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Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?

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Article

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Before the U.S. Supreme Court's 1988 Term Justice Harry Blackmun was asked whether he believed *Roe v. Wade*[1] would be overturned. His outlook for the future of *Roe* was pessimistic: "The next question is, '[w]ill *Roe v. Wade* go down the drain?' . . . I think there's a very distinct possibility that it will, this term. You can count the votes."[2] When the Court added *Webster v. Reproductive Health Services*[3] to its docket Blackmun's prediction seemed prescient. He was only partially right, however; while the Court used *Webster* to enhance states' ability to restrict abortions, it did not overrule *Roe*.[4]

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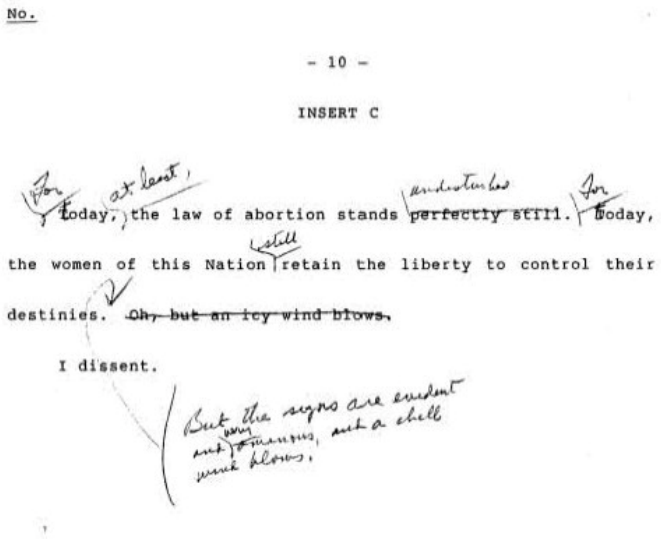
1. 410 U.S. 113 (1973).

2. Associated Press, *Justice Fears for* Roe *Ruling*, N.Y. TIMES, Sept. 14, 1988, at A24.

3. 492 U.S. 490 (1989).

4. *Id.* at 491–523.

Certainly, Justice Blackmun was relieved that *Roe* survived another day, but the Court's decision still troubled him enough that he authored a dissenting opinion.[5] To make his reservations clear, when the Court's decision was announced on July 3, 1989, Blackmun took the relatively extraordinary step of announcing an emotional dissent from the bench.[6] For ten minutes he spoke in a tone described as "grave, angry, and distressed."[7] Linda Greenhouse, the Supreme Court correspondent for the *New York Times*, wrote the next day that Blackmun's tone was "weary and sorrowful."[8] This is perhaps because he did not go into this dissent lightly. Rather, Blackmun seems to have agonized over the perfect wording. Figure 1 depicts the draft of his final three sentences—perhaps the most famous words spoken in a dissent from the bench in the past twenty-five years.[9]



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~~Today~~, the law of abortion stands ~~perfectly still~~. ~~Today~~, the women of this Nation retain the liberty to control their destinies. ~~Oh, but an icy wind blows.~~

I dissent.

Figure 1: Blackmun's Draft Dissent in *Webster*.

5. *Id.* at 537 (Blackmun, J., dissenting).

6. *Id.* at 490; EDWARD LAZARUS, CLOSED CHAMBERS 418–19 (1998).

7. LAZARUS, *supra* note 6, at 418.

8. Linda Greenhouse, *Supreme Court, 5-4, Narrowing* Roe v. Wade*, Upholds Sharp State Limits on Abortion*, N.Y. TIMES, July 4, 1989, at A1.

9. Harry Blackmun, Insert C (date unknown) (unpublished draft dissent to *Roe v. Wade*, on file with the Library of Congress) (Figure 1).

There are two notable features of Blackmun's conclusions. First, he added the word "for" at the beginning of the first two sentences to emphasize that, in his eyes, *Roe's* days were clearly numbered. Second, he indicated the precedent's demise would be harsh, and he looked for the right words to make his point. Originally he typed, "Oh, but an icy wind blows."[10] However, he inserted changes below the text that were ultimately what he proclaimed: "But the signs are evident and very ominous, and a chill wind blows."[11] As he gave this dissent from the bench Blackmun certainly appears to have been cognizant that his words would have a clear effect on the public's view of *Webster*. As such, his dismay was publicly evident.

Using Blackmun's behavior as a launching point, this Article argues he read his dissent because of his ideological discord with the majority, because of the legal and policy salience of the Court's decision, and because of his concern that *Roe* would soon be overturned. The question is whether Blackmun's behavior was specific to *Webster* or whether there is something systematic about his behavior across Justices, across Courts, and across time. In other words, are there empirical regularities to the conditions under which Justices will announce their separate opinions from the bench or, alternatively, is it simply a random phenomenon?

The answer, laid out in the remainder of this Article, is that important and theoretically motivated patterns exist to explain Justices' decisions to announce separate opinions from the bench. The empirical results demonstrate the decision to announce is a function of ideological, case-specific, and potentially strategic considerations. The remainder of this Article proceeds as follows. Part I explores additional examples of publicly read dissents. Part II puts forth the theoretical argument and provides hypotheses based on this argument. Part III describes the data used to test these hypotheses, and Part IV presents the results of this analysis. This Article concludes with a discussion of whether announcing dissents from the bench can have an effect on legal policy and what these find-

10. *Id.*

11. *Id.* At least one citizen was unhappy with Blackmun's public argument. Indeed, on July 6, 1989, Gerald Foley wrote to the Justice. His letter was one sentence long: "Mr. Justice Blackmun: Concentrate on rendering decisions and leave the weather reports to the meteorologists. Thank You." To this, Blackmun wrote on the bottom of the note, "a chill wind blows!" Letter from Gerald Foley to Harry Blackmun, Assoc. Justice, U.S. Supreme Court (July 7, 1989) (on file with the Library of Congress and with the author).

ings mean for our understanding of Supreme Court decision making and the Justices' relationships with one another.

I. READING SEPARATE OPINIONS FROM THE BENCH

Justice Blackmun's public dissent in *Webster* is certainly interesting but is not unique; many other examples—some tempered, some terse, some extremely long, and some that pull no punches—demonstrate the importance of this behavior. This Part discusses some of the most famous of these phenomena from the twentieth century.

When he took over the Chief Justiceship in 2005 John Roberts hoped to achieve some measure of collegiality on a Court that had become increasingly divided since 2000.[12] Initially, the Justices' propensity for consensus suggested Roberts might have been successful.[13] Towards the end of the 2005 Term and into the start of the 2006 Term, however, his hopes began to unravel.[14] In fact, more than one-third of all cases decided during the 2006 Term came down to a 5-4 vote—a modern record.[15] The reading of dissents from the bench demonstrates disharmony on the Court—at least over the outcome of specific cases. In fact, the liberal wing of the Roberts Court appeared to become increasingly upset with their colleagues' decisions. As such, each Justice in this typical voting bloc read dissents from the bench during the 2006 Term.[16]

In *Ledbetter v. Goodyear Tire & Rubber Co.*,[17] Justice Ruth Bader Ginsburg announced her dissent from the bench, the second time in two months she took such a tack in cases involving women's rights.[18] While it was clear that the actions of her

12. Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC, Jan.–Feb. 2007, at 104, 105.

13. Linda Greenhouse, *Roberts Dissent Reveals Strain Beneath Court's Placid Surface*, N.Y. TIMES, Mar. 23, 2006, at A1.

14. *See id.*; Linda Greenhouse, *Roberts Is at Court's Helm, but He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, at A1.

15. *See* Anthony Lewis, *The Court: How 'So Few Have So Quickly Changed So Much,'* N.Y. REV. BOOKS, Dec. 20, 2007, at 58, 58.

16. Editorial, *A Disappointing Term: President Bush's Nominees Give the Supreme Court an Activist Nudge to the Right*, WASH. POST, July 3, 2007, at A14.

17. 127 S. Ct. 2162 (2007).

18. *See* Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1. Ginsburg's dissent was approximately seven minutes long. She began by strongly admonishing the majority coalition for its decision: "In our view the Court does not comprehend or is indifferent to the insidious way in which women can be victims of pay discrimination." Audio

colleagues angered Ginsburg, Robert Barnes writes that, "Ginsburg's voice was as precise and emotionless as if she were reading a banking decision, but the words were stinging."[19] In this public argument, she explicitly asked Congress to, "correct this Court's parsimonious reading of Title VII."[20] Justice Ginsburg announced an equally angry dissent in *Gonzales v. Carhart*.[21]

Richard Lazarus argues that announcing a dissent from the bench is significant for a Justice; as he puts it, "[i]t's a different order of magnitude of dissent."[22] For Justice Ginsburg, Lazarus suggests her dissents "may be signifying an increasing frustration [with the Court's decisions]."[23] One other notable announced dissent from the liberal side of the Court came in *Parents Involved in Community Schools v. Seattle School District No. 1*.[24] In open court Justice Breyer argued that, "[i]t is not often in the law that so few have so quickly changed so much."[25] Like Ginsburg's dissents, Breyer's indicates a clear dissatisfaction with the direction of the Court's legal policy choices.

The reading of dissents from the bench on the Roberts Court is not relegated to the moderate or liberal Justices, however. Indeed, during the 2005 Term Justices Antonin Scalia and Clarence Thomas read angry dissents in *Hamdan v. Rumsfeld*.[26] As Tony Mauro and Jason McLure point out, "[f]or 30 minutes, spectators in the Court chamber saw a dramatic display of tensions between the moderate and conservative wings

recording: Opinion Announcement in Ledbetter v. Goodyear Tire & Rubber Co., Inc. (May 29, 2007), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion/, at 4:00 min.

19. Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1.

20. Audio recording, *supra* note 18, at 10:52 min.

21. 127 S. Ct. 1610 (2007); Audio recording: Opinion Announcement in Gonzalez v. Carhart (Apr. 18, 2007), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_380/opinion/, at 7:27 min.

22. Barnes, *supra* note 19.

23. *Id.*

24. 127 S. Ct. 2738 (2007).

25. Audio recording: Opinion Announcement in Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (June 28, 2007), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion/, at 32:53 min.

26. 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 128 S. Ct. 2229 (2008).

of the Court."[27] Justice Thomas's dissent began by noting that he had never before taken such a tack: "In 15 terms on this Court, I have never read a dissent from the Bench; but today's requires that I do so."[28] When it was Scalia's turn, he made an equally impassioned argument and closed by stating, "I vigorously dissent."[29]

One year before *Hamdan*, Justice Scalia was equally caustic in his announced *Roper v. Simmons* dissent.[30] Specifically, he was angry when the Court ruled that the death penalty for those who committed murder while under eighteen years of age was cruel and unusual punishment.[31] As Jan Crawford Green-

27. Tony Mauro & Jason McLure, *Top Court Invalidates Gitmo Tribunals*, N.J. L.J., July 3, 2006, at 11, 11.

28. Audio recording: Opinion Announcement in Hamdan v. Rumsfeld (June 29, 2006), *available at* http://www.oyez.org/cases/2000-2009/2005/2005_05_184/opinion/, at 24:26 min. Thomas continued:

> A mere ten days ago, each member of today's plurality deferred to the Army Corps of Engineers' highly questionable determination that storm drains, roadside ditches, and desert washes are navigable waters or, rather, waters of the United States. Today, when there is much more at stake than ephemeral pools of water, the plurality and the Court repeatedly refuse to defer to the wartime judgment of the President himself. The Court's determination that it is qualified to pass on the military necessity of the Commander in Chief's decision to employ a particular form of force against our enemies is unprecedented, and it is unsupported by any authoritative source of law, and is specifically refuted by every relevant historical example. Accordingly, I respectfully dissent.

Id. at 24:36 min.

29. As Scalia put it:

> Our past practice has always been to err on the side of caution and deference to the Executive in cases involving the prosecution of warfare and judgments about the appropriate use of military power, including the power to try enemy captives. Today, that edifice of caution and deference comes crashing down. The Court takes on a new role as active manager of the details of military conflicts. We bring neither lawful jurisdiction nor competence to the performance of this role. For all these reasons, I vigorously dissent.

Id. at 28:33 min.

30. 543 U.S. 551, 607 (2005) (Scalia, J., dissenting).

31. Justice Scalia's announcement began angrily:

> Today the Court announces that the meaning of the Constitution has changed in the fifteen years since we decided [*Stanford v. Kentucky*, 492 U.S. 361 (1989)], which held that the Eighth Amendment does not prohibit capital punishment for offenders who committed crimes after the age of sixteen but under the age of eighteen. The Court holds, mind you, not that our decision fifteen years ago was wrong, but that our Constitution's meaning has changed. It reaches this implausible result by purporting to advert to [']the evolving standards of decency['] of our national society. It finds that a national consensus that could not be perceived in our people's laws barely fifteen

burg noted, "Justice Scalia again forcefully and in quite harsh language at times [said] that Justice Kennedy was making a mockery of the Constitution, ignoring the wishes of the citizens of the United States, and paying attention to the views of foreigners."[32]

Certainly the Roberts Court has had its share of fireworks when the Justices announce opinions, dissents, and concurrences in open Court. But other Courts, even those without the ideological divisions of the recent years, have had equally interesting announcement days. Indeed, while Epstein et al. demonstrate that, prior to roughly 1940, there was a norm by which Justices did not publicly dissent either orally or in writing, such public displays occurred on occasion.[33] For instance, when the Court upheld a decision by President Franklin Roosevelt taking the country off the gold standard, Justice McReynolds declared from the bench that, "[t]he Constitution, as we have known it, is gone."[34] Two years later McReynolds fired another oral salvo when the Court upheld the social security unemployment tax; specifically, he argued that the union of states was being "destroyed."[35]

Even after the practice of reading public dissents was strongly discouraged by Chief Justice Burger, some Justices, like Potter Stewart, continued the practice when deemed appropriate.[36] In his tribute to Justice Stewart, Laurence Tribe

> years ago now solidly exists. That is so, the Court says, because since *Stanford*, four states have changed their laws to forbid execution of under-eighteen offenders. Justice Kennedy said five states, one of those five did not change its laws, a court changed the laws, a court held that it was unconstitutional, in other words, if there is any change in consensus it is the consensus of judges not of the people. One wonders whether those four states would even have changed their laws had they known that this Court, by a stroke of a pen, would make the change irrevocable.

Audio recording: Opinion Announcement in Roper v. Simmons (Mar. 1, 2005), *available at* http://www.oyez.org/cases/2000-2009/2004/2004_03_633/opinion/, at 9:49 min.

32. *NewsHour with Jim Lehrer: Juvenile Death Penalty* (PBS television broadcast Mar. 1, 2005), *transcript available at* http://www.pbs.org/newshour/bb/law/jan-june05/juvenile_3-1.html.

33. *See* Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 362–63 (2001).

34. *See* Proceedings in the Supreme Court of the United States in Memory of Mr. Justice McReynolds (Mar. 31, 1948), *in* 334 U.S. v, x (1948).

35. *See M'Reynolds Dies; Court Dissenter*, N.Y. TIMES, Aug. 26, 1946, at 23.

36. *See* Laurence H. Tribe, *Justice Stewart: A Tale of Two Portraits*, 95 YALE L.J. 1328, 1331 (1986).

argues that "[his] firm conviction that the republic deserves an explanation of where its Supreme Court Justices stand on an issue—and why— manifested itself in his policy of reading his dissents from the bench."[37] Additional evidence of Stewart's up-front approach in highly salient cases include his majority opinion in *Katz v. United States*[38] (prior to the Burger Court) and his concurrence in *Furman v. Georgia*[39] (during the Burger Court) in which the Justice's avoidance of "turgid prose" was on full display.[40]

Finally, timing affects opinion announcements as well. Figure 2 shows a memorandum in which Justice Blackmun's clerk suggested that announcing his dissent in *Bowers v. Hardwick*[41] on a Friday was a bad idea because it would be ignored during the weekend-long news cycle.[42] Thus, she advised him to push for the announcement to come down on the following Monday.[43] The Chief Justice agreed to Justice Blackmun's request.[44]

37. *Id.*

38. 389 U.S. 347, 347–51 (1967) ("For the Fourth Amendment protects people, not places.").

39. 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

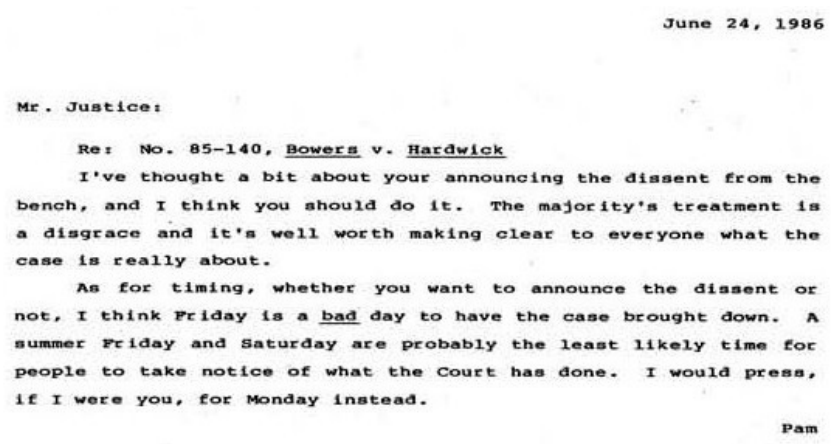
40. Tribe, *supra* note 36.

41. 478 U.S. 186 (1986).

42. Memorandum from Pamela Karlan, Law Clerk, to Harry Blackmun, Assoc. Justice, U.S. Supreme Court (June 24, 1986) (on file with the Library of Congress) (Figure 2).

43. *Id.*

44. *See Bowers*, 478 U.S. at 186 (noting that the case was decided on Monday, June 30, 1986). Although focusing on the timing of announcements may stem from political astuteness, reading a dissent from the bench can come at bad times as well—sometimes in very tragic ways. Indeed, former Chief Justice Rehnquist points out that on April 22, 1946, while announcing a dissent from the bench, Chief Justice Stone pitched forward, felled by a stroke, and died later that night. William H. Rehnquist, Chief Justice of the U.S. Supreme Court, Remarks at Duke University School of Law, as part of the My Life in the Law Series (Apr. 13, 2002), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-13-02.html.



June 24, 1986

Mr. Justice:

Re: No. 85-140, Bowers v. Hardwick

I've thought a bit about your announcing the dissent from the bench, and I think you should do it. The majority's treatment is a disgrace and it's well worth making clear to everyone what the case is really about.

As for timing, whether you want to announce the dissent or not, I think Friday is a bad day to have the case brought down. A summer Friday and Saturday are probably the least likely time for people to take notice of what the Court has done. I would press, if I were you, for Monday instead.

Pam

Figure 2: Memo Concerning Timing of Opinion Announcement in *Bowers*.

II. WHAT EXPLAINS ANNOUNCED DISSENTS FROM THE BENCH?

The Introduction and the previous Part indicate that Justices can and do announce separate opinions from the bench—even when Court norms suggest taking such action should be rare. Why would Justices ever take such a tack? Because scholars have not written specifically on the decision to orally dissent, this Article turns to analyses of other behaviors for clues as to why they would engage in this behavior. This Part considers the most relevant of this small but rich literature, with a clear focus on dissenting behavior more generally.

Announcing a dissent or concurrence orally is not the only means by which Justices can "go public" when they are dissatisfied with decisions their colleagues make (at any stage of the decision-making process). For example, when a Justice publishes a dissent from the denial of certiorari, she publicly expresses her disapproval of the Court's decision not to review a case—an action that is not taken lightly.[45] These dissents may play two separate, but equally important roles. First, they provide an avenue through which a Justice may communicate with external actors.[46] Indeed, Justices may wish to comment on a lower court's decision or to relay information to litigants regarding strategies for getting similar cases accepted in the future. Second, a dissent from denial may be part of the Court's

45. *See* Tribe, *supra* note 36, at 1330–31.

46. Lee Epstein et al., Discerning the Goals of U.S. Supreme Court Justices (unpublished manuscript, on file with the author).

internal bargaining process.[47] That is, a Justice may use such a dissent to indicate her resolve on a matter or to boost the credibility of future threats to go public. Regardless of the intended audience, going public through dissents from denial of certiorari serves key purposes for the Justices. At the same time, however, doing so also breaks a norm of behavior on the Court.[48]

A particularly poignant example is that sometimes Justices even threaten to publicly discuss internal Court procedures with which they disagree. Justice Douglas's reaction to Chief Justice Burger's request for reargument in *Roe v. Wade* illustrates this point.[49] When Burger asked for this course of action, Douglas was incensed and threatened to make public a dissent that told "what is happening to us and the tragedy it entails."[50] He was particularly upset because the Court had a majority and he believed the Chief wanted to hear reargruments in part to procure the votes of Justices Powell and Rehnquist—the two newest members of the Court.[51] Thus, Douglas felt the Chief's plan "dilute[d] the integrity of the Court and ma[de] the decisions here depend on the manipulative skills of [the] Chief Justice."[52] Ultimately, we believe announcing opinions from the bench is similar to Justice Douglas's behavior in *Roe* and to the decision to dissent from denial of certiorari. That is, each behavior breaks a collegial norm on the Court, and is therefore not taken lightly by the Justices choosing such a course of action.

The remainder of this Part focuses on the literature on dissenting behavior to provide us with insight into announced opinions; these insights are presented as a series of hypotheses.

Scholars provide three primary explanations for this behavior: ideological affinity, strategic factors, and institutional context.[53] First, and most fundamentally, the decision to dissent or concur stems from a disagreement over law and policy preferences.[54] This may be because a Justice is unhappy with the precedent set in a case, or because she believes existing legal

47. *Id.*

48. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 59 (1998).

49. LAZARUS, *supra* note 6, at 354.

50. *Id.*

51. *Id.*

52. *Id.* For a discussion of when the Court is likely to hear reargruments, see Valerie Hoekstra & Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Reargruments*, 56 POL. RES. Q. 351, 353–57 (2003).

53. *E.g.*, Paul J. Wahlbeck et al., *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 AM. POL. Q. 488, 494 (1999).

54. *Id.* at 494–95.

doctrine is being compromised by the majority's policy choice. Therefore, as Wahlbeck, Spriggs, and Maltzman argue, a Justice is more likely to write separately when she is ideologically distant from her colleagues. Furthermore, the likelihood of ideological disagreement is increased by cases that deal with multiple issues.[55]

Second, Wahlbeck et al. argue that the decision to write a separate opinion is not simply a function of policy preferences.[56] Rather, the decision may include a variety of strategic considerations.[57] For instance, Justices must consider how the implications of their actions will affect long-term relationships with their colleagues because the decision to write separately is affected by the collegial norms of the Court as well as by the relationship between each Justice and the majority opinion author.[58] In addition to considerations of collegiality, the size of the majority coalition may influence the decision to write separately.[59] The strength of the majority's coalition is related to its size, and as such, a "minimum winning" coalition may be more vulnerable to attack by members of the minority. Finally, separate opinions are more likely in highly salient cases because, in these cases, Justices are less likely to sweep disagreements under the rug in the name of consensus or collegiality.[60]

Beyond Justices' relationship with one another, they may consider the reactions of external actors when deciding to read a dissent from the bench. To support this argument, we draw on Hausegger and Baum's investigation of when Justices are likely to offer invitations to Congress to override the Court's decision by passing new legislation.[61] They find that such invi-

55. *Id.* at 495.

56. *Id.* at 496, 498.

57. *Id.* at 496–98. For a discussion of strategic choices more generally, see EPSTEIN & KNIGHT, *supra* note 48, at 56–98 (discussing whether Justices act strategically to advance their legal interpretations); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 62–72 (2000) (discussing the strategic methods that Justices use to influence their colleagues during the opinion-drafting process); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 198–210 (1964) (discussing how a Justice may use his power to further his policy objectives in the context of legal and political limitations). *See generally* Paul Brace & Melinda Gann Hall, *Integrated Models of Judicial Dissent*, 55 J. POL. 914 (1993) (discussing the impact that institutional rules and structures have on judicial voting).

58. *See* Wahlbeck et al., *supra* note 53, at 496.

59. *Id.* at 497.

60. *See id.* at 496–97.

61. *See* Lori Hausegger & Lawrence Baum, *Inviting Congressional Action:*

tations may be more likely to occur in areas of minimal interest to the Justices and in cases in which many amicus curiae briefs were filed on the losing side.[62] Their model focuses on invitations found in majority opinions; however, the effect of salience may also operate in the opposite way. More specifically, Hausseger and Baum's argument hinges on the fact that Justices signing onto the majority opinion are requesting Congress to take action on a decision with which they disagree.[63] An issue need not be of minimal interest when the minority expresses a desire for congressional assistance in overturning the Court's decision because the minority Justices are actually requesting Congress to overturn the decision made by the majority.

Beyond policy preferences and strategy, Justices' decisions may also be shaped by institutional factors such as holding the Chief Justiceship, being a new member of the Court, and workload considerations.[64] In other words, the institutional setting in which Justices operate may encourage or discourage the writing of a separate opinion. For example, while acclimating themselves to their roles as Supreme Court Justices, new Justices may be less likely to author separate opinions than would their more experienced counterparts.[65]

Ultimately, significant insight into why Justices may want to announce a decision orally may be gleaned from their decision to dissent generally, and from the relationship between the Court and external actors. These insights lead us to several specific hypotheses that focus on both the Court's internal and external context. The Court's internal dynamics are an important starting point to determine the effect that ideology plays in a Justice's decision to dissent from the bench. Given that we know Justices are more likely to issue a written dissent when they are ideologically distant from the majority opinion writer,[66] Justices will also likely be influenced in the same way when deciding whether to read the dissent in open court. This leads to the following hypothesis:

A Study of Supreme Court Motivations in Statutory Interpretation, 43 AM. J. POL. SCI. 162, 167–70 (1999).

62. *Id.* at 178–79.

63. *See id.* at 168.

64. *See* Brace & Hall, *supra* note 57, at 918–19; Wahlbeck et al., *supra* note 53, at 498–99.

65. Wahlbeck et al., *supra* note 53, at 498.

66. *Id.* at 495; *see also* Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1834 (2009).

Ideological Distance Hypothesis: The greater the ideological distance between a Justice and the majority opinion author, the more likely a Justice will announce a dissent from the bench.[67]

It is also known in the literature that Justices are less likely to write separately if they have cooperated more often with the majority opinion writer in the past.[68] This dynamic is also likely involved in the decision to dissent from the bench. Specifically, Justices who have joined more opinions with the majority opinion author are less likely to publicly rebuke the policy decision announced by the Court in the current case.[69] This dynamic yields our second hypothesis:

Collegiality Hypothesis: A dissenting Justice is less likely to publicly announce a dissent if she has cooperated with the majority opinion author more often in the past.

Next, when a case is particularly salient, the Justices' views are more intensely held, which means that they are more likely to hold fast to their policy positions stated at conference.[70] As such, it is intuitive that Justices would be more willing to air their differences in open court rather than simply in written form. Thus, it is expected that:

Salient Case Hypothesis: Justices are more likely to announce dissents from the bench in politically and legally salient cases.

The salience of a case may also be measured by how closely divided the Justices are over the outcome of a case. Such divisions indicate a clear-cut disagreement over the policy set by the majority.[71] In other words, a Justice may be more upset about a majority decision in these cases than when the Justices reach a unanimous or near unanimous decision. This leads to the hypothesis that:

Minimum Winning Coalition Hypothesis: A Justice is more likely to announce a dissent from the bench when the majority coalition is minimum winning, as in a 5-4 decision.

Beyond factors internal to the Court, external forces may influence the decision to announce from the bench. Indeed,

67. Wahlbeck et al., *supra* note 53, at 495.

68. *Id.* at 496, 500, 502–03.

69. *See id.* at 496, 507. Wahlbeck and his colleagues specifically argue that the more often the present majority-opinion writer has cooperated with a Justice in the past, the less likely the Justice will author a separate opinion in the present case. *Id.* at 502–03, 507.

70. *See id.* at 496–97.

71. *See id.* at 497, 503.

Hausseger and Baum argue that Justices may sometimes try to send signals to the elected branches about changing decisions with which they disagree.[72] We utilize this intuition and argue that Justices dissatisfied with a decision may announce a dissent in open court as a strong signal that Congress should alter the majority opinion. In particular, we hypothesize that:

Distance from Congress Hypothesis: The closer ideologically a Justice is to each house of Congress, the more likely he will read a dissent or concurrence from the bench.

III. DATA AND METHODS

To test our hypotheses, we use a newly constructed dataset consisting of all cases that had, as of August 2007, an opinion announcement audio file available on the Oyez website.[73] These announcement files, 1291 in total, cover cases decided between 1975 and 2006. There are some gaps and periods of undercoverage in the data. For example, between 1975 and 1984 data are available for only twenty of the Court's opinions. For cases decided in the last fifteen or so Terms, the data are more complete. Of the 501 orally argued, signed opinions or judgments of the Court released from 2000 to 2006, there are announcement files for all but seven (or about ninety-nine percent of all cases).[74]

Because this Article focuses on modeling the decision of each separate opinion author to announce his or her opinion in open court, the unit of analysis is the separate opinion (excluding all non-unanimous cases). Across the 684 unique, non-unanimously decided cases, we observe a total of 1078 separate opinions, forty of which (3.7 percent) were orally announced. The dependent variable is coded 1 if a Justice announces either a dissent or a concurrence in open court and 0 otherwise. Because this variable is dichotomous, the model invokes a logistic regression with robust standard errors.[75]

72. *See* Hausegger & Baum, *supra* note 61, at 168.

73. For these announcements and many other resources, navigate Oyez.com: U.S. Supreme Court Case Summaries, Oral Arguments & Multimedia, http://www.oyez.org/ (last visited April 14, 2009).

74. We are currently in the process of systematically examining what, if any, biases exist in the sampling of cases that we have. Ultimately, however, we are describing the population of currently available data. As more audio files are made available, we plan to include them in our dataset.

75. We do not distinguish between concurrences and dissents. Of the separate announced decisions, however, only six of them are concurrences. Our

The model includes a series of independent variables. First, *Majority Opinion Writer Distance* measures the ideological distance between the majority opinion writer and the Justice who writes separately in a case. We use the Judicial Common Space (JCS)[76] scores and calculate the absolute value of the difference between the two Justices. This variable ranges from 0.0009 to 1.36 with a standard deviation of 0.378.

We also include a variable to test for whether Justices who are more collegial with the majority opinion author are less likely to read from the bench. To capture this concept we follow Wahlbeck et al.[77] and include *Collegial Relationship*, measured as the percent of the time in the previous Term the separate opinion author joined a concurring or dissenting opinion written by the majority author in the current case. This variable ranges from 0 to 92.85 with a mean of 9.36.

To tap Case Salience, we include three variables. First, we measure the *Legal Salience* of a case with a categorical variable measured as 1 if a case formally alters precedent or declares an act of Congress unconstitutional, and 0 otherwise.[78] This variable takes on a value of 1 in approximately 10 percent of our observations.

Additionally, borrowing from social psychology literature, Black and Johnson suggest that the more salient a case is to the Justices, the more active they will be at oral arguments.[79] Thus, to measure the degree to which individual Justices find a case salient, we include the number of questions asked by the Court during the case's oral argument session. ***Number of Oral Argument Questions*** has a mean of 128 and a standard deviation of roughly forty-two questions.

Beyond these factors that focus on case salience, Hoekstra and Johnson argue a proxy for case controversy is whether the

results do not change substantively if we omit them from the model. Thus, our analysis largely focuses on the concept of dissenting from the bench.

76. *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306–07 (2007).

77. *See* Wahlbeck et al., *supra* note 53, at 500. The only difference between their measure and ours is that we do not purge this variable of "ideological compatibility." *Id.*

78. This follows common practice in the literature. *See, e.g.*, MALTZMAN ET AL., *supra* note 57, at 46.

79. Ryan C. Black & Timothy R. Johnson, Judicial Politics and the Search for the Holy Grail (of Salience) 10–11 (Jan. 4, 2008) (unpublished manuscript), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/2/1/2/4/6/pages212460/p212460-1.php.

final merits vote was decided by a single vote.[80] Accordingly, we code *Minimum Winning Vote* as 1 for all cases with a minimum winning coalition (for example, 5-4), and 0 for all other cases (for example, 7-2). In our sample, thirty-nine percent of the observations are coded as 1.

To test the two congressional hypotheses, we return to the JCS scores and compute the absolute value of the distance between the dissenting/concurring Justice and the median member of the Senate (*Senate Median Distance*) or the House (*House Median Distance*). As we note above, we expect both variables to be negatively related to public announcements. That is, when the Justice announcing hopes to be helped by Congress, she will make a public plea for the legislature to act.

Finally, we include three control variables that provide additional explanations for why Justices may announce dissents or concurrences from the bench. We code *Issue Expertise* as the number of separate opinions in a given value area written by a Justice since joining the Court, divided by the total number of cases from that value area that have come before the Court.[81] We also include *Freshman Separate Writer*, which is coded 1 if the Justice writing the separate opinion has not yet served two full terms on the bench.[82] Finally**,** *Multiple Legal Provisions* comes directly from Professor Harold Spaeth and is coded as 1 when an opinion deals with more than one legal provision.

IV. RESULTS

We report the parameter estimates for our model in Table 1. Overall, the model performs relatively well and provides an interesting glimpse of why Justices would take the unusual step of announcing their dissents in open Court.

80. Hoekstra & Johnson, *supra* note 52, at 354, 356.

81. To operationalize this variable, we take an approach similar to MALTZMAN ET AL., *supra* note 57, at 43–44.

82. *See* Wahlbeck et al., *supra* note 53, at 501. We also sought to control for whether a Justice is the Chief. However, in the data no Chief Justice issued a dissent from the bench. Thus, it cannot be included in the model, but it is suggestive that the Chief Justice, as leader of the Court, may be even more reluctant than Associate Justices to break norms of collegiality. *See, e.g.*, *id.* at 507.

Variable	Coefficient	Robust Standard Error
Distance Between Justice and Majority Opinion Writer	1.62*	.79
Collegiality Between Justice and Majority Opinion Writer	0.03	.02
Political Salience for Justice	0.01*	.00
Legal Salience for Justice	1.63*	.40
Minimum Winning Majority Coalition	1.54*	.37
Distance Between Justice and Senate Median	-3.82*	2.02
Distance Between Justice and House Median	2.99*	1.66
Expertise of Justice in Issue Area	-0.00	.01
Justice is New to the Court	0.03	.80
Case Complexity	-0.28	.49
Constant	-6.42*	.86
N	1078	

Table 1: Logistic Regression Results of a Justice's Decision to Announce a Dissent from the Bench.
* Denotes $p < 0.10$ (two-tailed test).

Consistent with our *Ideological Distance Hypothesis*, the data suggest that as the distance between the dissent author and the majority opinion author increases, so too does the likelihood that the dissenter will orally announce her opinion. The substantive magnitude of this result is visually illustrated in Figure 3, which portrays the predicted probability of announcement, conditional on three levels of ideological distance. When distance between the dissenting and majority writers is at its minimum (in substantive terms the pairing of Justices Ginsburg and Breyer in 2006), the predicted probability of an announcement is 0.003.[83] Moving to the median distance, or in substantive terms the pairing of Justices O'Connor and Stevens in 2000, the probability of observing an announcement increases to 0.007.[84] While still miniscule in overall size, it is a 133 percent increase in the likelihood (and is statistically significant at the 90 percent level). Finally, moving to the maximum

83. *See infra* fig.3.
84. *See infra* fig.3.

observed distance (pairing then-Associate Justice Rehnquist with Justice Marshall in 1984), the probability of an announcement grows to 0.02, which is significant even though the standard error bars overlap.[85] This is still a small probability, but given that Justices do not often dissent from the bench, this is a large effect.

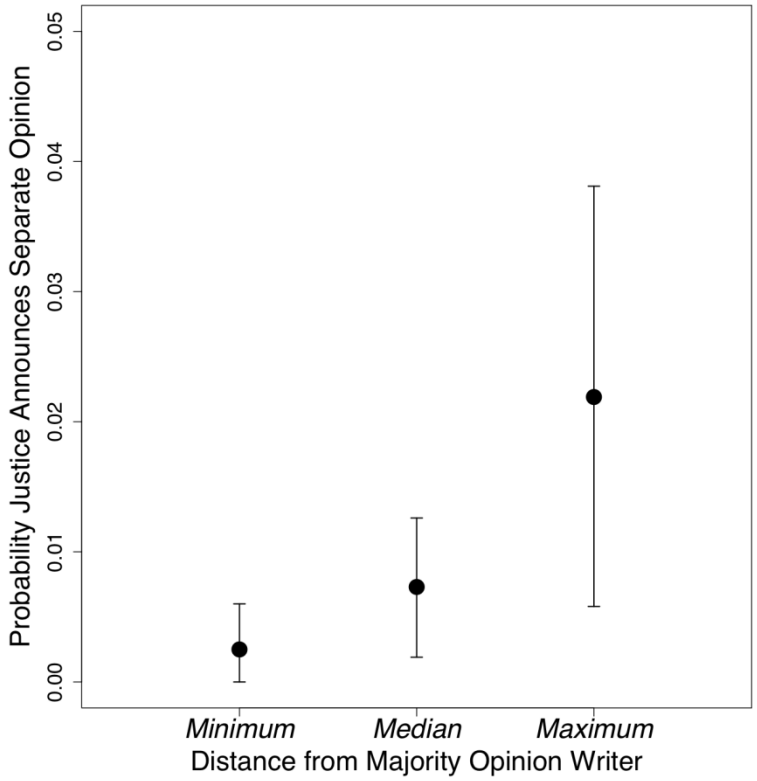


Figure 3: Effect of Majority Opinion Writer Distance on Probability of Announcement.

The data also lend limited support for the *Case Salience* hypothesis. While the model suggests that all four variables are significantly related to a Justice's decision to announce her dissent—in probing each variable's substantive significance—only *Number of Oral Argument Questions*, which is displayed in Figure 4, and *Minimum Winning Vote* have substantively mea-

85. *See infra* fig.3. The difference between the median and maximum is not statistically significant, but the difference between the minimum and maximum is statistically significant at the ninety percent level.

ningful results.

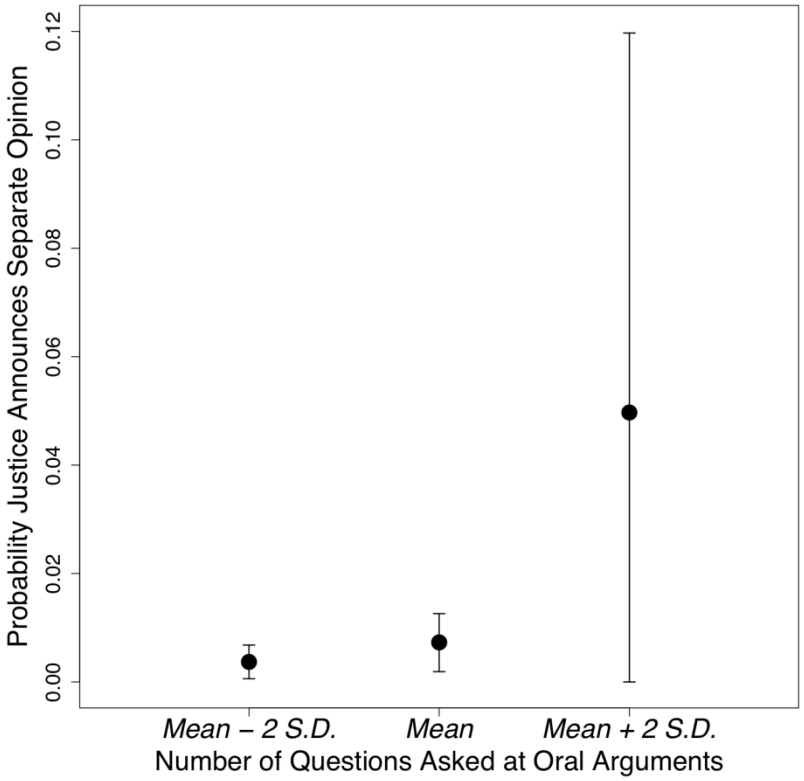


Figure 4: Effect of Number of Oral Argument Questions on Probability of Announcement.

Holding all other variables at their median values, a Justice has only 0.004 probability of announcing her opinion when there is relatively little activity at oral arguments.[86] For a case with an average amount of oral argument activity, the probability doubles to 0.008.[87] This difference is statistically significant at the 90 percent level. The move from an average case to a case with an above average amount of activity increases the probability of announcement to 0.01, but this change is not statistically distinguishable from either the mean or lower level of oral argument activity.[88]

In the context of the *Minimum Winning Vote* variable, the

86. *See supra* fig.4.
87. *See supra* fig.4.
88. *See supra* fig.4.

substantive results are stronger. Here, a Justice announces with a probability of only 0.007 when the decision is not a minimum-winning one.[89] In its minimum-winning counterpart, however, a Justice will announce with a probability of 0.03—more than a three-fold increase that is statistically significant at the 90 percent level.[90]

Our model provides interesting yet mixed results for our congressional hypotheses. Recall that we hypothesize that as the distance between a Justice and the chamber median decreases, the Justice should be more likely to announce her separate opinion from the bench. The negative and statistically significant coefficient on the *Senate Median Distance* variable supports this intuition, but, paradoxically, the finding for the *House Median Distance* variable runs contrary to our prediction. That is, while closeness *increases* the probability a Justice announces her dissent when looking at the Senate median, closeness *decreases* the probability that the same Justice announces when looking at the House median. Certainly, this is not a fully satisfying result for us, but it is consistent with extant work that demonstrates that Justices are more likely to be influenced by their ideological relationship with the Senate than with the House.[91]

Finally, we do not find support for our *Collegial Relationship* variable,[92] or any of the remaining control variables: *Multiple Legal Provisions*, *Freshman Separate Writer*, and *Issue Expertise*.

CONCLUSION

Clearly, Justices on the U.S. Supreme Court do not announce separate opinions from the bench often. However, they do so under certain conditions. When a Justice is ideologically

89. *See supra* fig.4.

90. *See supra* fig.4.

91. Timothy R. Johnson, *The Supreme Court, the Solicitor General, and the Separation of Powers*, 31 AM. POL. RES. 426, 438 (2003).

92. One might speculate that we have collinearity between our *Collegial Relationship* and *Majority Opinion Writer Distance* variables. There is a medium-sized negative relationship between the two variables (p = -0.51), but reestimating the model excluding *Collegial Relationship* does not affect our inferences about *Majority Opinion Writer Distance* (p = 0.10), nor does estimating the model without *Majority Opinion Writer Distance* alter our inference about *Collegial Relationship* (p = 0.72). We retain both variables, as this model specification makes the most sense both theoretically and statistically (by the Bayesian Information Criterion).

distant from the majority opinion writer, she is more likely to issue a dissent in open court. In addition, when their ideological predilections are more strongly held (in salient cases), they are more likely to speak out about a decision with which they disagree. Finally, a Justice's relationship with Congress affects whether she will act in this manner. We believe these findings tell us a good deal about how Justices interact with one another and with their political context.

We also know that Justices who announce dissents use tones that are also less pleasant and sadder than Justices who announce majority opinions from the bench. This is an intuitive finding, and is consistent with behavior exhibited by Justices Blackmun, Scalia, and others. Indeed, when a Justice is particularly unhappy with what his colleagues in the majority have done, and when a case is salient to that dissenting Justice, the level of vitriol should rise.

The final question, however, is to what end Justices announce their dissents. Do they do so only to blow off steam, or do they have another agenda? Hausseger and Baum demonstrate conditions under which majority coalitions will ask Congress to overturn a decision.[93] However, they do not show evidence of whether Congress reacts to these invitations. While our data do not allow us to systematically test this argument either, cases in which announced dissents may have led to action by Congress do exist.[94]

For example, in *Employment Division v. Smith* the Court held that a state law that prohibited the religious use of drugs did not violate the Free Exercise Clause of the First Amendment.[95] Congress responded with the Religious Freedom Restoration Act (RFRA) of 1993, which required a compelling government interest for the enactment of laws that substantially burdened religious freedom.[96] Holding that Congress overstepped its enforcement powers under section five of the Fourteenth Amendment, the Court then invalidated the RFRA in

93. *See* Hausegger & Baum, *supra* note 61, at 167–70, 178–79.

94. *See, e.g.*, Richard Leiby, *A Signature with the First Lady's Hand in It*, WASH. POST, Jan. 30, 2009, at C1 (explaining how Congress enacted the Lilly Ledbetter Fair Pay Act to overrule *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007)).

95. 494 U.S. 872, 881–82 (1990) (stating that the state statute was a neutral, generally applicable law that did not violate other constitutional protections), *superseded by statute* 42 U.S.C. §§ 2000bb et seq. (2000), *as recognized in* United States v. Lundquist, 932 F. Supp. 1237, 1239 (D. Or. 1996).

96. 42 U.S.C. §§ 2000bb et seq. (2000).

City of Boerne v. Flores.[97] Congress then tried to fix the RFRA through the Religious Land Use and Institutionalized Persons Act.[98] While we cannot draw a direct correlation between this new law and her actions, Justice O'Connor announced her dissent in *Boerne* from the bench. The key to her decision came in the conclusion of her five minute announcement: "[i]f the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and would allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty."[99] Our argument is that her public statement had at least something to do with why Congress passed such a law. As such, it is no wonder that Justices continue to use such a strategy when they think they will impact law and policy.

Our results lead to a more general conclusion: Justices will read opinions from the bench when they care a good deal about the issue and when they want to change the policy set by the majority. That is, they use their dissents to signal litigants and other actors (here we test the relationship with Congress) that the decision is a bad one and someone must act to change it. This is consistent with existing work and also adds to the concept that Justices act in calculated ways when rendering decisions.

Finally, announcing separate opinions from the bench offers Justices the ability to directly and publicly communicate their positions, conveying additional information through the manner in which they read these opinions.[100] In the end, this seems to be a rare, yet integral, part of how Justices decide cases and how they interact with one another and those beyond the Court.[101]

97. *See* 521 U.S. 507, 511, 516–17 (1997).

98. 42 U.S.C. § 2000cc-1 (2000).

99. Audio recording: Opinion Announcement in City of Boerne v. Flores (June 25, 1997), *available at* http://www.oyez.org/cases/1990-1999/1996/1996_95_2074/opinion/, at 8:44 min.

100. Beyond explaining what factors lead a Justice to issue a dissent in Court, we are interested in exploring what goes into such public statements. That is, are all dissents as caustic and as morose as Justice Blackmun's in *Webster v. Reproductive Health Services*, 492 U.S. 490, 537 (1989)? *See supra* text accompanying notes 5–10. We plan to investigate this topic in the future.

101. We note that our findings about signaling a Justice's views are consistent with Guinier's assessment of oral dissents as democracy-enhancing jurisprudence or demosprudence. *See* Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 47–56 (2008).