinions when the authors are ideologically distant from the majority opinion writer.

Coalition building is a central part of decision-making on collegial courts. Although Supreme Court justices can and do vote consistently with their sincere policy preferences (Segal and Spaeth 2002), it takes five votes to form a majority and five votes to secure a controlling rationale. Justices therefore have incentives to work together and maintain productive working relationships with their colleagues over the long term. When managed poorly, short-term disagreements have the potential to impair the capacity of justices to make policy, to forge consensus, and to achieve common policy goals over the long term.

It is puzzling, then, that in recent years the justices have directed caustic rhetoric against one another, particularly in dissent. In just the past few terms, opinion writers have endured withering attacks from their colleagues, particularly in dissenting opinions. For example, the late Justice Antonin Scalia accused Justice Anthony Kennedy of "hubris" in the landmark same-sex marriage case *Obergefell v. Hodges* (2015), declaring that, "The opinion is couched in a style that is as pretentious as its content is egotistic" (*slip op.*, at 75). Scalia also had harsh words for Chief Justice John Roberts's majority opinion in *King v. Burwell* (2015), which concerned the

Affordable Care Act, suggesting that the majority was biased in favor of the law and "prepared to do whatever it takes to uphold and assist its favorites" (*slip op.*, at 47). It was not only Justice Scalia engaging in this rhetoric. Justice Sonia Sotomayor labeled as "patently absurd" a legal test developed by Justice Alito in the death penalty case *Glossip v. Gross* (2015, *slip op*. at 124).

Critics of such rhetoric see it as a sign of increasing polarization on the Supreme Court and have speculated that it risks damaging the Court's legitimacy by creating the impression that judicial decision making is unprincipled (Kravitz 2015; Morhaim 2015).[1] The behavior also runs the risk of undermining efforts to build and maintain coalitions on the Supreme Court, which are necessary for the justices to produce majority opinions that carry the force of law. The puzzle, then, is why the justices would engage in such caustic and potentially damaging rhetoric. The justices surely must know the risk that it poses to the institution, since the justices know full well that they must work with the same colleagues in subsequent cases. If the justices employ caustic rhetoric anyway, then what is the point of it? What benefits does it provide, and what, if anything, can it teach us about coalition building on the Supreme Court?

In this paper I take up these questions by considering two alternative theories. The first, which I call the *polarization hypothesis*, suggests that caustic rhetoric is a response to increasing polarization on the U.S. Supreme Court. This alternative is grounded in the attitudinal model, which posits that the behavior of Supreme Court justices is mostly rooted in their sincere ideological preferences (e.g., Segal and Spaeth 2002). Under the polarization hypothesis, Supreme Court justices would be expected to direct caustic rhetoric against justices whose preferences they most disfavor, i.e., justices who are most distant from them in ideological space.

[1] See, for example, Morhaim (2015), who writes, "While Justice Scalia's general dissent is no surprise, his flagrant insertion of personal perspective and political preference is wholly inappropriate and undermines the fundamental ideal of the Supreme Court: impartiality in the eyes of the law."

A second alternative is the *coalition maintenance hypothesis*, which suggests that the justices use caustic rhetoric to build and maintain governing coalitions. This alternative is grounded in the strategic model of judicial behavior, which holds that the justices adjust their behavior in response to the actions of their colleagues, sometimes even making substantive compromises to forge majority coalitions (Maltzman et al. 2000). The coalition maintenance hypothesis would suggest that the purpose of caustic rhetoric is not primarily to express discontent with other justices who are ideologically remote, but to punish close colleagues who have defected or are threatening to defect from majority coalitions.

I test these theories by conducting two separate analyses grounded in alternative ways of operationalizing the dependent variable, contentious rhetoric. One method focuses on particular contentious words and phrases that Supreme Court justices commonly use in their opinions. The other examines the overall tone of dissenting opinions, making use of Linguistic Inquiry and Word Count (LIWC) data. In general, I find more support for the polarization hypothesis than the coalition maintenance hypothesis. While there is some evidence that justices deploy particular forms of contentious rhetoric against close colleagues as a shaming mechanism, these tendencies are idiosyncratic to particular justices and not systematic. Whereas, variations in the overall tone of dissenting opinions do vary systematically and are primarily a function of ideological distance from the opinion writer, which is consistent with polarization.

Theories of Dissenting Opinion Writing

It is a basic feature of Supreme Court decision-making that the justices need five votes for an outcome to be authoritative or for majority opinions to become binding precedent (Epstein & Knight 1998; Maltzman et al. 2000). It is less evident, however, that these facts alone are sufficient for the justices to work together. The use of caustic rhetoric is but one sign that the

justices might be unwilling to cooperate. The frequent appearance of fractured majority coalitions, with no single opinion receiving a majority of votes,[2] suggests that justice are willing to write separately and fragment the Court, as their preferences dictate (Landes & Posner 2009).

That the justices frequently do work together is likely attributable to institutional norms which generate expectations that a majority opinion will be produced (Epstein et al 2001; O'Brien 2014). Justices might also make the strategic calculation that, more often than not, they will be in a better position to advance their policy goals if they work together to forge a majority coalition than if they go it alone (Epstein & Knight 1998; but see Brenner & Whitmeyer 2009). Maltzman et al. (2000) have found persuasive evidence that justices in fact do make special efforts to forge consensus when faced with disagreement, circulating a greater number of opinion drafts when majority coalitions are ideologically diverse, when other justices in the coalition threaten to dissent, or when opinion writers need just one more vote for a majority.

Less clear are the dynamics at work when the spirit of cooperation breaks down, such as when the justices direct caustic rhetoric at one another. On the one hand, the rhetoric might signal that the justices are simply unwilling to work together on the particular questions that are before the Court. The justices are too far apart, and so the only recourse is for the justices to vent their frustrations at each other. Alternatively, caustic rhetoric might be used as a coalition maintenance tool, as a way of attaching costs to disagreements with the dissenting justices. Under this model, caustic language serves as a shaming mechanism, sending the message to ideologically close colleagues that any future disagreements will also result in public expressions of ridicule. I will explore each of these alternatives in turn.

[2] See, for example, *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007), in which Justice Alito wrote for a three-judge plurality and Justice Scalia wrote separately, in an opinion joined by Justice Thomas.

The Polarization Hypothesis

One potential explanation for the use of caustic rhetoric is that it reflects increasing polarization on the Supreme Court: justices use such rhetoric because of their sincere policy disagreements with majority opinion writers who are distant from them. In this respect, the polarization hypothesis is consistent with the attitudinal model, which holds that judicial behavior is primarily determined by the justices' sincere ideological preferences (Segal and Spaeth 2002). Justices direct contentious rhetoric against colleagues to whom they are the most opposed, and they do not worry about the potential institutional consequences of their actions.

The subject of polarization has received much attention in the study of politics (Schlesinger 1985), with research focusing on polarization in Congress (Fleisher and Bond 2004; Theriault 2013) and the electorate (Fiorina et al. 2006), among other contexts (Bond and Fleisher 2000). The "shrinking middle" is important for any number of reasons, but perhaps the most serious consequences are for coalition building. With policymakers so divided, polarization creates challenges for policymakers who would build the consensus needed to govern effectively. In the judicial politics literature, scholarly attention has also turned to polarization, as the Supreme Court has seen a declining center in recent years (Clark 2009; Landes & Posner 2009; Kuhn 2012). To some degree, the Court has resisted the most extreme effects of polarization, not because the justices are any less policy-oriented than other policymakers, but because the relatively small size of the Court requires having only one or two swing justices to constitute a healthy center. In recent terms, for example, the presence of Sandra Day O'Connor, Anthony Kennedy, and Stephen Breyer on the Court may have tempered polarization to some degree. But as the parties become better sorted and presidents continue to appoint justices who reflect party values (Espstein and Segal 2005), the center may well vanish from Supreme Court politics as well. Already, studies of the voting habits of the justices have found that polarization

systematically influences the Court's tendency to decide cases by one-vote margins, as well as to issue decisions with dissenting opinions (Clark 2009; Landes & Posner 2009).[3]

Another potential consequence of polarization may be that justices are more willing to deploy caustic rhetoric against one another. With the justices better sorted, and the parties themselves further apart, the justices may find themselves disagreeing more consistently with certain colleagues and less likely to build coalitions with them. Justices will have fewer incentives to maintain cordial relations with these colleagues because the chances of achieving compromise are already diminished. According to the *polarization hypothesis*, then, caustic rhetoric should be employed the most frequently against majority opinion writers who are ideologically distant from the dissenting justices. Such rhetoric would be interpreted as a symptom of deteriorating relations among the justices, a reflection of the justices' sincere distaste for their opponents' views, but serve no other strategic purpose.

Coalition Maintenance Hypothesis

In contrast, the *coalition maintenance hypothesis* suggests that caustic rhetoric does serve a specific strategic purpose: to impose costs on disagreement. It is well documented that, historically, justices have threatened to take certain actions against their colleagues to change their behavior. Research has shown that during the opinion writing process, for example, justices threaten not to join majority opinions unless certain changes are made; and, moreover, that these threats are often successful, with opinion writers accommodating their colleagues in response (Wahlbeck et al. 1998; Maltzman et al. 2000). Justices have also threatened to publish dissents from denials of *certiorari*, or even to write separately on the merits, to secure concessions from

[3] Interestingly, Landes & Posner (2009) find that the fraction of dissents has declined over time, while concurrences have increased, "which might imply an increase in disagreements over reasoning as opposed to outcome" (802).

their colleagues.[4] Such behavior would be consistent with the strategic model, which suggests that justices make choices to influence their colleagues, even if they sometimes compromise their sincere preferences (Murphy 1964; Epstein and Knight 1998).

The reason that these threats work is because the justices perceive that the Court's legitimacy will be damaged when certain types of disagreements are aired publicly (Perry 1991). Dissensus can undermine the perception that judicial decision making is principled, which in turn can damage legitimacy (Gibson & Caldeira 2011). Regardless of whether the concerns are actually justified, the mere possibility that the Court's legitimacy will be damaged may lead justices to accommodate colleagues who threaten to expose disagreements, particularly when there is a risk that the Court will appear overly politicized. The caustic rhetoric and *ad hominem* attacks in cases like *Obergefell*, *Burwell*, and *Glossip* might well fall within this category. Besides considering the institutional costs, justices might feel that their own personal reputations will be damaged when they are targeted by these extreme forms of dissenting behavior.

It is possible, then, that the use of caustic rhetoric is part of an intentional strategy to make disagreement with dissenting justices both institutionally and personally costly to the majority opinion writer as well as to the other justices in the majority coalition. For the strategy to be the most effective, however, one might logically expect the rhetoric to be deployed most frequently against colleagues who are ideologically close to the dissenting justices, perhaps even justices who are ordinarily considered to be members of the same voting bloc. When justices are more ideologically distant from one another, they have little reason to expect that caustic rhetoric will do much to change the behavior of their colleagues in future cases. The justices are simply too far apart, leading them to respectfully agree to disagree with one another. When justices are

[4] As Perry (1991) explains, "Dissents from denial are the one method of persuasion outside conference that is perceived to 'follow the rules'; and there is reason to believe that they are used strategically. Threatening to dissent is often sufficient to achieve a grant" (170).

ideologically close, however, authors of dissenting opinions may well see value in imposing costs on disagreement as a way of discouraging defections in the future. A caustic opinin sends a clear signal to close colleagues that they cannot stray from their regular voting bloc without risking damage to their reputations as well as the Court's legitimacy.

Research Design

The polarization hypothesis and the coalition maintenance hypothesis have competing empirical implications that lend themselves well to systematic analysis and comparison. If the polarization hypothesis is correct, then one would expect to observe dissenting opinion writers using caustic rhetoric more frequently as the ideological distance from majority opinion writers, or majority coalitions, increases. However, if the coalition maintenance hypothesis is correct, then one would expect to observe the opposite trend. Caustic rhetoric would be used more frequently as a dissenting opinion writer's distance from the majority opinion writer decreases.

There are at least two alternative ways to measure the contentiousness of dissenting opinions. One way is to examine the systematic use of particular words and phrases by dissenting opinion writers. For example, since at least the 1970s, it has been customary for Supreme Court justices to use the phrase "I respectfully dissent" when writing in disagreement with their colleagues (Note 2011). Departures from this norm are frequently interpreted as discourteous, particularly when the justices employ the terser formulation, "I dissent." One approach to the study of contentious rhetoric, then, would be to assess the conditions under which the justices employ this less courteous alternative. Do we find that justices tend to use this particular form of disrespectful rhetoric against their ideological opponents on the Court, or are they more likely to direct it against close colleagues, as a shaming mechanism?

A second possibility is to look at the overall tone of dissenting opinions through the use of content analysis software. Linguistic Inquiry and Word Count (LIWC) software can analyze text files to generate systematic measures of tonal attributes that are widely employed in the social sciences, including research on the Supreme Court (Owens & Wedeking 2011; Cross & Pennebaker 2014; Carlson et al. 2016). One particular dimension of interest is a text's emotional tone. According to the LIWC codebook's description of *emotional tone*, "a high number is associated with a more positive, upbeat style; a lower number reveals greater anxiety, sadness, or hostility" (Pennebaker et al. 2015). By comparing the tone of majority and dissenting opinions, it is possible to see whether dissenting opinion writers are more likely to produce opinions with a lower emotional tone score when they are responding to opinions by ideologically distant authors, or if opinions with more negative tone are directed against closer colleagues.

The Use of Particular Forms of Contentious Rhetoric

The first analysis examines the use of particular forms of contentious rhetoric by Supreme Court justices, specifically the use of the phrase "I dissent." As discussed above, it has become customary for dissenting justices to use the politer phrasing "I respectfully dissent" when disagreeing with their colleagues, so the terser alternative is often interpreted by outsiders as rude, or minimally as a sign of strong disagreement with the majority (Note 2011). Justices who refuse to dissent respectfully tend to use other caustic rhetoric in their opinions as well, so focusing on occasions in which justices employ the phrase "I dissent" can be a useful proxy for systematically identifying the most strongly worded, disrespectful dissenting opinions.

[TABLE 1 ABOUT HERE]

As an initial test of the hypothesis, Table 1 documents the frequency with which dissenting justices used the phrase "I dissent" during a thirty-year period spanning 1981 to 2010.

The dependent variable (I DISSENT), as reported in Table 1, is a dummy variable coded 1 when a dissenting justice used the phrase "I dissent" in the dissenting opinion and 0 otherwise. Common alternatives were "I respectfully dissent," "I must dissent," "I therefore dissent," or else some other indication that the justice "would" decide a case differently.[5] The distribution of these alternative forms of dissenting behavior is provided in Table 2.

[TABLE 2 ABOUT HERE]

An initial review of the data finds support for both hypotheses and suggests that the use of this particular form of rhetoric has changed over time. To begin with, Table 1 indicates that the phrase "I dissent" has appeared *less frequently* since the 1980s, notwithstanding Justice Scalia's harsher rhetoric in recent terms. Justices were more likely to use the phrase "I dissent" in the 1980s, with the most frequent users Justices Thurgood Marshall, with 76 occurrences, Brennan (65), and Blackmun (62). Moreover, when justices used the phrase "I dissent" in the 1980s, they tended to target justices who were ideologically distant from them. Justice Marshall, for example, most frequently targeted Rehnquist (35.5%), while Burger only targeted Brennan (100.0%). Although these trends are generally less strong after 1990, justices today still do often target their ideological opponents. Of the occasions when Justice Ginsburg used the phrase "I dissent" in her opinions, for example, 19.1% were directed against Scalia, 14.3% were directed against Rehnquist, and 9.5% were against Thomas. Justice Ginsburg never employed the phrase against one of her closest colleagues on the Court, Justice Stephen Breyer.

Yet, other data are consistent with the coalition maintenance hypothesis, particularly after 1990. In recent years, among the most frequent targets of the phrase "I dissent" have been swing justices like Sandra Day O'Connor and especially Anthony Kennedy. Of the occasions when

[5] Justice Ginsburg frequently uses this alternative formulation. See, for example, *Herring v. United States*, 555 U.S. 135 (2009) (Ginburg, J., dissenting) ("For the reasons stated, I would reverse the judgment of the Eleventh Circuit.")

Justice Scalia used the phrase "I dissent," his most frequently target was Kennedy (22.0%). Ginsburg also used the phrase most frequently against Kennedy (28.6%), as did Breyer (21.7%) and Stevens (50.0%). Rehnquist used disrespectful language 11.9% of the time against O'Connor; and Stevens used it *only* against O'Connor (50.0%) and Kennedy (50.0%), the few times when he deployed the rhetoric.[6] Other special targets were justices who had "defected" from the parties of their appointing presidents. For example, Justice Scalia frequently used the phrase against Republican appointees who voted with the liberal bloc, such as Stevens (17.1%) and Souter (7.3%). In recent years, then, it would seem that while justices sometimes direct this particular form of contentious rhetoric against distant colleagues, their more frequent targets are close colleagues whose votes would seem to be attainable.

In order to provide a more rigorous test of these hypotheses, I conducted a multivariate analysis of dissenting behavior using logit regression. Data are based on an augmented version of Spaeth's (2011) Supreme Court Database, using the justice-centered data, which include a separate entry for each justice participating in every case. For the purposes of this first analysis, I looked only at the behavior of dissenting justices, excluding unsigned *per curiam* opinions because I am specifically interested in the relationship between dissenting justices and majority opinion writers. The principal independent variable (OPINION WRITER IDEOLOGICAL DISTANCE) measures the ideological distance between a dissenting justice and the majority opinion writer, based on the Martin-Quinn scores (2002). Specifically, I record the absolute value of the difference between the Martin-Quinn scores of dissenting justices and majority opinion writers. I also ran the model a second time measuring ideological distance with reference to the median

[6] Justice Stevens' overwhelming preference was to dissent "respectfully," employing the phrase more frequently than any other justice during the study period.

justice in the majority coalition (COALITION IDEOLOGICAL DISTANCE).[7] If the polarization hypothesis is correct, then I would expect to observe a positive relationship with the dependent variable—as the ideological distance between the majority opinion writer and a dissenting justice increases, then the likelihood of using "I dissent" in a dissenting opinion also increases. However, if the coalition maintenance hypothesis is correct, then the relationship should be negative. Justices will be less likely to write "I dissent" as their distance from the opinion writer increases, instead using the rhetoric when disagreeing with close colleagues.

Because Table 1 indicates that the influences on the use of dissenting rhetoric may have changed over time, I also incorporate a dummy variable comparing the years 1981-1990 with 1991-2010 (POST 1990). Specifically, I expect to find more support for the polarization hypothesis prior to 1991 and the coalition maintenance hypothesis subsequently. The periodization is defensible because the trends in Table 1 suggest that the change in the use of dissenting rhetoric may have been directly precipitated by the retirements of Justice Brennan and particularly Thurgood Marshall from the Supreme Court. Justice Marshall used the phrase "I dissent" more than any other justice, and he frequently targeted colleagues such as Rehnquist who were distant from him. In contrast, justices like Scalia who have served more recently have tended to use caustic rhetoric against close colleagues. I expect, therefore, to find a statistically significant interaction between the variables OPINION WRITER IDEOLOGICAL DISTANCE and POST 1990, with a negative association between the variables occurring only after 1990.

Additionally, I control for the number of justices who dissented in the case (NUMBER OF DISSENTING VOTES), as well as CASE SALIENCE using Clark et al.'s (2015) measure, which is

[7] The alternative formulation is important because research suggests that the content of the majority opinion is more likely to reflect the ideology of the coalition median than the opinion writer (Bonneau et al. 2007; Clark & Lauderdale 2010; Carrubba et al. 2012). I lead with opinion writer ideology, however, because both the polarization hypothesis and the coalition maintenance hypothesis assume that the use of caustic dissenting rhetoric reflects the particular relationship between the dissenting justice and the opinion writer.

based on newspaper coverage of the decision. I used the version of the salience variable that is based on early coverage of Supreme Court decisions because the justices are incapable of knowing what subsequent coverage of their decisions will be at the time when they are choosing whether to employ caustic rhetoric in their dissents. The use of caustic rhetoric might even generate media coverage that would not otherwise have occurred, making it more appropriate to use a salience measure focusing only on early coverage.

I also included three additional salience controls related to issue area, measuring whether the Court was overturning or altering precedent (FORMAL ALTERATION OF PRECEDENT), declaring a law unconstitutional (DECLARATION OF UNCONSTITUTIONALITY), or deciding a constitutional issue (CONSTITUTIONAL CASE). All three variables were based on measures already present in Spaeth's (2011) database.[8] Additionally, I controlled for the amount of caustic rhetoric employed by all justices in the previous term (PAST RHETORIC), since it is possible that increased occurrences of caustic rhetoric will encourage other justices to use it subsequently. Specifically, the PAST RHETORIC (1-YEAR) variable measures the proportion of all dissents from the previous term that included the phrase "I dissent." I expect PAST RHETORIC to be positively associated with the likelihood that a dissenting justice will use caustic rhetoric.

Finally, I included dummy variables for each of the justices serving on the Court during the period under analysis. This is because, to some extent, the use of dissenting language may reflect the idiosyncrasies of particular justices. Justice Ginsburg, for example, almost never uses the phrase "I respectfully dissent" in her opinions, preferring to say that she "would" decide a

[8] Specifically, FORMAL ALTERATION OF PRECEDENT is measured 1 when the PRECEDENTALTERATION variable in Spaeth (2011) is coded as 1; DECLARATION OF UNCONSTITUTIONALITY is 1 when DECLARATIONUNCON in Spaeth is greater than 1; and CONSTITUTIONAL CASE is coded 1 when LAWTYPE in Spaeth is coded 1 or 2).

case differently, or writing "I dissent" when she wants to be more forceful.[9] The coefficients for the justice dummies are not reported in the tables below, but they are available on request.

[TABLE 3 ABOUT HERE]

The results of the analysis are provided in Table 3 in five columns. Model A examines dissenting behavior in the years 1981-1990, while Model B looks at the same relationships in the period 1991-2010. Model C examines the entire study period but includes the interaction of ideological distance (OPINION WRITER IDEOLOGICAL DISTANCE) and time period (POST 1990). Model D tests the same interaction with an alternative measure of ideological distance, based on the coalition median (COALITION IDEOLOGICAL DISTANCE), while Model E is robust to the inclusion of dummy variables for each justice, the coefficients for which are not reported.[10]

Overall, the trends are consistent with Table 1, finding support for the polarization hypothesis prior to 1991 and the coalition maintenance hypothesis subsequently. Column A of Table 3 shows that the OPINION WRITER IDEOLOGICAL DISTANCE variable is statistically significant and signed in a positive direction, meaning that the likelihood that a justice will use the phrase "I dissent" increases as the distance between a dissenting justice and a majority opinion writer increases. Yet, Model B shows that from 1991-2010, ideological distance is *negatively* associated with the use of caustic rhetoric. These results hold up in Model C, when the entire period is studied using an interaction term, and when an alternative measure of ideology is used in Model D (COALITION IDEOLOGICAL DISTANCE). The clear implication is that the justices have changed in their use of dissenting rhetoric over time. Whereas, in the 1980s, justices were

[9] Justice Ginsburg has used the word "respectfully" just twice in her dissents, both times early in her career. See *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431 (1994); and *Gray v. Netherland*, 518 U.S. 152 (1996). In an interview with the American Constitution Society earlier this year, Ginsburg said that she never says "respectfully dissent" because she considers the practice disingenuous ("Conversation" 2015).

[10] Robust standard errors were generated clustering by CASEID.

more likely to direct caustic rhetoric against their ideological opponents, in more recent decades justices have deployed it against justices who are ideologically close to them.

[FIGURE 1 ABOUT HERE]

These trends are illustrated in Figure 1, which graphs the probability that a dissenting justice will use the phrase "I dissent" as the OPINION WRITER IDEOLOGICAL DISTANCE variable increases from its minimum value to its maximum.[11] In the 1980s, a one standard deviation increase from the mean caused the likelihood of caustic rhetoric to increase from 21.2% to 29.7%, while subsequently a one standard deviation increase caused the likelihood to decrease from 11.1% to 8.9%. Substantively, the trends suggest that justices today are more strategic in their use of caustic rhetoric than they were in the past. Instead of deploying it against ideological opponents, as they once did, justices use it against close colleagues who have disagreed with them, presumably to impose costs on dissensus. But the trends also indicate that, despite Justice Scalia's recent rhetoric, justices have in general been *less* likely to use disrespectful rhetoric in the past few decades than they were in the 1980s, and that ideological differences have been overall less of an influence on the use of the rhetoric than they once were. The probability of an "I dissent" has been lower since 1990, and the relationship with ideology has been weaker.

Notably, however, these findings are not robust to the inclusion of the individual justice dummies in Column E, which does not necessarily invalidate the trends found in the other columns, but does raise the possibility that the use of disrespectful rhetoric is better understood as reflecting the idiosyncratic preferences of particular justices.[12] As the composition of the Court changes, different justices use rhetoric in new ways that suit their purposes, with justices

[11] Data for Figure 1 were generated using the *margins* command in Stata 14.0. Values of the other variables are set at their means.

[12] Replacing the ideological distance variable with the measure using the COALITION IDEOLOGICAL DISTANCE variable is also not statistically significant when the justice dummies are introduced.

like Thurgood Marshall primarily targeting ideological opponents, and other justices like Scalia using the rhetoric for more strategic purposes. Turning to the control variables, some trends in Table 3 indicate that disrespectful rhetoric may occur when the NUMBER OF DISSENTING VOTES increases, which makes sense since a greater number of dissenting votes provides greater opportunities for disrespectful exchanges. One might also expect closely divided cases to be more contentious, making it more likely that justices will have incentives to deploy such rhetoric. Additionally, disrespectful rhetoric appears more frequently in constitutional cases (CONSTITUTIONAL CASE), although these findings do not hold up uniformly across time periods

The Tone of Dissenting Opinions

The second analysis focuses on the overall tone of dissenting opinions, using the LIWC measure of emotional tone. As discussed above, higher values are associated with positive, more upbeat text, while negative values are associated with anxious, sad, or hostile text. For this second analysis, the primary focus was on the Roberts Court, covering the 2005-2014 terms. I created a unique text file for every majority, concurring, and dissenting opinion written during these years, once again excluding *per curiam* opinions. I then generated a LIWC emotional tone score for each opinion, and then merged these data into Spaeth's justice-centered database.

[TABLE 4 ABOUT HERE]

Table 4 reports the average tone scores for majority, concurring, and dissenting opinions during the study period. Unexpectedly, it finds that overall the tone of dissenting opinions has been slightly higher than that of majority opinions on the Roberts Court. The tone of concurring opinions is highest, at 33.9 on a 100-point scale, followed by dissenting opinions (31.8), and then majority opinions (30.0). It would appear that, at least in terms of general tone, dissenting

opinions are no less positive and upbeat than majority opinions. It should be noted, however, that no opinions rank highly in terms of emotional tone in an absolute sense.

[TABLE 5 ABOUT HERE]

Table 5 uses OLS regression to examine systematic influences on the tone of the justices' opinions. Most of the variables are identical to previous tables, with a couple of new additions. The new analysis includes dummy variables measuring whether the opinion was a dissent (DISSENTED) or a concurring opinion (CONCURRED) to reflect the fact that this analysis includes majority, concurring, and dissenting opinions in the analysis. The results are presented in three columns. Model A presents the model without interaction terms or the individual justice dummies. Model B introduces an interaction term measuring whether the tone of dissenting opinions declines as the author's ideological distance from the majority opinion increases. Model C then measures whether the results are robust to the introduction of justice dummies.[13]

Looking across the columns, we find once again that, contrary to expectations, the overall tone of majority opinions is higher in dissenting (DISSENTED) and concurring (CONCURED) opinions than in majority opinions. However, as Model B shows, the tone of dissenting opinions declines as the ideological distance between the author and the majority opinion writer increases. The interaction term in Model B is statistically significant and signed in a negative direction, which indicates a negative interaction, consistent with the prediction of the polarization hypothesis. Dissenting justices direct their most negative, hostile language against their ideological opponents. Moreover, these trends are robust to the introduction of individual justice dummy variables in Column C, which means that they are not simply a function of the idiosyncratic preferences of particular justices. While the particular forms of language analyzed

[13] Chief Justice John Roberts was excluded as the baseline category.

in the previous section did largely reflect the preferences of particular justices, the tone of the opinion is apparently driven by more systematic underlying factors.

Two other trends in the data are worth noting. First, the emotional tone of majority opinions is lower in salient cases (CASE SALIENCE). This finding is also robust to the introduction of the justice dummy variables, but there is no statistically significant interaction between salience and whether an opinion is a concurrence or a dissent. The latter findings are not reported in the table because the interaction terms were not significant. Second, the data indicate that conservative justices are more likely to write opinions with a more negative emotional tone. Four of the justice dummy variables are statistically significant and all signed negatively: SCALIA, THOMAS, BREYER, and ALITO. While Justice Breyer is generally associated with the liberal wing of the Court, his voting record is at the Court's center, so in general one can conclude that much of the negative rhetoric on the Court is coming from justices to the right of the Court's median.

Implications

The findings of this study provide some support for both the polarization and the institutional maintenance models, but overall the support for the polarization model is stronger. While it is true that in recent years justices have directed particular form of negative rhetoric against close colleagues, presumably as a shaming mechanism, its use appears to reflect the individual preferences of particular justices. The analysis of the phrase "I dissent" is a case in point. Although in recent years majority opinion writers at the center of the Court, such as Kennedy and O'Connor, were targeted by this rhetoric, the same trends did not obtain before 1991, when justices were more likely to employ the phrase "I dissent" to signal strong disagreement with justices who were ideologically distant from them. It would seem, then, that the use of particular words and phrases is idiosyncratic. Different justices will make rhetorical choices that suit their

tastes, and justices will sometimes direct certain forms of rhetoric against close colleagues as a shaming mechanism, but the trends are not systematic and therefore do not seem to have lasting institutional implications for the Court. If Justice Scalia was particularly negative towards Kennedy and Roberts during his final year on the Court, this has not been the usual dynamic.

The more typical pattern is for the tone of opinions to decline in salient cases and when dissenting opinion writers are ideologically distant from majority opinion writers. That is to say, ideological polarization is the more stable underlying predictor of whether the Court's rhetoric has a negative emotional tone. This negativity is particularly pronounced among the conservative members of the Court but is not limited to them. The effects of ideological polarization hold up even after taking the behavior of individual justices into account. That is to say, all of the justices on the Roberts Court have had a tendency to produce opinions with a more negative tone when they are responding to justices with whom they most strongly disagree.

What are the consequences of the Court's use of negative rhetoric? Subsequent research would do well to investigate the effects on coalition building, as well as the Court's legitimacy (Kuhn 2012). It might also be worthwhile to investigate the effects of different types of rhetoric besides the particular phrase "I dissent." It should be noted that my focus on this one form of disrespectful rhetoric does not mean to imply that I think the justices take too seriously whether a dissent includes the word "respectfully." Instead, I present it as one example of discourteous rhetoric that justice use, and I assume that when opinions dispense with courtesy in this one way, they do so in other ways as well. The disrespectful dissent is therefore a useful proxy for identifying cases in which justices are using more forceful rhetoric in their opinions. It could be that other words and phrases more closely capture the justices' displeasure and could be used as the foundation for future studies of opinion content. But it is also possible that, as the findings

here suggest, the use of particular words and phrases by the justices is too idiosyncratic, and the more fruitful approach will be to focus on an opinion's overall emotional tone.

Works Cited

Bond, Jon R., and Richard Fleisher, eds. 2000. *Polarized Politics: Congress and the President in a Partisan Era*. Washington, DC: CQ Press.

Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman, & Paul J. Wahlbeck. 2007. "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51: 890-905.

Brenner, Saul, and Joseph M. Whitmeyer. 2009. *Strategy on the United States Supreme Court.* New York: Cambridge University Press.

Carlson, Keith, Michael A. Livermore, & Daniel Rockmore. 2016. "A Quantitative Analysis of Writing Style on the U.S. Supreme Court." *Washington University Law Review* 93: 1461-1510.

Carrubba, Cliff, Barry Friedman, Andrew D. Martin, & Georg Vanberg. 2012. "Who Controls the Content of Supreme Court Opinions?" *American Journal of Political Science* 56: 400-412.

Clark, Tom S. 2009. "Measuring Ideological Polarization on the United States Supreme Court." *Political Research Quarterly* 62: 146-157.

Clark, Tom S., Jeffrey R. Lax, and Douglas Rice. 2015. "Measuring the Political Salience of Supreme Court Cases." *Journal of Law and Courts* 3: 37-65.

Clark, Tom S., & Benjamin Lauderdale. 2010. "Locating Supreme Court Opinions in Doctrine Space." *American Journal of Political Science* 54: 871- 890.

"Conversation with Ruth Bader Ginsburg." American Constitution Society. June 13, 2015. Available at http://www.c-span.org/video/?326578-1/conversation-supreme-court-justice-ruth-bader-ginsburg.

Cross, Frank B., & James W. Pennebaker. 2014. "The Language of the Roberts Court." *Michigan State Law Review* 2014: 853-894.

Epstein, Lee, & Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.

Epstein, Lee, and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York, NY: Oxford University Press.

Epstein, Lee, Jeffrey A. Segal, and Harold J. Spaeth. 2001. "The Norm of Consensus on the U.S. Supreme Court." *American Journal of Political Science* 45: 362-377.

Fiorina, Morris P., Samuel J. Abrams, and Jeremy C. Pope. 2006. *Culture War? The Myth of a Polarized America*. New York: Longman.

Fleisher, Richard, and Jon R. Bond. 2004. "The Shrinking Middle in the U.S. Congress." *British Journal of Political Science* 34: 429-451.

Gibson, James L., and Gregory A. Caldeira. 2011. "Has Legal Realism Damaged the Institutional Legitimacy of the U.S. Supreme Court?" *Law & Society Review* 45: 195-219.

Greenburg, Jan Crawford. 2007. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin Books.

Kravitz, David. 2015. "Scalia's Appalling Zingers." *The Washington Post*. August 1, 2015. A15.

Kuhn, David Paul. 2012. "The Incredible Polarization and Politicization of the Supreme Court." *The Atlantic*. June 29, 2012. Available at http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/.

Landes, William M., and Richard A. Posner. 2009. "Rational Judicial Behavior: A Statistical Study." *Journal of Legal Analysis* 1: 775-831.

Lane, Charles, and David Von Drehle. 2003. "Is Scalia Too Blunt to be Effective?" *The Washington Post*. October 17, 2003.

Maltzman, Forrest, James F. Spriggs, & Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York, NY: Cambridge University Press.

Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10: 134-153.

Morhaim, Dan. 2015. "Personal, Political Rants by the Supreme Court Suggest the Court Needs Reform." *The Baltimore Sun*. July 12, 2015. 23A.

Murphy, Bruce Allen. 2014. *Scalia: A Court of One*. New York: Simon & Schuster.

Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago, IL: University of Chicago Press.

Note. 2011. "From Consensus to Collegiality: The Origins of the 'Respectful' Dissent." *Harvard Law Review* 124: 1305-1326.

O'Brien, David M. 2014. *Storm Center: The Supreme Court in American Politics*. Tenth Edition. New York: W.W. Norton & Company.

Owens, Ryan J., & Justin P. Wedeking. 2011. "Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions." *Law & Society Review* 45: 1027-1061.

Pennebaker, J.W., R.J. Booth, R.L. Boyd, & M.E. Francis. 2015. *Linguistic Inquiry and Word Count: LIWC2015.* Austin, TX: Pennebaker Conglomerates (www.LIWC.net).

Perry, H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.

Schlesinger, Joseph A. 1985. "The New American Political Party." *American Political Science Review* 79: 1152-1169.

Segal Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York, NY: Cambridge University Press.

Spaeth, Harold J. 2011. *The Supreme Court Database*. Version 2011, Release 03. Available at http://scdb.wustl.edu/documentation.php?s=2.

Theriault, Sean M. 2013. *The Gingrich Senators: The Roots of Partisan Warfare in Congress*. New York: Oxford University Press.

Wahlbeck, Paul J., James F. Spriggs, and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court." *American Journal of Political Science* 42: 294-315.

Yarborough, Tinsley E. 2000. *The Rehnquist Court and the Constitution.* New York: Oxford University Press.

Cases Cited

Glossip v. Gross, 476 U.S. ___ (2015)

Gray v. Netherland, 518 U.S. 152 (1996)

Hein v. Freedom from Religion Foundation, 551 U.S. 587 (2007)

Herring v. United States, 555 U.S. 135 (2009)

King v. Burwell, 476 U.S. ___ (2015)

Obergefell v. Hodges 476 U.S. ___ (2015)

Security Services, Inc. v. Kmart Corp., 511 U.S. 431 (1994)

Table 1. Use of "I Dissent" by Dissenting Justices, by Majority Opinion Writer (Frequencies in Parentheses), 1981-2010

Dissenting Justices

Majority Opinion Writers	Brennan	White	Marshall	Burger	Blackmun	Powell	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Roberts	Alito
Brennan		20.6% (7)	1.3% (1)	100.0% (3)	3.2% (2)	12.9% (4)	11.9% (5)	0.0% (0)	26.7% (4)	9.8% (4)	0.0% (0)						
White	18.5% (12)		7.9% (6)	0.0% (0)	21.0% (13)	22.6% (7)	7.1% (3)	0.0% (0)	20.0% (3)	2.4% (1)	25.0% (3)	0.0% (0)	0.0% (0)				
Marshall	1.5% (1)	2.9% (1)		0.0% (0)	3.2% (2)	16.1% (5)	9.5% (4)	0.0% (0)	6.7% (1)	12.2% (5)	16.7% (2)	0.0% (0)					
Burger	6.1% (4)	5.9% (2)	5.3% (4)		3.2% (2)	6.5% (2)	9.5% (4)	0.0% (0)	0.0% (0)								
Blackmun	1.5% (1)	14.7% (5)	2.6% (2)	0.0% (0)		22.6% (7)	16.7% (7)	0.0% (0)	0.0% (0)	9.8% (4)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)			
Powell	9.2% (6)	5.9% (2)	11.8% (9)	0.0% (0)	8.1% (5)		2.4% (1)	0.0% (0)	0.0% (0)	0.0% (0)							
Rehnquist	15.4% (10)	5.9% (2)	35.5% (27)	0.0% (0)	16.1% (10)	0.0% (0)		0.0% (0)	0.0% (0)	9.8% (4)	0.0% (0)	0.0% (0)	0.0% (0)	14.3% (3)	13.0% (3)		
Stevens	13.9% (9)	20.6% (7)	7.9% (6)	0.0% (0)	1.6% (1)	3.2% (1)	19.1% (8)		13.3% (2)	17.1% (7)	25.0% (3)	0.0% (0)	0.0% (0)	14.3% (3)	4.4% (1)	0.0% (0)	0.0% (0)
O'Connor	24.6% (16)	14.7% (5)	10.5% (8)	0.0% (0)	21.0% (13)	9.7% (3)	11.9% (5)	50.0% (2)		2.4% (1)	8.3% (1)	0.0% (0)	0.0% (0)	4.8% (1)	17.4% (4)	0.0% (0)	
Scalia	6.2% (4)	2.9% (1)	4.0% (3)		9.7% (6)	6.5% (2)	0.0% (0)	0.0% (0)	6.7% (1)		8.3% (1)	0.0% (0)	0.0% (0)	19.1% (4)	13.0% (3)	0.0% (0)	0.0% (0)
Kennedy	3.1% (2)	2.9% (1)	13.2% (10)		8.1% (5)		4.7% (2)	50.0% (2)	6.7% (1)	22.0% (9)		0.0% (0)	0.0% (0)	28.6% (6)	21.7% (5)	100.0% (1)	0.0% (0)
Souter		0.0% (0)	0.0% (0)		0.0% (0)		0.0% (0)	0.0% (0)	0.0% (0)	7.3% (3)	0.0% (0)		33.3% (1)	0.0% (0)	13.0% (3)	0.0% (0)	100.0% (1)
Thomas		2.9% (1)			3.2% (2)		0.0% (0)	0.0% (0)	6.7% (1)	2.4% (1)	0.0% (0)	0.0% (0)		9.5% (2)	17.4% (4)	0.0% (0)	0.0% (0)
Ginsburg					1.6% (1)		7.1% (3)	0.0% (0)	0.0% (0)	2.4% (1)	0.0% (0)	0.0% (0)	66.7% (2)		0.0% (0)	0.0% (0)	0.0% (0)
Breyer							0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	16.7% (2)	0.0% (0)	0.0% (0)	0.0% (0)		0.0% (0)	0.0% (0)
Roberts								0.0% (0)		0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	4.8% (1)	0.0% (0)		0.0% (0)
Alito								0.0% (0)		0.0% (0)	0.0% (0)		0.0% (0)	4.8% (1)	0.0% (0)	0.0% (0)	
	100.0% (65)	100.0% (34)	100.0% (76)	100.0% (3)	100.0% (62)	100.0% (31)	100.0% (42)	100.0% (4)	100.0% (15)	100.0% (41)	100.0% (12)	100.0% (0)	100.0% (3)	100.0% (21)	100.0% (23)	100.0% (1)	100.0% (1)

Note: Results are not reported for Sotomayor and Kagan because they served for only a handful of years in 1981-2010, but their data are factored into the column totals. Cells are blank when justices did not serve on the Court together during the years under analysis.

Table 2. Alternative Forms of Dissenting Rhetoric

Type of Dissent	Frequency	Percent
"I dissent."	467	18.3%
"I respectfully dissent."	1,222	47.9%
Other	862	33.8%
TOTAL	2,522	100.0%

Note: The "other" category includes, most frequently, circumstances in which justices do not formally state that they are dissenting but that they "would" decide the cases in different manners. In a small handful of cases, justices in this category also might have written, "I must dissent" or "I therefore dissent," among other variants.

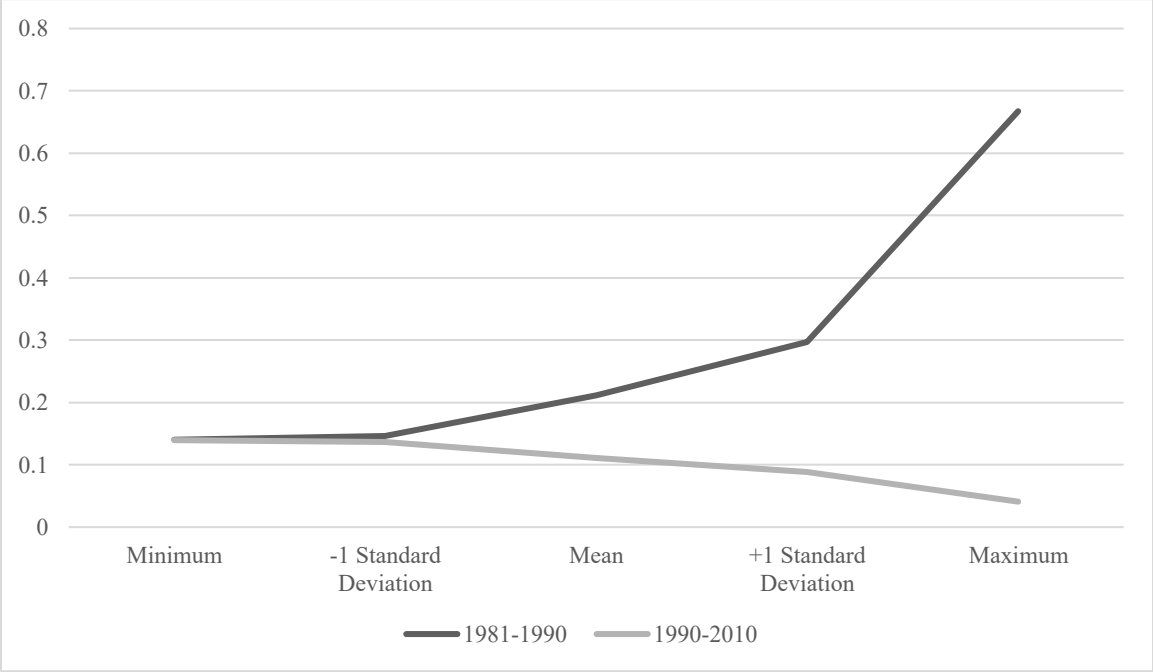
Table 3. Logit Model of the Use of "I Dissent" in Dissenting Opinions, 1981-2010

	Model A (1981-1990)	Model B (1991-2010)	Model C (all years)	Model D (alt. ideol.)	Model E (w. dummies)
OPINION WRITER IDEOLOGICAL DISTANCE	0.228***	-0.122*	0.224***		0.081
	(0.038)	(0.051)	(0.038)		(0.052)
COALITION IDEOLOGICAL DISTANCE				0.345***	
				(0.049)	
POST 1990			0.324	0.604*	0.037
			(0.284)	(0.301)	(0.330)
(POST 1990 * OPINION WRITER IDEOLOGICAL DISTANCE)			-0.349***		-0.095
			(0.063)		(0.081)
(POST 1990 * COALITION IDEOLOGICAL DISTANCE)				-0.474***	
				(0.074)	
NUMBER OF DISSENTING VOTES	0.162*	0.067	0.126*	0.125*	0.066
	(0.074)	(0.090)	(0.057)	(0.058)	(0.067)
CASE SALIENCE	-0.013	0.104	0.040	0.040	0.047
	(0.104)	(0.132)	(0.081)	(0.081)	(0.086)
FORMAL ALTERATION OF PRECEDENT	0.175	0.411	0.247	0.249	0.432
	(0.354)	(0.384)	(0.273)	(0.272)	(0.296)
DECLARATION OF UNCONSTITUTIONALITY	-0.126	0.027	-0.030	0.017	0.175
	(0.294)	(0.285)	(0.208)	(0.211)	(0.244)
CONSTITUTIONAL CASE	0.158	0.516*	0.291*	0.252*	0.229
	(0.155)	(0.212)	(0.125)	(0.128)	(0.138)
PAST RHETORIC (1-YEAR)	-0.442	1.765	1.213	1.165	1.070
	(1.587)	(0.939)	(0.837)	(0.854)	(0.918)
constant	-2.208***	-2.509***	-2.779***	-3.036***	-2.603***
	(0.636)	(0.371)	(0.394)	(0.406)	(0.483)
Wald chi2	41.520***	23.220***	139.250***	171.380***	228.710
pseudo R2	0.041	0.029	0.078	0.088	0.217
N	1000	1116	2116	2116	2116

*$p < 0.05$; ** $p < 0.01$; *** $p < 0.001$

Note: Standard Errors are in parentheses. Model A includes data from 1981-1990; Model B covers the period 1991-2010; Model C includes all year, including the interaction term; Model D tests an alternative measure of ideology, including the same interaction term; and Model E is robust to the inclusion of individual justice dummy variables, the coefficients for which are not reported but are available on request.

Figure 1. Probability of Using "I Dissent," at Varying Levels of Ideological Distance Between a Dissenting Justice and the Majority Opinion Writer, by Time Period



Note: Values of other variables are set at their means.

Table 4. Average Tone of Opinions on the Roberts Court, 2005-2015

Opinion Type	Emotional Tone (LIWC)
Majority	31.8
Concurrence	33.9
Dissent	30.0

Table 5. OLS Regression Model of the Tone of Supreme Court Opinions, 2005-2015

	Model A	Model B (w. interaction)	Model D (w. dummies)
DISSENTED	3.869**	6.291***	6.380***
	(1.473)	(1.921)	(1.931)
CONCURRED	4.677**	1.901	2.579
	(1.515)	(1.809)	(1.838)
OPINION WRITER IDEOLOGICAL	-0.271	0.746	0.719
DISTANCE	(0.429)	(0.587)	(0.591)
DISSENTED * OPINION WRITER		-1.875*	-1.786*
IDEOLOGICAL DISTANCE		(0.828)	(0.827)
NUMBER OF DISSENTING VOTES	-0.465	-0.392	-0.398
	(0.439)	(0.437)	(0.433)
CASE SALIENCE	-0.974**	-0.960**	-1.001**
	(0.354)	(0.352)	(0.353)
FORMAL ALTERATION OF	3.925	3.931	3.999
PRECEDENT	(4.373)	(4.416)	(4.415)
DECLARATION OF	2.601	2.649	2.435
UNCONSTITUTIONALITY	(2.684)	(2.663)	(2.665)
TERM	0.241	0.238	0.367
	0.256	0.254	0.260
STEVENS			-1.786
			(1.143)
O'CONNOR			13.630
			(13.068)
SCALIA			-5.417**
			(1.912)
KENNEDY			-2.971
			(2.045)
SOUTER			-1.864
			(2.803)
THOMAS			-4.977*
			(1.965)
GINSBURG			-3.412
			(2.145)
BREYER			-4.297*
			(1.924)
ALITO			-6.430**
			(2.038)
SOTOMAYOR			-4.011
			(2.318)
KAGAN			-4.094
			(2.923)
constant	-451.198	-445.442	-701.679
	(514.562)	(511.252)	(521.706)
F	4.540***	4.250***	3.010***
R^2	0.022	0.026	0.035
*$p < 0.05$; ** $p < 0.01$; *** $p < 0.001$			N = 1,645