The Effect of Supreme Court Opinions: To Dissent or Not Dissent

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The judicial behavior of the Supreme Court Justices is one of the biggest factors that affects the law of the land on a daily basis. However, it is not only the majority opinions that cause long-lasting effects. This is argued because dissenting opinions also have long-lasting effects that help to shape the legal field of the country, even if they are not what leads to a ruling to be made. This research paper discusses the several different ways that dissents can be strong and effective, varying from the way that they are written, to the way that they are presented, and even depending on how many or how few justices decide to dissent. This thesis utilizes case studies to examine the significance of dissenting opinions on future rulings of the Supreme Court and how these opinions can cause the overturning of rulings of cases from the past. The ultimate goal of this thesis is to analyze Supreme Court opinions, specifically dissenting ones, how certain factors can help strengthen dissenting opinions and how dissenting opinions can even strengthen or weaken the image of a Supreme Court Justice. Finally, the results of this study yield that dissenting opinions are actually the strongest opinions made by the Supreme Court. Therefore, the more consideration that a Supreme Court Justice puts towards their dissenting opinion means the higher effects that they will have on the nation that they have a life-term to serve.

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Introduction

In the Supreme Court, it is the majority opinion that leads to new policy being passed for the United States. But, it is not only these majority opinions that have a lasting effect. This is because dissenting opinions are also able to cause long-term effects as well, particularly when it comes to the revision of previous Supreme Court rulings. To further discuss this topic, this research paper will answer the question: Which characteristics of a dissenting opinion make it strong enough to be used to help change/create a future Supreme Court ruling?

To help answer this question, some of the characteristics of a dissenting opinion from the Supreme Court that are significant enough to help create and change future Supreme Court rulings are those with strong uses of vocabulary and lengthy explanations to express their reasonings and the impacts of the majority opinion. Some scholarly work that helps to support this evidence is the article Lexical verb hedging in legal discourse, written by Holly Vass. This article explains how critical the particular vocabulary used by Supreme Court Justices in both majority and dissenting opinion is. The article argues the importance of "hedging", which is a tactic used by Supreme Court Justices to how that they understand how their ruling may have its limitations and exceptions (Vass, 2017). The importance of this question is that once answered, it will help to provide new information that is currently lacking in scholarship. Although dissenting opinions are a topic that has been studied over time, there is quite a lack of a true in-depth analysis on this topic.

To provide evidence for this argument, I will utilize further scholarly research that has been conducted on the topic of judicial behavior - specifically focusing on those that surround the Supreme Court and the opinions that have been provided by past and present Supreme Court Justices. For the methodology of this research, I will use a qualitative approach for this work. This qualitative approach will be through the use of a content analysis, where I will be using the database WestLaw to help break down the content within the dissenting opinions, eight in total, that I will be focusing on. From there, this research paper will discuss the several different ways that dissents can be strong and effective, varying from the way that they are written, to the way that they are presented, and even depending on how many or how few justices decide to dissent.

Furthermore, this paper will analyze research that has shown just how impactful dissenting opinions can be and what can be done to help strengthen their effects even more. This thesis will then examine the significance of dissenting opinions on future rulings of the Supreme Court and how these opinions can cause the overturning of rulings of cases from the past. The ultimate goal of this thesis is to analyze Supreme Court dissenting opinions, how they are constructed and what makes particular opinions so strong in their use to overturn later rulings.

Here, I will make note of a brief summary of the results from this research. Ultimately, the hypothesis from this paper was rejected due to a lack of findings to support the idea that dissents with particular use of vocabulary, those that use the tactic of hedging, and those that are longer in length than average dissent are more effective than those that do not. Instead, what is stated/written by dissenting Justices is what has a stronger effect rather than how it is written. Although the hypothesis was denied, this research is still important to help contribute to the lack of scholarship currently existing on this given topic.

Literature Review

The following review of literature is meant to further explain the question of how the formation and presentation of Supreme Court dissenting opinions impact future Supreme Court rulings. In the majority of Supreme Court cases, the dissenting opinion is usually not the

one that determines the ruling, however they are still extremely important and oftentimes are referenced in the future to help shape new opinions or even overturn a previous landmark ruling. The following literature review will be broken down into five sections. The first section will examine how Supreme Court justices give their opinions, specifically looking at dissents, with a focus on how they write their opinions, such as word choice or how they choose to publicly present their opinions. The second section will discuss the impact of dissenting opinions on future cases and rulings of the Supreme Court. The third section will take a more psychological approach and centers on judicial behavior and how the behavior of judges is displayed in their opinions, whether the opinion is a dissenting or a majority opinion. Lastly, the fourth and fifth sections will discuss the great significance that Supreme Court opinions hold, especially dissenting opinions, and how these opinions can affect us on a daily basis.

How Supreme Court Justices Deliver Their Opinions

This section provides a literary analysis on how Supreme Court justices form and deliver their opinions, mainly focusing on dissenting opinions. To begin, it is important to discuss how dissenting opinions came to be in the first place. The dissent initially began during the term of the iconic Chief Justice John Marshall (Morgan, 1953). It was during this time that Justice William Johnson practically created the dissent, as he countered the majority opinion of the court in what he referred to as an act of his freedom of expression. This behavior by Williams was viewed in strong distaste by Chief Justice Marshall, as Williams was the first judge to speak out with a differentiating opinion under the Marshall court (Morgan, 1953). This part of the literature is important as it shows the evolution of the dissent and its significance, plus the distaste associated with it, dating back to many, many years passed.

Even though the creation of the dissent is important, it is also important to understand why the dissent is used in the first place. The significance of why justices use the dissent is discussed in the article The Politics of Dissents and Concurrences on the U.S. Supreme Court, written by Paul Wahlbeck, James Spriggs, and Forrest Maltzman. Scholarship has focused on the reasoning why some Supreme Court justices decide to dissent, and whether they do this together or by themselves (Wahlbeck et al. 1999). Findings suggest that an opinion issued by a judge is a strategic calculation that reflects more than just a preference over case outcomes (Wahlbeck, Spriggs, & Maltzman, 1999) and there are multiple factors such as time left on the bench, policy preferences, and more are all important factors on the reasoning for a justice's dissent.

Moving on from its creation and use, one of the key parts of writing a judicial opinion is the word choice of the justices. Research has emphasized the importance of the particular vocabulary used by Supreme Court Justices in both majority and dissenting opinions (Vass, 2017). This part of the literature introduces the importance of hedging, which is a tactic used by Supreme Court Justices to show that they understand how their ruling may have its limitations and exceptions (Vass, 2017). The quantitative research conducted the corpus linguistic tool WordSmith Tools version 6.0 to analyze the occurrence, frequency, and role of key lexico- grammatical items that are used while hedging. The key words most often looked for while conducting these quantitative analyses are 'indicate', 'suggest', 'appear' or 'propose'. In regards to dissenting opinions, the hedging term most often used is "reason to believe." Through highlighting the importance of particular vocabulary in judicial opinions, this article is able to depict the strategic decisions made by dissenting judges in their written opinions.

As well as quantitative work, there are qualitative pieces of literature that support the argument of the importance of word choice in how Justices form their opinions, as well as analyze how the Supreme Court Justices dissent (Stager, 1925). What the author focuses on is not the reason why Justices sometimes do dissent, but, instead, he notes the fact that they

do dissent and how sometimes these Justices will take the time to state particular points that they are dissenting against. A justice could simply write that they have a dissenting opinion, no explanation needed, yet Stager focuses on why they take the time to write and explain their opinions, which according to the author are often done in full 30-page explanations. According to the author, this display of taking the time to truly explain oneself and their erroneously-viewed opinion shows how important dissenting is in order to bring balance to the court.

Finally, after the Justices decide to write a dissent and to what extent that they will write it, the Justices then are able to decide how they will express their opinion, or decide if they even want to express it at all. Literature supporting this has been conducted with a mixed methods approach to studying how effective it is for a Supreme Court Justice to read their dissenting opinion from the bench (Blake & Hacker, 2010). As the authors state in their article, it is already an unlikely occurrence that a justice were to actually announce their dissenting opinion (Blake & Hacker, 2010), so when they do, it really shows the significance of the dissent. Oftentimes, when a justice reads their dissent from the bench, it shows that push has come to shove and there is likely an irreparable chance of bargaining between the Justices.

Overall, the research provided in this section is helpful to understand the basis of why we even have a dissenting opinion in the first place. Through understanding these works, we are able to create a foundation of understanding as to how effective dissenting opinions are and how they are affected through their own formation.

The Impact of Dissenting Opinion on Future Supreme Court Cases

As impactful as they are in their present time, a dissenting opinion can be argued to be even more impactful after many years have passed since it was published. In scholarship provided, readers are given more of a basic explanation of what Supreme Court decisions are and of their impacts (Leming, 1995). Unlike the previous articles, Leming does not focus on a specific topic of judicial decision making or behavior and instead, does point out in his work how dissenting opinions can become influential in the future, as they can be used to reverse or revise future Court decisions. This evidence helps in making this literature a strong piece in the limited research on judicial opinions.

Subsequent research further assessed the significance of dissenting opinions in the shaping of future rulings (Aikin, 1968). These opinions that often begin as the minority often gain the strength of becoming the law of the land, as the judges who were initially viewed as the divergent members of the group are the ones who in reality contributed the most advanced ideas in the first place (Aikin, 1968). This qualitative analysis, which was conducted in 1968, within this article is extremely significant in understanding the importance of a dissenting opinion and how beneficial it can be to the future development of United States law. For this article to have been written decades ago, it shows just how impactful dissenting opinions were then, and how they continue to prove their impact now in 2022.

It is important to note that although dissenting opinions do create differences in future rulings, it is equally important to note that this is done on purpose. Scholarship discusses how Supreme Court Justices provide cues within their written opinions to help future litigants to reframe case facts and legal arguments in any similar future cases to receive the majority support (Baird & Tonja, 2009). The authors do this through the use of an empirical investigation into the dissenting opinions of Justices who suggest strengthening federal-state powers for future cases. This qualitative work helps to prove that through these dissenting Justices providing cues in their opinions, they are able to lead to a significant change in the outcome of future cases.

Such findings are supported by additional research, where it is argued that dissenting Supreme Court Justices use their opinions to secure better policy outcomes for future court rulings (Smelcer, 2009). Smelcer uses

three factors to measure the efficacy of these dissenting opinions; thoughtfulness, ingenuity, and legal craftsmanship. Based on these three factors, Smelcer was able to identify which dissenting opinions would come back to become a majority opinion.

As we can see, there is plenty of research to support the impact of past dissenting opinions on future Supreme Court rulings. These scholars in this section of this review of literature in particular have helped to provide stepping stones in showing the strengths of dissents in the future, but in the past and the present as well.

Judicial Behavior

There are many important pieces to understanding the dissenting opinions but one thing that can not be left out of this understanding would be the understanding of this topic from a psychological approach. To do this, we must research further into the minds of the judges who deliver any opinion and not just a dissenting one and see why they behave the way they do (Ulmer, 1970). This literature analyzes the behavioral factors contributing to why Supreme Court Justices dissent. The author states how as humans, it is in our nature to react to certain situations in a non-spontaneous manner, and the same goes for the judges because at the end of the day they are just regular people. The significance of this article is that although most of us view judges, especially those appointed to the Supreme Court, as higher beings (Ulmer, 1970), the case in reality is that we are all shaped to have certain opinions and reactions based on our backgrounds, which is explored in this research.

One way to break down this discussion of judicial behavior is to focus on what is called reflexive metadiscourse, which is how a writer shapes their words in their discussion to lead to a certain opinion (McKeown, 2021). Scholarship examines the use of reflexive metadiscourse in majority and dissenting opinions of the U.S Supreme Court. Through the use of 60 majority opinions and 60 dissenting opinions, McKeown was able to find that the Justices who wrote majority opinions did so in a manner that focused/"reflexively discoursed" on their own opinion, while dissenters wrote in a way that focused/"reflexively discoursed" on the opinion of others (which would be the majority opinion). This article is important because of its focus on judicial behavior and how judges piece together their opinions within their writings.

Lastly, there is research that focuses on the more superficial results of judicial behavior (Sommer, 2020). In this piece, the author analyzes how the Supreme Court Justices weigh how impactful all of their decisions will be from the bench not only on their own personal basis but in terms of their political impacts as well. Sommer studies this behavior through a quantitative analysis, pulling statistics on judicial recusals and how impactful the way a judge recuses (whether the recusal is discretionary or done because of the justice's health) is on the statistics. Although this article is more focused on recusals rather than Supreme Court opinions, it is still important in displaying judicial behavior and how much our Justices analyze their behaviors and the impact they will make. To address judicial behavior in the understanding of this research on dissenting opinions is key, as it goes deeper than the surface level of simply looking at opinions and what they do. Judicial behavior is important in the scale of all Supreme Court opinions and it greatly helps to remind the majority that these Justices that many of us look up to are human just like us.

The Significance of Dissenting

Although all of the opinions issued by the Supreme Court are important, dissenting opinions have continued to prove their weight in terms of significance. However, even if an opinion can show its importance, its lasting effects can weigh less depending on how it isxpressed (Fife, Goelzhauser, Hodgson, & Vauvalis, 2017). In their work, the authors describe how it is important that Supreme Court Justices explain themselves when stating their opinion on a ruling, whether they concur or dissent. Not only do the authors of this piece state how an opinion without explanation isn't useful, but they also directly quote Justice William J. Brennan, who stated that a Justice has

the "obligation" of explaining their opinion, because if they do not, then the opinion serves no useful purpose (Fife, Goelzhauser, Hodgson, & Vouvalis, 2017). As a matter of fact, Supreme Court dissents that have been provided without opinion have oftentimes been lost in history, which helps to display just how significant it is that Justices provide argument for their dissents to help hold their weight. Even Supreme Court Justices have emphasized the significance of dissents. In her writing, the legendary Ginsburg discusses how strong a dissenting opinion can really be. Ginsburg describes in her piece how typically in a ruling, only the majority opinion is openly discussed when it is announced from the bench. In almost all times that rulings are announced from the bench, separate opinions (either concurring or dissenting) are discussed at the surface level but not looked at in depth. Because of this, Ginsburg argues that what should happen is that dissenting opinions should also be orally presented from the bench with the way they would garner immediate attention for the sake of argument and not subjecting to the majority. This qualitative article shows the strength of a dissenting opinion, and how a justice can and should use their minority opinion in a powerful manner. Research discusses the possible power a dissenting opinion could hold depending the way the dissenter welds their power (Gerkin, 2005). Gerkin describes dissenting by deciding as would-be dissenters being able to enjoy the "local majority on a decision making body and can thus dictate the outcome." The democratic process of dissenting by deciding depicts how critical it is for dissenting opinions to exist in our justice system, for if there were no Justices to dissent, how would the power of the Supreme Court be checked on an internal basis? As displayed, the research provided in this section is useful to help in the understanding of how significant dissenting opinions are in various manners.

Tying in with this section, the following section of this literature review will support just how impactful dissenting opinions are on not only those who understand the legal processes of the Supreme Court, but for those who also know very little about the highest law of the land.

The Dissent's Effect on the General Public

As important as it is for legal and political scholars to understand the Supreme Court and its processes, the same importance should be upheld by the general public as well. Nonetheless, the way that the media depicts the Supreme Court (or any branch of government) is perhaps the most impactful thing on the understanding of the different processes taking place and how these things affect an everyday American (Sill, Metzgar, & Rouse, 2013). One significant point in this empirical article is how unlike the other branches, the judicial branch does not have to fight or make click-bait headlines to receive coverage from the media. This shows the power that the Supreme Court has and how significant of a role it makes even in the lives of citizens who may not be very politically active. This phenomenon of the Supreme Court rocking headlines was recently displayed in the media after the overturning of landmark case Roe v. Wade. After news of the overturning of the right to a safe abortion broke out, many people who previously did not engage in Supreme Court news began to educate themselves on what they can do to help defend their rights and learn the true impact it can have on many, many individuals across the country. Since much time has passed since the creation and expansion of the dissent, the views and opinions on the dissent have expanded as well, allowing literature to depict the growth of the dissenting opinion (Boudin, 2012). As Boudin states, the dissent was initially viewed as a way of undermining faith in the courts, but now it is seen as a critical part of the legal process. Boudin discusses how a dissenting opinion may be the most personal opinion that a judge can write, as they do not have to discuss it with anyone or have to settle on making any agreements, but if they choose to do so, it makes an impact on how that judge is viewed and respected. Instead of being a display of misbehavior against the court, dissents are instead useful and helpful to understand what is

needed to help shape and reshape laws.

However, although dissenting opinions can have many benefits, they can also cause various downfalls (Stack, 1996). The author approaches these two different arguments in parts through a qualitative analysis, stating that part one will attempt to prove that the practice of the dissent is unjustified and is harmful to the rule of law. On the other hand, part two justifies the use of a dissent through the practice of American deliberative democracy. These two approaches help to explain how beneficial and how harmful the creation of a dissenting opinion could be to the American justice system. Yet, one of the key parts of Stack's article is stating how no matter what harm a dissenting opinion can cause, its main effect in the court is that a dissent is the biggest factor in upholding the Supreme Court's legitimacy (Stack, 1996).

Lastly, it is crucial to note that as the amount of knowledge the average American has gained on the Supreme Court more than likely has to do with the amount of literature that has increased on the topic of the Court (Schmidt and Shapiro, 2010). In this research, the authors provide an evaluation of oral dissenting on the Supreme Court. They examine these dissents in both a historical and contemporary perspective, noting the heightened amounts of emerging academic literature on the subject, and they even go so far as to suggest a new framework for analysis of oral dissenting. The key question of this research is not necessarily why a Justice might decide to announce their dissent, but why certain announced dissents seem to resonate while others (most of them) are ignored and forgotten. In all, the authors provide an empirical and analytical discussion of the role that oral dissents play in the powerful relationship between the Supreme Court and the American people.

Overall, this literature review depicts just how important a dissenting opinion truly can be. The literature provided emphasizes the different ways that a dissent is formed, used, expressed, and interpreted. But, outside of the literature, we are able to see for ourselves how impactful dissenting opinions can be on an everyday basis. To contribute to this research, the research I have begun to conduct will help to add to the lack of work that has been done to answer the questions of how the construction and presentation of dissenting opinions affects the way that they are used later to revise and reconstruct new Court rulings.

Methodology

I chose to conduct the necessary research for this thesis to find out how dissenting opinions can become especially effective through the use of a qualitative research design. In this thesis, I will be utilizing a qualitative approach through content analysis to prove that how dissenting opinions are written and presented is what makes them more impactful later on in time. The ultimate goal of this research approach will be to show that the use of particular vocabulary terms, length of explanations, and how these opinions are publicly presented are what makes certain dissenting opinions stronger than others; in specifics, I will be looking into dissents that include the terms "indicate, suggest, appear, propose", which in scholarship are found to be in dissents that are more effective in the long term when it comes to remediating past rulings (Vass, 2017), dissents that use the tactic of hedging (tactic used by Supreme Court Justices to show that they understand how their ruling may have its limitations and exceptions) through the use of the statement "reason to believe", and how long the provided explanations are.

Due to the time frame allotted to this research paper, this work will only focus on eight dissenting opinions, which are discussed further in this paper. To help filter these eight dissents that use these key items that I am looking for, I will use databases such as WestLaw to further search into these opinions. In these comparisons, I will also look at dissenting opinions that are written by a justice that can be considered successful as they were used later on to change a Court ruling, or a dissent written by the same justice that can be considered to be unsuccessful as it never caused any change in the Courts. From here, I will consider the differences in how these dissents were written and implement them into my analysis to help create a process of matching

a justice's opinions and depict how they write both successful and unsuccessful opinions.

One particular Supreme Court justice's dissenting opinions that were often used later on in the Supreme Court to write overturning decisions were that of Justice John Marshall Harlan. One of Harlan's most important dissents (where Harlan was the lone dissenter) was his opinion that he wrote to argue against the ruling of Plessy v. Ferguson. This dissent alone is what was used later on to overturn Plessy and created the new ruling that was established in Brown v. Board of Education, which remains to be the nation's most famous civil rights case. This is just one example of the kinds of Supreme Court dissents I will be performing a content analysis on to help prove how important the formation of dissenting opinions are for their use in later Supreme Court rulings.

A second case study to add to my research would be the dissent written by Justice Brandeis against the majority ruling of Olmstead v. United States (1928). Although this was a big split in the court, with there being four dissenters in this case, Justice Brandeis was the one to take the lead in this opinion, fighting for the right to privacy that was implied in the Constitution. After this opinion was led by Brandeis, the Court eventually ruled in Katz v. United States (1967) that wire-tapping was an unconstitutional way of gathering evidence under the fourth amendment. Being that this dissent which was written in 1928 was able to be used decades later in the court to help revise a ruling, it is important to analyze how Brandeis was able to write such a strong opinion.

Thirdly, similar to the lone dissent undertaken by Justice Harlan in Plessy v. Ferguson, Justice Stone also wrote a lone dissent in the 1940 Minersville School District v. Gobitis case. In this initial ruling, eight of the justices argued that the Minersville School district was able to legally order students to salute to the flag. In his lone dissent, Stone argued that the "freedom of mind and spirit must be preserved," and it was this compelling argument that the Supreme Court was later able to use in the overruling of their decision for the West Virginia State Board of Education v. Barnette case.

Lastly, I will also analyze the dissent provided by Justice O'Connor in the 1983 landmark case of Akron v. Akron Center for Reproductive Health. In the original ruling made for this case, the majority of the Court did reaffirm its support for womens reproductive rights, however Justice O'Connor argued against the provisions made in this opinion and felt that more of a separation must be made between individual rights and interests of the state. Justice O'Connor's dissent helped to overturn this ruling in 1992 with the case Planned Parenthood v. Casey.

On the other hand, all of these justices listed above also had dissenting opinions to which no change came about. Primarily, in another case where Harlan was the lone dissenter were the Civil Right cases of 1883. However, unlike his dissent in the Plessy v. Ferguson case, nothing came from this opinion and the ruling made on these cases were never overturned. Similarly, Justice Brandeis also had multiple unsuccessful dissenting opinions, one of which was his dissent towards the ruling of Pierce v. United States, which was another opinion that showed his adamant belief in the right to privacy but this dissent was unable to bring about any change later on in the Court. The same can be said for Justice Stone, who led the dissenting opinion in United States v. Butler, arguing that judicial restraint was overstepped, yet this dissent was never enough to be able to overturn the ruling initially made. Lastly, an unsuccessful dissent from Justice O'Connor was that of which she wrote in response to the ruling of Van Orden v. Perry, where she agreed with Justice Souter in the push of separation between church and state. Through future analysis of these unsuccessful dissents, this research will be able to determine what possibly went wrong with these opinions and led to a different outcome than other dissents by the same justices.

Ultimately, the framework of this methodology will be able to analyze how these successful dissents are constructed and see what can be found in common and what differences can be found between them. However, as expressed in the above paragraph, I will take the time in each case study to compare an unsucjie

Overall, the use of this qualitative method and case studies are a beneficial way to gain data that is currently lacking in this aspect of judicial behavior.

Results

(The visuals for this section will be attached before the Works Cited.)

Within this section, I will discuss the findings of the research question and hypothesis. As hypothesized earlier in this paper, I expected to find that the characteristics of a dissenting opinion from the Supreme Court that are significant enough to help create and change future Supreme Court rulings are those with strong uses of vocabulary and lengthy explanations to express their reasonings and the impacts of the majority opinion. By running the eight dissenting opinions that I stated in my methodology (two from Justice John Marshall Harlan, two from Justice Stone, two from Justice Brandeis, and two from Justice O'Connor) through the database WestLaw, I was, however, unable to find the correlation between "successful" dissenting opinions and the characteristics of vocabulary use and lengthy explanations. To specifically address this paper's hypothesis, I will say that my hypothesis was incorrect and proven wrong by the data that I will list below. In this results section, each Justice that was listed above will have their own subsection where each of their dissenting opinions analyzed in this paper will be listed. In each of these sections, I will provide a brief overview of the case being discussed and its majority opinion, then list the "successful" dissent, followed by the "unsuccessful" dissent, along with the data broken down by each dissent (listed in tables as well), which will help to describe why my hypothesis was unable to be proven.

Supreme Court Justice One: John Marshall Harlan

Harlan's Successful Dissent - Plessy v. Ferguson The landmark case Plessy v. Ferguson (1896) is the landmark case that upheld the constitutionality of racial segregation under the "separate but equal" doctrine. During the time of this case, the state of Louisiana had enacted the Separate Car Act, meaning that railways were required to have separate railway cars for the Committee of Citizens to attempt and repeal the law enacted by the state. This committee, a group of New Orleans residents, asked Plessy to sit in the "whites only" railway car of a Louisiana train, which he agreed to participate with. Not only did Plessy agree, but so did the railroad that this act took place at because of the additional costs placed on the company by the Separate Car Act. When Plessy was confronted and ordered to leave the "whites only" railway car, he refused and was then arrested.
When this case was judged by the Supreme Court, the Court held that the state law was constitutional. In the majority opinion that was written by Justice Henry Billings Brown, Brown conceded that the 14th Amendment did intend to establish equality for all races, but that separate treatment did not insinuate inferiority of black citizens, thus upholding state-imposed racialm segregation.

In Justice John Marshall Harlan's dissent, Harlan argued that our Constitution is meant to be "color-blind" and that there was no true class-system in the United States, pushing the idea that all citizens should have equal access to their civil rights. In this dissent, I expected to find high amounts of the words stated in my methodology to be most prominent in successful dissenting opinions, which are; indicate, suggest, appear, and propose. To my surprise, the word "indicate" was never found in this dissent, nor was 'appear' or 'propose'. Out of these four words, only suggest was found twice. As I described in my methodology, I also expected to find the tactic of hedging, through the use of the statement "reason to believe" in dissents that were later used to overrule a former Supreme Court ruling. Once again, to my dismay, this tactic was never used. Lastly, this dissent was eight pages (single-spaced) in length, which is just under the average length of a Supreme Court dissent, which is nine pages.
Harlan's Unsuccessful Dissent - Civil Rights Cases of 1883 The Civil Rights Cases of 1883 stemmed from the Civil Rights Act of 1875, which was meant to affirm the "equality of all persons in the enjoyment of transportation facilities, in hotels

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In Justice John Marshall Harlan's dissent, Harlan argued that our Constitution is meant to be "color-blind" and that there was no true class-system in the United States, pushing the idea that all citizens should have equal access to their civil rights. In this dissent, I expected to find high amounts of the words stated in my methodology to be most prominent in successful dissenting opinions, which are; indicate, suggest, appear, and propose. To my surprise, the word "indicate" was never found in this dissent, nor was 'appear' or 'propose'. Out of these four words, only suggest was found twice. As I described in my methodology, I also expected to find the tactic of hedging, through the use of the statement "reason to believe" in dissents that were later used to overrule a former Supreme Court ruling. Once again, to my dismay, this tactic was never used. Lastly, this dissent was eight pages (single-spaced) in length, which is just under the average length of a Supreme Court dissent, which is nine pages.
Harlan's Unsuccessful Dissent - Civil Rights Cases of 1883 The Civil Rights Cases of 1883 stemmed from the Civil Rights Act of 1875, which was meant to affirm the "equality of all persons in the enjoyment of transportation facilities, in hotels and inns, and in theaters and

in public places of amusement." Although the businesses that were being regulated in this Act were being treated as public facilities, meaning that they were subjected to public regulations, five separate events occurred where black individuals were refused the same accommodations that were provided to white individuals, thus violating the Act. After these violations, it was ruled by the Court's majority opinion that the Fourteenth Amendment did not permit the federal government to bar discriminatory behavior enacted by private parties. In response to this majority opinion, Justice John Marshall Harlan advised that there should be a broader interpretation of the Fourteenth Amendment and stated that these private parties provided public functions, thus allowing them to be subject to regulation from the federal government. Ultimately, this dissent never created any change in a future Supreme Court ruling, thus making it "unsuccessful." To my surprise, after my analysis of this opinion, I actually found more of the content that I expected to be more prominent in the successful dissents. I say this because I found the word 'indicate' twice in this dissent, along with 'suggest' eight times, and both 'appear' and 'propose' four times each. However, although much more of these key vocabulary terms were used in this dissent, the tactic of hedging was once again not utilized by Harlan in this opinion. Lastly, this opinion was also much longer than Harlan's successful opinion, totaling to twenty-two single spaced pages, which is much longer than the average written opinion.

Supreme Court Justice Two: Justice Louis D. Brandeis

Brandeis' Successful Dissent - Olmstead v. United States

In the case of Olmstead v. United States, Roy Olmstead was suspected of bootlegging alcohol during the time of the Prohibition Act. Moving forward without judicial approval, federal agents went and installed wiretaps in the basement of Olmstead's building, along with some more in the streets near his home. These wire taps provided evidence that allowed Olmstead to be convicted of violating the National Prohibition Act, due to him importing, possessing, and selling illegal liquors. In the majority opinion, written by Justice William Howard Taft, it was held that neither the Fourth or Fifth Amendment rights of Olmstead were violated in this case. Regarding the Fourth Amendment, the Court ruled that this right was not violated since "mere wiretapping" is not the same as a search and seizure. In regards to the Fifth Amendment, the Court ruled that this right was not violated since Olmstead was not forcibly/illegally made to have the conversations that were recorded on the wiretapping, and these conversations were entirely voluntary. Because of this, Justice Brandeis decided to lead the dissenting opinion. In his dissent, Brandeis argued that there was realistically no difference if someone were to listen in on a private phone call or if they were to decide to read a sealed letter. Furthermore, Brandeis argued that our Founders had "conferred against the government, the right to be let alone – the most comprehensive of rights and the right most favored by civilized men."

Similar to Justice John Marshall Harlan, Justice Brandeis is noted as one of the Supreme Court Justice's who is willing to dissent quite expressively when he disagrees with the majority opinion. Because of this, I was truly expecting to find the key items that I listed in my hypothesis to be found in his dissent from Olmstead v. United States. However, to my dismay, not a single one of the four key terms (indicate, suggest, appear, and propose) were found in Brandeis' dissent. Neither was the tactic of hedging. Lastly, what I feel is most surprising from this dissent is its length, which comes out to be only four single-spaced pages, less than half than the typical written opinion length!

Brandeis' Unsuccessful Dissent - Pierce v. United States

The story of Pierce v. United States began in 1917, in Albany, New York. It was then that the Albany police had arrested four socialists who were distributing a pamphlet titled, "The Price We Pay," which provided an argument that the United States capitalistic government was to blame for our country entering into World War One. These four socialists were convicted of violating the Espionage Act. When the Supreme

Court heard this case, the majority vote, led by Justice Mahon Pitney, sided with upholding this ruling. Justice Pitney stated that the "false statements" found in "The Price We Pay" were meant to hinder the war efforts led by then President Woodrow Wilson.

This "falsity" claimed by Justice Pitney is where Justice Brandeis decided to begin his dissent, insisting that this pamphlet was not meant to be nor did it need to be something factual, as its content was based on "opinions and judgment." Justice Brandeis felt that there was great risk in allowing content such as this to be scrutinized for its lack of factuality, and stated that actions such as this ruling would deny "freedom of criticism and discussion." Similar to what we saw above in Justice John Marshall Harlan's unsuccessful dissent written for the Civil Rights Cases, in Justice Brandeis' dissent in Pierce v. United States, we see more of the key items I was hoping to find in the successful dissents. This is seen with each one of the key vocabulary terms (indicate, suggest, appear, and propose) being stated once each in this opinion. One thing that does stand out during my analysis is that Justice Brandeis did use the hedging tactic, as he stated "reason to believe" on page ten of this dissent. Finally, this dissent is actually much longer than Brandeis' successful dissent, coming out to be fourteen single spaced pages in length (although this dissent is clearly lengthened through the use of a poem included by Brandeis).

Supreme Court Justice Three: Justice Harlan Fiske Stone

Stone's Successful Dissent - Minersville School District v. Gobitis

The facts of the case in Minersville School District v. Gobitis began in 1835, when the Gobitis children (Lillian and William) were expelled from their Pennsylvania public schools for refusing to salute the American flag during the Pledge of Allegiance. Lillian and William, both of whom were Jehovah's Witnesses, felt that saluting flags was prohibited by the Bible, and eventually it was argued that their expulsions violated their First Amendment rights. When the Court heard this case, the majority opinion, led by Justice Felix Frankfurter, upheld the mandatory flag salute. Justice Frankfurter primarily relied on the rule of "secular regulation" which weighs the secular purpose of a non-religious government regulation against the religious practice it makes illegal or otherwise burdens the exercise of religion, and stated that the push for national unity was based on the need for national security.

Justice Harlan Stone felt very strongly against this opinion. In his dissent, he stated that the "very essence of liberty" is guaranteed by the Constitution, and in our Constitution we are supported with, "... the freedom of the individual from compulsion as to what he shall think and what he shall say." Once again, when analyzing the successful dissenting opinion, the amount of key vocabulary terms I had wanted to find in the successful opinions were lacking. Out of the four key words, only 'indicate' was found once, with the other three terms (suggest, appear, and propose) not being stated at all in this dissent. Similar to the other two successful dissenting opinions, the tactic of hedging was not used in this opinion either. Lastly, just like Justice Brandeis' successful dissenting opinion, this opinion is only four single-spaced pages in length.

Stone's Unsuccessful Dissent - United States v. Butler

The facts of the case found in United States v. Butler began in 1933, when Congress implemented the Agricultural Adjustment Act. Under this Act, Congress was initiating a processing tax, and these funds received from this tax would then be redistributed to farmers who guaranteed that they reduce the acreage of their land. The decision as to which crops would be regulated was provided by the Secretary of Agriculture, who decided that one of these crops should be cotton. Because of this, William M. Butler, who was a cotton processor, received a tax claim, which caused him to say that this Act was unconstitutional. Here, we see the Court side with the "weaker party", as the majority opinion did rule in favor of Butler and agree that this Act was indeed unconstitutional. In this majority opinion written by Justice Owen J. Roberts, it

was stated that this unconstitutionality lied in the fact that Congress had attempted to regulate and control agricultural production, which is a power reserved to the states. Congress does have a Spending Power (detailed in Article One, Section Eight), but this power is restricted to situations in which it is being used for the general welfare of the people. Furthermore, Agricultural production historically lies outside of the authority of regulation from the federal government.

After this majority ruling, Justice Stone decided to lead the dissenting opinion, where he was actually joined by Justice Brandeis as well. In his opinion, Justice Stone did agree with the majority opinion regarding the wrongdoing enacted by Congress and its broad taxing power, which was based under the General Welfare Clause. However, he argued the Agricultural Adjustment Act of 1933 was beneficial for the general welfare of the United States, therefore making this Act constitutional. As we see in the two unsuccessful dissenting opinions analyzed above, United States v. Butler also has more of the key items I was searching for than its successful comparison case of Minersville School District v. Gobitis. In this dissent, Stone wrote 'indicate' once, 'suggest' twice, 'appear' once, but he did not use the word 'propose'. Stone also did not use the tactic of hedging in this dissent either. Lastly, this unsuccessful dissent was almost double the length of the successful one, coming out to a total of seven single-spaced pages.

Supreme Court Justice Four: Justice Sandra Day O'Connor

O'Connors Successful Dissent - Akron v. Akron Center for Reproductive Health

The case of Akron v. Akron Center for Reproductive Health (1983) is a milestone case for women's reproductive rights. In this landmark case, the city of Akron, Ohio, enacted some regulations to be applied to the performance of abortions in the city. Some of these provisions were, "...all abortions performed after the first trimester were to be done in hospitals, parental consent before the procedure could be performed on an unmarried minor, doctors to counsel prospective patients, a twenty-four hour waiting period, and that fetal remains be disposed of in a "humane and sanitary manner."" The Supreme Court majority opinion, written by Justice Powell, invalidated the regulations provided by the city of Akron, showing a clear commitment to the protection of women's rights that were established in Roe v. Wade. Clearly, the majority of the Court ruled in favor of continuing to protect American women within their health and their choices made regarding their own body, and Justice O'Connor felt the same way. However, Justice O'Connor felt that the ruling made should have gone a bit further, specifically, she disagreed with the idea of the Court basing abortion rights on the basis of trimesters, and felt that more of a push should have been made to protect individual rights. For my analysis of this case, I was pleased to find that the word 'indicate' was stated by Justice O'Connor five times in her dissent, and the word 'appear' was stated once, however, 'suggest' and 'propose' were never used. Another positive from this dissent was that Justice O'Connor used the tactic of hedging twice in her dissent, once on page eight and again on page nine of her opinion. Lastly, this dissenting opinion comes to a total of eleven single-spaced pages in length.

O'Connor's Unsuccessful Dissent - Van Orden v. Perry

Some background information on the case Van Orden v. Perry (2005) is that it began with a man named Thomas Van Orden who decided to sue the state of Texas in federal district court. His basis for the lawsuit was that a Ten Commandments monument on the grounds of the state capitol building was an unconstitutional government endorsement of religion, thus arguing that this violated the First Amendment's establishment clause, which prohibits the government from passing laws on the basis of respecting an establishment of religion. In a 5-4 decision, the Court ruled against Orden, stating that "the establishment clause did not bar the monument on the grounds of Texas' state capitol building." Justice O'Connor's dissent in this case is not nearly as strong as the one she

wrote in response to the Akron ruling. Totaling in at only one sentence in length, none of the key items I was looking for in my analysis could be found in this dissent, were Justice O'Connor simply writes, "For essentially the reasons given by Justice Souter, post, p.___ (dissenting opinion), as well as the reasons given in my concurrence in McCreary County v. American Civil Liberties Union of Ky., post, at ___, I respectfully dissent." For context, Justice Souter based his argument on the idea of the separation of religion and state.

As we can see with the analysis of the eight dissenting opinions listed above, my hypothesis has ultimately been proven wrong. When I began this research paper, I expected to find opinions written with particular vocabulary terms and those that are longer in length to be the opinions that were ultimately more successful.

However, after completing my analysis, I quickly found that this was quite the opposite. Surprisingly, in three out of the four opinions that I deemed to be unsuccessful, there were more of these key items I was searching for to be found. However, when it came to analyzing the successful dissenting opinions, besides noticing the lack of the key items I was looking for, I also noticed that there is a sense of similar language within the four opinions. Beginning with the successful opinion written by Justice John Marshall Harlan for Plessy v. Ferguson, this opinion is full of comparisons to previous Supreme Court rulings, such as those of the cases Strauder v. West Virginia, Neal v. Delaware, and Gibson v. State. The same can be said for Justice Brandeis' successful dissent from Olmstead v. United States, where he cites multiple cases in his writing such as McCulloch v. Maryland, Brooks v. United States, and Weems v. United States. Next, we can also see the same kind of approach with Justice Stone in his successful dissent from Minersville School District v. Gobitis, where he cites some cases such as Hamilton v. Regents, Davis v. Beason, and Schneider v. The State of New Jersey. Lastly, Justice O'Connor cites in her Akron v. Akron Center for Reproductive Health a few cases as well, such as Roe v. Wade, Bellotti v. Baird, and Griswold v. Connecticut. This use of a similar approach between the four different dissents helps to show that use of similar language amongst successfully written opinions truly resonates amongst the Justices and shows them what may be the best approach to explain why they shaped their opinion the way that they did. Although the four Justices did not use the approaches and specific kinds of language I was looking for in their writing, it is still clear that there is a shared approach amongst their writing.

Limitations in this Work

After completing the analysis of the eight total dissents I focused on in this study, I did realize that one of my limitations for this research paper is the lack of time. I feel that had more time been available to focus on this research being conducted, perhaps a total of five dissents per Justice could have been analyzed. I feel that if there was room for more dissents to have been added, perhaps my hypothesis could have been provided with more of a challenge rather than simple defeat. I say this because clearly scholarship has come to show that these characteristics that I was searching for do appear in successful opinion writing, as supported in the article previously mentioned, Lexical verb hedging in legal discourse, written by Holly Vass.

Additionally, after preparing to conduct my own research, I found that there is a clear lack of research that has been conducted on the topic of judicial behavior. During the time frame that I was allotted to work on this piece, I was only able to find one judicial behavior piece that touched on this my topic of focus, which was the article Dissent Behavior and the Social Background of Supreme Court Justices, written by Professor Sidney Ulmer. Perhaps, if there had been more time allotted, I could have focused more of my research towards this topic, thus providing some contribution to where current scholarship is lacking.

Conclusion

This thesis aimed to study the impact of how a dissenting opinion was written and how this writing style would be effective in the long term. More specifically, the purpose of this

thesis was to truly break down multiple dissents from different iconic Supreme Court Justices - Justice John Marshall Harlan, Justice Louis D. Brandeis, Justice Harlan Fiske Stone, and Justice Sandra Day O'Connor - and how their use of language could affect the way that their dissenting opinion could possibly be used to overturn a Supreme Court ruling in the future. Explicitly, this research paper had the purpose of analyzing specific vocabulary (as discussed in the "Results"; indicate, suggest, appear and propose) and writing tactics (tactic of hedging and length of written opinion) and how these traits did or did not affect an opinion's effectiveness. Based on conclusions made by previous scholars, this thesis hypothesized that depending on how a dissenting opinion was written, the use of this particular vocabulary and writing style that I have mentioned would greatly affect a paper's later success. Through my analysis of eight dissenting opinions, two from each of the Supreme Court Justices mentioned above, this study allowed me to provide a breakdown of the type of language used in each of these dissents. This approach allowed me to create a comparison for what language was actually used in each one of these dissents, either successful or unsuccessful, and whether or not the language that was used was what I hypothesized would be more effective. To help lay out my findings, I did create a table for each of the eight dissents that I analyzed to provide a visual aid for the data that was produced.

In the end, I have concluded that it is actually not the specific use of vocabulary and writing tactics that help to make a dissenting opinion more effective. Furthermore, the research from this paper actually goes to show that it is really what a Justice has to say that makes an opinion more effective. This paper found that it is not how a Justice says what they need to express, but instead it is what they choose to express in and of itself. I feel that it is essential to state that although my hypothesis was ultimately rejected after the conducting of my research, conducting research such as this is important and can help to contribute to what little research has been done on this topic. This can be said especially on the topic of judicial behavior, which as I previously mentioned, there is only one paper published describing exactly what I discuss in
this work. With how long the Supreme Court has been making history here in the United States along with being such a public figure known in and out of the country, more research should be conducted to help us understand such a powerful figure.
As I have stated, what these Supreme Court Justices have to say is really what makes a big difference. Because of this, it is essential that the words used to express how a Justice feels on a particular topic/ruling are carefully chosen. Along with this, there is more benefit that a Justice explains themselves and how they feel in depth so future Justices can pick at their opinion to help create a new ruling. With this being said, I would like to include a quote from the iconic Justice, Ruth Bader Ginsburg, where she states, "Losers can be turned into winners." Justice Ginsburg made this statement when discussing dissenting opinions, as she was a believer in the idea that dissenting opinions can be truly powerful. This quote truly resonated with me and gave me inspiration to delve deeper into this topic of dissents. Justice Ruth Bader Ginsburg was one of the most iconic Supreme Court Justices, as she paved the way for women in justice and advocates for people to speak their mind even if their opinion is not the majority.
Continuing on this idea, it is truly up to these Supreme Court Justices who are willing to go against the majority opinion that can make a difference in the Supreme Court and its impact. Now, I will list two other landmark cases and Justices that I feel are important to note. Beginning with the dissenting opinions in Dred Scott v. Sandford, written by Justice McLean and Justice Curtis, these opinions were later used to aid in the passage of the Thirteenth, Fourteenth, and
Fifteenth Amendments and the overturning of the Dred Scott decision. Next, the dissenting opinion written by Justice Roberts, Justice Murphy, and Justice Jackson in response to Korematsu v. United States, and although Ko-

rematsu was never overturned, it is important that these Justices decided to dissent during such a tense time period in American history. Particularly, I would like to note that Justice Jackson went so far as to call the actions of the American military as racist, which shows his willingness and bravery to stand against the idea of a large majority.

Now, I would like to note the inspiration felt by the Justices who decide to dissent on their own. These lone Justices truly take a step away from their colleagues to be able to firmly decide and express what is morally right or wrong within themselves and the current case that they are ruling upon. One particular Justice that I would like to give credit to is Justice John Marshall Harlan. Justice John Marshall Harlan is perhaps the greatest dissenter to have ever served on the Supreme Court, with his lone dissents not only focusing on the landmark cases surrounding civil rights, but also on other topics such as economics. Justice John Marshall Harlan, a man from Kentucky, was able to relate to the American people, which is truly essential from those who hold positions of power in this country. Without the ability to relate to the opinion of the public, then there is a great disconnect between regular citizens and those in power who are meant to serve them - but this was never the case for Justice John Marshall Harlan.

Overall, although what was aimed to be found in this research paper was not met, this paper does highlight the need for dissents to continue to be written, particularly in a way where a Justice expresses what is wrong with a current ruling and what must be done to fix it. Opinions like these are detrimental for the American people and for the progression of the Supreme Court as a whole.

*Figures referenced in Results to be found in the following pages.

Table One: Plessy v. Ferguson

Successful Opinion: Plessy v. Ferguson	Justice John Marshall Harlan
Specific Use of Vocabulary:	
Indicate -	0
Suggest -	2
Appear -	0
Propose -	0
Hedging Tactic:	Not found.
Length:	8 single-spaced pages

Table Two: Civil Rights Cases of 1883

Unsuccessful Opinion: Civil Rights Cases	Justice John Marshall Harlan
Specific Use of Vocabulary:	
Indicate -	2
Suggest -	8
Appear -	4
Propose -	4
Hedging Tactic:	Not found.
Length:	22 single-spaced pages.

Table Three: Olmstead v. United States

Successful Opinion: Olmstead v. United States	Justice Brandeis
Specific Use of Vocabulary:	
Indicate -	0
Suggest -	0
Appear -	0
Propose -	0
Hedging Tactic:	Not found.
Length:	4 single-spaced pages

Table Four: Pierce v. United States

Unsuccessful Opinion: Pierce v. United States	Justice Brandeis
Specific Use of Vocabulary:	
Indicate -	1
Suggest -	1
Appear -	1
Propose -	1
Hedging Tactic:	Used, found on page 10 of dissent.
Length:	14 single-spaced pages.

Table Five: Minersville School District v. Gobitis

Successful Opinion: Minersville School District v. Gobitis	Justice Stone
Specific Use of Vocabulary:	
Indicate -	1
Suggest -	0
Appear -	0
Propose -	0
Hedging Tactic:	Not used.
Length:	4 single-spaced pages.

Table Six: United States v. Butler

Unsuccessful Opinion: United States v. Butler	Justice Stone
Specific Use of Vocabulary:	
Indicate -	1
Suggest -	2
Appear -	1
Propose -	0
Hedging Tactic:	Not used.
Length:	7 single-spaced pages.

Table Seven: Akron v. Akron Center for Reproductive Health

Successful Opinion: Akron v. Akron Center for Reproductive Health	Justice O'Connor
Specific Use of Vocabulary:	
Indicate -	5
Suggest -	0
Appear -	1
Propose -	0
Hedging Tactic:	Used twice, on pages eight and nine.
Length:	11 Single-spaced pages.

Table Eight: Van Orden v. Perry

Unsuccessful Dissent: Van Orden v. Perry	Justice O'Connor
Specific Use of Vocabulary:	
Indicate -	0
Suggest -	0
Appear -	0
Propose -	0
Hedging Tactic:	Not used.
Length:	One sentence.

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