

The Importance of Being Caustic: The Linguistic Features of Influential Dissents*

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Dissents are costly. Drafting an opinion takes time, judges risk infuriating their colleagues, and the resulting opinion has no legal or precedential value. Yet, at least one justice chooses to take this action in about two-thirds of the U.S. Supreme Court's cases. Why? A key reason is the potential to contribute to future legal development. We explore the linguistic features of dissenting opinions that make such future impact more likely. We theorize that justices who draft dissents with more memorable language have a greater impact on future Supreme Court majorities. Drawing on an original dataset, we demonstrate that dissents using more negative emotion, more distinctive individual words, more first person pronouns, and more general references are more likely to be cited in future majority opinions. The results have important implications for our understanding of separate opinion writing as well as legal development more generally.

*Data and code necessary to replicate the analyses in this paper will be available on the authors' websites upon publication.

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Introduction

When legislators come out on the losing side of a big vote, they may issue a statement criticizing the winning position. Likewise, appellate court judges on the losing side of a case may choose to write a dissenting opinion criticizing the position taken by the majority. Dissenting opinions, like press releases, have no obvious policy effect. Policy, like history, is written by the victors. Future judges are not bound by the logic or legal rationales set forth in a dissenting opinion in any legal sense (Garner et al. 2016).

If judges are motivated by policy (Epstein and Knight 1998) and dissenting opinions have no policy effect, then one might think that judges should only dissent when issuing such decisions is costless. But they are not. Dissenting opinions take time and resources to craft and edit, and such opinions may further hamper judges' attempts to achieve their collegiality goals by antagonizing colleagues with whom judges will work for years to come (Baum 1997). Viewed in this way, dissenting opinions are odd artifacts (but see Peterson 1981; Wahlbeck, Spriggs et al. 1999).

Why, then, do judges dissent? Beyond any expressive purpose that dissenting opinions serve, judges largely justify their dissenting opinions in terms of their effect on legal development. Antonin Scalia famously quipped, "I write my dissents for casebooks. There's no other reason to write them" (qtd. in Senior 2013). Ruth Bader Ginsburg has expressed a similar focus on future influence, stating "I like to think most of my dissents will be the law someday" (qtd. in Vloet 2015).¹ In short, judges argue that dissenting opinions have important *long-term* effects on legal development even if they have minimal *short-term* effects on legal doctrine.²

¹This idea is not a new one. Writing in 1894, Carson argues that "dissenting opinions are interesting... because of the importance of the doctrines contended for, and the way in which they have become woven into the warp and woof of our jurisprudence, to become in time of controlling importance in determining the pattern of the texture" (274).

²Dissents do have some important short-term effects on legal development. Most im-

Anecdotal evidence of changes in doctrine fueled by a past dissent abound. One of the most famous recent examples is the application of the undue burden test as an alternative to the strict scrutiny test, set forth in *Roe v. Wade*, in abortion rights cases. Justice O'Connor first suggested the Court adopt the test in a dissenting opinion in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Throughout the following decade, O'Connor, Kennedy, and others on the Court wrote dissenting and concurring opinions that suggested the superiority of an undue burden test for abortion rights jurisprudence. The Court formally adopted the test as the controlling test for such cases almost a decade later in *Planned Parenthood v. Casey*, 515 U.S. 833 (1992). In this way, an idea from yesterday's dissenting opinion became today's binding constitutional law.

But how often does this happen? While judges and scholars alike are quick to cite these famous anecdotal examples of dissenting opinions affecting legal development, to date, we are aware of no systematic exploration of or explanation for this phenomenon. Why do some dissents achieve this type of success while others languish in obscurity? Baird and Jacobi (2009) suggest that dissenting opinions may have an indirect effect on legal development by affecting the arguments that later litigants will make. Dissenting opinions may also directly affect the arguments future judges make in their opinions and the support they provide for those arguments even without litigant intervention.

In this paper, we craft and test a theory of policy influence by dissenting opinions that leverages linguistic variation. Not all dissents are equal. Two judges who disagree with the same majority opinion may craft very different dissenting opinions, not only focusing on different legal questions, but also framing the conflict in different language. Drawing upon the vast literature on framing effects in political discourse, we argue that the language judges use in their dissents affects its longer-term influence on legal development. Judges choose to

portantly, dissenting opinions affect the content of the majority opinion by inducing the majority opinion writer to respond to the claims made by the dissenter (Maltzman, Spriggs and Wahlbeck 2000).

write a dissent in an attempt to contribute to legal development. It follows that they also carefully select the language they use in order to maximize the future importance of their dissent. Indeed, we expect judges use particularly memorable language in an attempt to write dissents that stand out and, therefore, have a greater effect on the development of the law.

We examine the effects of dissenting opinions on legal development through citation patterns in the U.S. Supreme Court. A citation to a dissenting opinion is entirely discretionary because judges are not bound by the opinions espoused in a dissenting opinion; yet, judges are free to engage with ideas in dissenting opinions that appeal to the case at hand. When a majority opinion cites a dissent from a previous case, that dissent plays a role in shaping an opinion that carries with it the force of law. Drawing upon an original database of citations to dissenting opinions written during the 1937 through 2014 terms, we chart the extent to which the ideas espoused in dissenting opinions have been addressed by later majority opinion authors. In this way, we present the first large-scale empirical examination of the legal influence of dissenting opinions in the U.S. Supreme Court.³

We also examine how the influence of a dissenting opinion varies by the language used to craft it. We catalog variation in the caustic language used in dissents both across justices and over time, relying upon computational linguistic techniques. We find that justices vary widely in the extent to which they rely upon memorable language in their dissenting opinions, and that those judges whose employ a memorable language strategy in their dissenting opinions are rewarded with a larger effect on legal development.

Our results build upon a burgeoning literature that suggests that judges are strategic in the language they employ during the opinion drafting process (Black et al. 2016; Nelson and

³Epstein, Landes and Posner (2011) examine the influence of dissenting opinions written in three U.S. Supreme Court terms and about 80 U.S. Court of Appeals dissents. Our dataset covers 75 more terms than the Epstein, Landes and Posner (2011) study, and our focus on the importance of language differs substantially than their focus on the benefits of dissent.

Hinkle 2015); examining dissenting opinions specifically we show an important intracourt effect of opinion language on legal development. These results have important implications for our understanding of both separate opinion writing as well as legal development more generally. Outside of judicial politics, the techniques we use have broad applications from measuring negativity in electoral campaigns to the tone and framing of media coverage.

Dissents and Legal Development

Political scientists generally argue that judges are primarily motivated by policy (Epstein and Knight 1998), though they acknowledge that policy is one of a number of goals that motivate judicial behavior (Baum 1997). Because dissenting opinions do not carry with them the force of law (Garner et al. 2016), take time and resources to write (Wahlbeck, Spriggs et al. 1999), may harm judges' collegial relations with their peers (Baum 1997), and might even hurt public perceptions of the Court (Hand 1958), the costs of dissenting opinions often appear to outweigh their benefits (Epstein, Landes and Posner 2011).

Yet others recognize the longer-term importance of dissenting opinions. According to Justice Brennan, "The dissent demonstrates flaws the author perceives in the majority's legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case" (Brennan 1986: 430). In their hornbook about precedent, Bryan Garner and his 13 eminent judicial coauthors suggest that "[d]issenting opinions can also suggest where the law is headed. If the dissenting judges make a strong enough case for their position, they may be laying the groundwork for a change in the law" (Garner et al. 2016, 192). In essence, those who write and cite dissents suggest that the primary purpose of a dissenting opinion is to affect the decisions of later judges. A dissenting opinion indicates that a judge has lost a particular battle, but the war—legal development—will continue to be fought. In this sense, these judges suggest that dissenting opinions are rational because of their potential to affect the course of the law in the longer-term.

Indeed, ideas and doctrines in dissenting opinions do eventually become controlling legal

doctrine. Beyond the undue burden example, John Marshall Harlan’s dissenting statement that the Constitution is “color-blind” in *Plessy v. Ferguson* was eventually adopted by the Court in *Brown v. Board of Education* almost 60 years later. Justice Brandeis dissented in *Olmstead v. United States*, saying that the Constitution required a “right to be let alone,” keying up the Court’s eventual protection of a variety of privacy rights. Other anecdotal examples include Justice Blackmun’s dissent in *Bowers v. Hardiwick*, a gay rights case, and Justice Holmes and Justice Brandeis’s famous dissents in the Court’s First Amendment jurisprudence (especially *Abrams v. United States*). These oft-cited examples suggest the vital importance a dissenting opinion can have on legal development. Thus, there is at least anecdotal historical evidence that dissents can play an important role in legal development (Urofsky 2015).

Memorable Language and Judicial Impact

While anecdotal evidence suggests that dissents *can* matter, we know little about what makes dissents more or less influential. A variety of complicated factors undoubtedly play a role. But the *sine qua non* of influence is recall. A dissent that is forgotten cannot be expected to influence legal development.

There are multiple reasons dissents are more likely to sink unremembered into the recesses of legal history than majority opinions. First, the doctrine of stare decisis does not place any obligation on future justices to apply, or even consider, separate opinions. Second, litigants may shy away from citing a dissent in support of their argument since to do so highlights the fact that the current law does not support their preferred outcome. Finally, legal research services such as Lexis and Westlaw do not provide headnotes or keynotes for dissenting opinions that would facilitate linking a dissent to a particular point of law.

Since separate opinions are at a competitive disadvantage in terms of staying on the judicial radar, we anticipate that how a dissent is crafted originally will matter for its long-term effect. The language in which a decision is written affects the likelihood that a judge

remembers (and, in turn, cites) it. To this end, Justice Antonin Scalia described his famed dissenting voice (and its purpose), saying: “My tone is sometimes sharp. But I think sharpness is sometimes needed to demonstrate how much of a departure I believe the thing is. Especially in my dissents. [I write my dissents for law students]... And they will read dissents that are breezy and have some thrust to them. That’s who I write for” (qtd. in Senior 2013). In the related context of writing legal briefs, Justice Scalia also notes that using language that is “vivid” and “lively” makes an argument more memorable (qtd. in Abrams 2017). In other words, Justice Scalia suggests that the language used to make an argument can help it get noticed and remembered. Such memorability is a necessary (although not sufficient) condition for judicial influence.

In this way, the language used to craft a dissenting opinion is really a choice about how (and on what terms) to frame the conflict between the dissenter and the majority opinion. Rice (2016) finds that dissenting opinion writers are particularly apt to choose to change the issues at stake in a case in their dissenting opinions. As a practical example, consider the following sentences from the first paragraphs of the four dissenting opinions filed in *Obergefell v. Hodges*, the U.S. Supreme Court decision that guaranteed marriage equality:

- “I write separately to call attention to this Court’s threat to American democracy.”—Justice Scalia
- “Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not.”—Chief Justice Roberts
- “The Court’s decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built.”—Justice Thomas
- “The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not.”—Justice Alito

Though all four justices disagree with the majority opinion, they frame their disagreement in starkly different terms. To Scalia and Thomas, the *Obergefell* decision is one at odds with basic principles of governance; to Roberts and Alito, the *Obergefell* decision hinges on the strength of constitutional argumentation.

As innumerable studies have found, framing effects matter. The political science literature on framing effects has uncovered a powerful role for framing effects on topics as diverse as issue evaluation and vote choice (Chong and Druckman 2007). Outside of political science, computational linguists have demonstrated that “the way in which a piece of information is expressed – the choice of words, the way it is phrased – might also have a fundamental effect on the extent to which it takes hold in people’s minds” (Danescu-Niculescu-Mizil et al. 2012). In other words, the language used to express an idea affects the extent to which it is memorable. As authors, judges who write dissenting opinions have broad latitude in the linguistic strategies they use and, by extension, the extent to which they write memorable dissents.

We focus on three types of language that existing research has determined to be particularly memorable. First, both the political science and computer science literatures on the effects of language have demonstrated that emotional language tends to be particularly memorable. For example, Civettini and Redlawsk (2009) find that voters are more likely to remember information that generates any emotional reaction than information that does not stimulate their emotions. Other studies (e.g. McGaugh 2003; Kern et al. 2005) come to similar conclusions. Some research even singles out negative emotions, with D’Argembeau and Van der Linden (2005) finding that content that stimulates negative emotions has a stronger effect on the ability to recall information than content that stimulates positive emotions. Most relevant to our study, dissenting opinions that are written in particularly emotional language tend to be covered at higher levels in the media, thus strengthening the extent to which they are memorable (Bryan and Ringsmuth 2016).

Judges are aware of the importance of emotional language for memorability, and, by

extension, legal development. As former U.S. Court of Appeals judge Patricia Wald has written:

It is, of course, possible to write a calm, moderate, restrained dissent, but the question arises: if the difference between the majority and dissent is so mild, why write at all? Logically, a dissent can usefully point out better alternatives to the majority's result or reasoning, or dangers in the development of the law which, while not shaking, are nonetheless worth noting. In the main, such workmanlike dissents do not, however, excite or incite changes in judicial thinking (Wald 1995: 1413).

In short, Wald directly ties emotional language to an increased ability to influence legal development.

Dissenting judges face choices about how to frame their dissent in terms of the emotional content of the language they employ.⁴ Because emotional language is more memorable, later Courts are more likely to recall, and potentially use, dissents framed with such emotional language. As a result, we expect that overall such dissents are more likely to ultimately influence legal development.

Emotional Language Hypothesis: An increase in the amount of emotional language in a dissenting opinion is positively associated with that dissent's effect on legal development.

Aside from the emotional language used in an opinion, the distinctiveness of the language used in a dissenting opinion may also affect its ability to influence legal development. Danescu-Niculescu-Mizil et al. (2012) demonstrate that memorable phrases (movie quotes,

⁴We leave aside in this paper the authoring judge's decision about why to frame a dissent in caustic language, instead looking at the effects of this language. For an analysis of the determinants of emotional language in opinions *see* Wedeking and Zilis (2016).

in their application) tend to employ distinctive words; that is, using words not commonly employed leads to greater memorability. Using semantic text analysis and computer vision, Coscia (2014) comes to a similar conclusion: memes that are similar to others in their content are limited in their effectiveness.

Indeed, many distinctive phrases in Supreme Court dissents have become part of the country's collective memory. Justices Breyer and Scalia, respectively, referred to majority opinions as “sheer applesauce” and “pure applesauce” while Scalia famously referred to the majority in *King v. Burwell* as engaging in “interpretive jiggery-pokery.” As another example, Ruth Bader Ginsburg criticized the Court's decision to gut provisions of the Voting Rights act in *Shelby County v. Holder*, stating that “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” In each of these instances, the justice's distinctive language was widely covered in the media, shared on social media, and excerpted in casebooks: all indicators of influence. They share in common a usage of words that only rarely appear in formal legal analysis.⁵

Distinctive Language Hypothesis: An increase in the amount of distinctive language in a dissenting opinion is positively associated with that dissent's effect on legal development.

Finally, existing research demonstrates that the generality of language affects the extent to which it is memorable. Danescu-Niculescu-Mizil et al. (2012) write that “memorable quotes are structured so as to be more ‘free-standing,’ containing fewer markers that indicate references to nearby text” (2). In other words, dissents framed in technical, case-specific language are less likely to be useful outside of the case at hand while dissents written in more general language provide more obvious opportunities for extension and citation in

⁵The frequency with which we discuss applesauce and umbrellas being one of many differences between justices and the average citizen.

other contexts.

The various memorable phrases from dissenting opinions discussed above provide some facial validity for this assertion. Scalia’s cry that the majority’s reasoning is “pure apple-sauce” is easy to remember and use outside of the specific health care context in which it was first uttered, as are Scalia’s and Thomas’s admonitions in *Obergefell* that the Court is overstepping its constitutional role in American democratic discourse. To this end, we expect generality to play a similar role as emotional and distinctive language.

Generality Hypothesis: An increase in the amount of general language in a dissenting opinion is positively associated with that dissent’s effect on legal development.

Importantly, the latter two hypotheses are not contradictory. The former suggests that more unusual words correspond to more influence. The latter suggests that dissents written with less case-specific language are more likely to be cited. Dissents can be very case-specific while using distinctive language to describe the case at hand (supporting the former hypothesis but not the latter) or very general but also bland in its word choice (supporting the latter hypothesis but not the former).

Measuring Influence

Key to testing our hypotheses is a strategy to measure the level of influence each of thousands of dissents has had on legal development. Measuring legal influence on this scale is particularly challenging; we follow existing research, conceptualizing legal influence at the most basic level: the citation (Hansford and Spriggs 2006; Hinkle 2015).⁶ Citation to any

⁶Influence in a strict counterfactual sense is perhaps impossible to determine because researchers are unable to randomly remove or add cases to the legal canon and observe how the law develops in the presence or absence of those cases. In the absence of a suitable random experiment, examining citation patterns provides one observational design that examines how legal ideas develop over time.

source hardly means that, in the absence of that source, the case at bar would be decided differently (though it may have that effect). However, a citation indicates that a judge finds an idea expressed in a source worthy of note. On some occasions the discussion involves a critique of the cited source. But most of the time citing a source indicates that its ideas are being adopted and applied. Thus, by examining citation patterns, we study the foundations of legal influence.

Ordinarily, detecting legal influence through citation patterns also picks up the effect legal norms. The norm of *stare decisis* demands that judges follow the legal principles espoused in previous decisions of their court or by courts superior to theirs in the judicial hierarchy (Garner et al. 2016). Such decisions are *binding* and therefore must be followed (and therefore are more likely to be cited) even when a judge disagrees with that previous decision. In contrast, citations to dissenting opinions are entirely *discretionary*; judges are never legally required to cite or acknowledge the content of a dissent, especially when that dissent comes in a prior case. As a result, measuring citations to dissenting opinions by majority opinion authors provides a window into legal influence because these citations are entirely at the discretion of the majority opinion author. By citing a dissenting opinion, the majority opinion author is “picking up”—is influenced by—that opinion, and this signal is particularly strong because she is not legally bound to acknowledge or follow that dissenting opinion. In short, a citation to a dissenting opinion is a marker of legal influence.

Data and Research Design

Dissenting behavior shifted dramatically on the Supreme Court around the late 1930s. Epstein, Segal and Spaeth (2001) document the precipitous rise in dissenting opinions and provide evidence that the change was due to the demise of a norm of consensus. We focus our examination on the impact of dissents written since this substantial shift in practice, which happily corresponds with the availability of quantitative measures of judicial ideology (Martin and Quinn 2002). We downloaded all Supreme Court opinions on the merits from

Lexis for the 1937-2014 terms. Next we extracted the text of every majority opinion and the text of each individual dissenting opinion.⁷ Isolating citations in majority opinions to dissenting opinions is not a trivial matter. The legal publication *Shepard's Citations* only lists citations to cases without any further information as to which opinion in the case was cited.⁸ Since we could not rely upon *Shepard's* for our purposes here, we generated an original dataset of citations using the text of majority opinions.⁹ This process culminated in an original dataset containing every citation from a majority opinion to a dissenting opinion written between 1937 and 2014.

We pair our original data on citation to dissents with an original dataset of the text of 5,795 dissenting opinions written from 1937 to 2014.¹⁰ As pointed out by Epstein, Landes and Posner (2011), citation to such opinions is not terribly common. Only 985 of these

⁷We do not incorporate partial dissents in this study. By focusing only on pure dissents we ensure that any citation to such an opinion must, necessarily, reference a point contrary to the majority opinion in the underlying case.

⁸*Shepard's* does distinguish the opinion type for the *citing* case, but it does not do so for the cited case.

⁹This data was compiled using a partially automated two-step process. First, we wrote a Python script to extract every paragraph of every majority opinion that contained a citation to a dissenting opinion (from any court). Second, we manually extracted every citation to a Supreme Court dissent from these paragraphs. Variation in citation format as well as the use of shortcuts such as *id.* and *supra* rendered fully automated citation extraction impracticable.

¹⁰Wide variation in the introduction of separate opinions seriously complicates the task of automatically extracting such opinion text. We conducted substantial iterative testing and modification of our algorithm (as well as manual modifications where necessary) to verify the number of separate opinions we extracted for each case matched the number of opinions reported in the Supreme Court Database.

dissents have been cited subsequently by at least one majority opinion. While our primary focus is on examining how the linguistic choices made by a dissenting justice play a role, we must also take into account the life cycle of a dissenting opinion. We know that the age of a case plays a role in whether it is cited in general (Black and Spriggs 2013). This should be doubly important for dissents because the passage of time may be required for the political context to shift, and, in line with our theory, for any particular dissent to be remembered. To address this reality, we look beyond whether a dissent is ever cited to examine whether it is cited in each particular subsequent term. By using the dissent-term as the unit of analysis, we can control for both the age of a dissent and the relevant political climate.

The outcome variable equals one if a particular dissent was cited by any majority opinion in a particular term.¹¹ Each dissent enters the data the term after it was issued and there is an observation for that dissent in every subsequent term through 2014. Since the outcome variable is dichotomous, we use a probit model. However, because each dissent is in the model multiple times, we use robust standard errors clustered on the dissent.

Our key explanatory variables are constructed to test the overall idea that dissents with more emotional, distinctive, and general language will be more memorable and, therefore, more likely to ultimately be incorporated in majority opinions. Tools from other disciplines are available to address the challenges of measuring these characteristics of a text. The Linguistic Inquiry Word Count (LIWC) software calculates word counts for a number of psychologically significant categories of vocabulary including words that indicate both positive and negative emotion (Pennebaker, Booth and Francis 2007). These variables have been shown to be valid measures of expressions of emotion (Kahn et al. 2007) and useful as applied to legal writing (Black et al. 2016; Bryan and Ringsmuth 2016; Wedeking and Zilis 2016). However, the legal context does require some modification to these particular LIWC categories because a handful of legal terms of art fail to retain the emotional content present in a more general context. For example, the word “complaint” indicates negative emotion in

¹¹Multiple cites to a dissent in a particular year are quite uncommon in the data.

most contexts. Yet, in the legal context, the most common use of this word is simply to refer to a legal pleading. Consequently, we have excluded such neutral legal terms of art from the LIWC emotion categories to create modified legal positive emotion and legal negative emotion categories. Using these categories we generate two variables for each dissent, one with the number of negative emotional words in the dissent and a similar count variable for positive emotional words.¹²

Next we construct a measure of how linguistically distinctive each dissent is. Measuring this in the legal domain requires a careful approach because word usage is quite a bit different in legal argumentation than it is in English usage more generally. Consequently, unlike Danescu-Niculescu-Mizil et al. (2012) we cannot simply use a generic English language corpus to build a measure of how frequently each individual word is used (and, therefore, how distinctive it is). Instead, we use the text of majority opinions, which provides a potential corpus of more than 32 million words. For example, in all Supreme Court majority opinions through the 2015 term both the word “omnibus” and the word “butt” were used a total 250 times (while the word “statute” was used over 100,000 times). In general usage of the English language one would expect the word omnibus to be used much less frequently than the word butt. But this would not reflect the reality that both words are quite infrequently incorporated into formal legal writing. As a result, we use the frequency with which words appear in majority opinions to measure which words are truly distinctive in this context.

Using majority opinions still leave two other potential problems when calculating how distinctive language in a dissent is. First, the very usage of a word in a dissent may result in that word being used in subsequent majority opinion. Therefore, it is important to focus on using only majority opinions from before a dissent to measure linguistic distinctiveness.

¹²The LIWC software generates percentages as output. However, our modeling strategy accounts for the length of each dissent so we use a raw count measure for each of our linguistic variables. All such variables gathered using the LIWC software are transformed into counts using the word count of each text.

Second, word usage may change sufficiently over time that using majority opinion texts from too broad of a time span make a word appear common even when it is distinctive at a later point in history.¹³ Our strategy to address these concerns is to use a rolling series of four-decade chunks of majority opinions in order to build frequency distributions that can be used to measure how distinctive words are over time. Every ten years we calculate a new frequency distribution based on forty years of majority opinions. The distinctiveness of the language in each dissent is calculated using the most recent frequency distribution that does not include any majority opinions issued after the dissent. For example, a dissenting opinion written any time during the 1980s is assessed using a frequency distribution built from majority opinions issued from 1940 to 1979. Each frequency distribution allows us to assign a value for each unique word based on how many times it appears in the relevant corpus of majority opinions.¹⁴

The next step is to move from a measure of how distinctive each *word* is to a summary measure of how distinctive each *dissent* is. In order to account for the shift in the baseline frequency distribution every ten years we define as “distinctive” any word that is in the bottom ten percent of the relevant frequency distribution. For our purposes, these words are in the top ten percent in terms of distinctiveness. Using this threshold, we count the total number of occurrences of distinctive words in each dissent (after preprocessing the text as described in footnote 14 and excluding proper nouns).¹⁵ Our database of dissents contain an average of 31 distinctive words per dissent with a standard deviation of 39.

¹³Language patterns tend to shift slowly, so this is not an imminent concern, but we account for it nonetheless.

¹⁴Before analyzing the frequency of words in majority opinion, we preprocess all texts to exclude stopwords and words shorter than three characters and then lemmatizing and stemming to reduce each word to its smallest constituent element.

¹⁵Our count of distinctive words excludes words that do not appear at all in the relevant majority opinion corpus.

Finally, we turn to measuring the generality of language in dissents. Danescu-Niculescu-Mizil et al. (2012) measure three types of linguistic elements to capture the generality of language: indefinite articles, pronouns, and verb tense. Indefinite articles, “a” and “an”, are used to refer to more general ideas and concepts. Similarly, third person pronouns also tend to be used in more general references (Danescu-Niculescu-Mizil et al. 2012). Furthermore, we expand our analysis to also investigate the use of first person pronouns. There is at least some indication that using the first person may lead to more effective dissents (Aldisert 2009: 203). Finally, Danescu-Niculescu-Mizil et al. (2012) argue that more general language uses fewer past tense verbs because such verbs are more likely to refer to specific events. Since present tense verbs do not share this characteristic, they indicate more general language (Danescu-Niculescu-Mizil et al. 2012). We extend this logic to apply to future tense verbs as well.

The LIWC software described above contains categories for various types of pronouns and verb tenses. We use this software to compile four counts for each dissent: the number of first person pronouns, the number of third person pronouns, the number of past tense verbs, and the number of present or future tense verbs. Past tense verbs are negatively correlated with generality, so a larger value should indicate a text is less memorable. All the other counts should indicate that a text is more memorable.

We also incorporate a placebo test into our analysis. We have hypothesized that dissents with more memorable language are more likely to be cited. An alternative explanation for why some dissents are cited is that the dissenting author has particularly strongly held opinions in the case and therefore writes an opinion that, through sheer force, is likely to be influential in the future. Luckily, strict norms of opinion writing allow us to identify a class of opinion in which the dissenting author feels particularly strongly about the dissent but in a way that may or may not be coupled with memorable language. Language can come to have particular meaning within a certain context and subculture above and beyond the dictionary definition of the words used. A prominent example of this is the volumes spoken

when a dissenting justice uses the bare phrase “I dissent.” This seemingly innocuous phrase is rendered vituperative due to the norm among justices of explicitly expressing their respect for their colleagues alongside the expression of their dissent (Wald 1995). As such, justices have come to use the bare “I dissent” (in contrast to the more common “I respectfully dissent”) as a pointed statement of the intensity of their disagreement with their colleagues in the majority (Note 2011). While it is clear how and why this linguistic convention is used, it is less clear whether such bluntness renders a dissent more memorable or otherwise enhances its future impact as a signal of intense preferences.

Such dissents are somewhat rare, happening in only 6% of dissents in the first five terms of the Roberts Court compared to 67.3% respectful dissents (Note 2011). The Roberts Court is not unusual in this regard, although usage has varied substantially over time. Overall, 15% of the dissents in our dataset use a blunt sign-off with no mention of respect, and Figure 1 illustrates how this has varied by term.¹⁶ Notably, the norm of explicitly stating that a dissent is respectful did not emerge until the Warren Court (Note 2011), so the proportion of dissents using the phrase “I dissent” in the early years of our data may not be quite as significant. Not surprisingly the amount of negative emotional language used in a dissent is positively (and significantly) correlated with the presence of an “I dissent.” But that correlation is only a relatively modest 0.11. If our theory—that memorability drives citation to dissenting opinions—is supported, there should be no relationship between the presence of an “I dissent” and the probability that dissent is cited in later terms.

The linguistic choices justices make are certainly not the only thing that influences whether, and when, a dissent gets cited by a majority of the Court. The length of the dissent is also likely to play a role. Dissents that address more issues or make more ar-

¹⁶This variable was coded using a combination of regular expressions and hand coding. Each instance of “I dissent” was examined in context to make sure it was not part of a sentence such as “respectfully, I dissent.” In addition, the closing paragraph of each dissent was examined for alternative constructions such as “I must dissent” or “I vigorously dissent.”

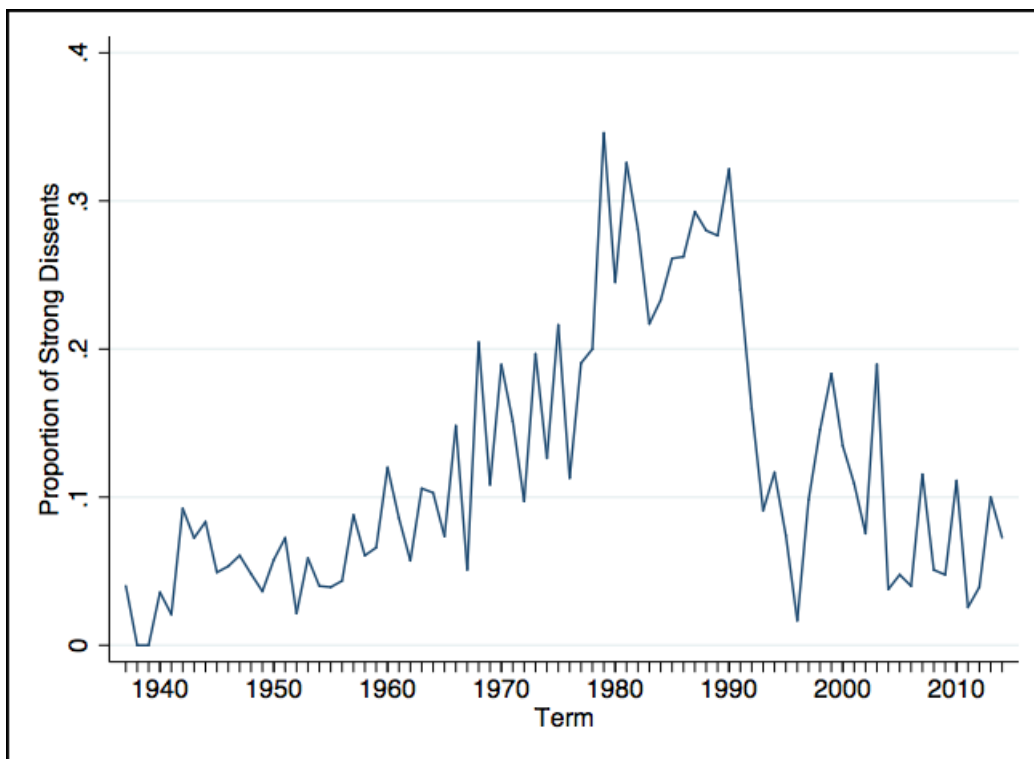


Figure 1: The proportion of dissents each year in the U.S. Supreme Court which utilize the strong form “I dissent.”

guments provide more fodder for future citations. Moreover, since we use count measures for various linguistic indicators it is important to control for the overall number of words used in each dissent. Following standard practice in text-based research, we control for the natural log of the number of words. Citation to a dissent is also likely to be related to the political context of the underlying case. Therefore, we account for the political context at the time a dissent was written by including a binary variable that equals one if the dissent was written in a case with a minimum winning coalition.¹⁷ When the original dissent was only a single vote away from commanding a majority, it is more likely to be cited in future majority opinions.

Finally, we address the changing situation of a dissent over time. Since we know that

¹⁷We obtain the relevant data for each case from the Supreme Court Database available at <http://scdb.wustl.edu>.

ideology plays a substantial role in Supreme Court decisionmaking, we anticipate that the ideological distance between the median of the Court in a given term and the author of a dissenting opinion (during the term in which they wrote the dissent) will be an important predictor of whether a dissent is cited. We calculate this distance using a standard measure of Supreme Court ideology, Martin-Quinn scores (Martin and Quinn 2002). As *Ideological Distance* increases, the probability of a dissent being cited should decrease. Another factor will be the relative composition of the Court’s issue portfolio in a given term. When more cases are heard that address the same issue area as a dissent, the more opportunities there are for it to be cited. Consequently, we control for the proportion of the Court’s docket in each term that address the same broad issue area as the dissent in question. Finally we control for the age of a dissent and its age squared to since the effect of age is likely to be non-monotonic.

Before turning to our empirical analysis, we offer a few descriptive summaries that show how the justices vary in the tone and quantity of the dissents they write. Table 1 lists the summary for each justice who joined the Court since 1937 of the total number of negative emotional words their dissents contain en masse as well as the average negative emotional words per dissent, and the proportion of times each justice signed off with a blunt “I dissent.” The rankings for each of these measures and the number of total dissents written by each justice are also listed. As expected, Justice Scalia is near the top of the list in terms of total negative verbiage issued in dissent. Yet his somewhat lower ranking in terms of average negative usage may suggest he saved his most vehement phrasing for particular occasions.

Perhaps unsurprisingly upon further reflection, the justice who averages the highest number of negative emotional words per dissent is Sonia Sotomayor who, in her relatively short tenure on the Court has become well-known for her “passionate” and “emotional” dissent on affirmative action (Sanchez 2014), in which she emphasized the importance of race:

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a

Justice	Total Neg. Emo. Words	Rank	Avg. Neg. Emo. Words	Rank	Proportion “I Dissent”	Rank	Total # of Dissents
Stevens	17478	1	27.1	21	0.01	30	644
Brennan	12753	2	32.6	15	0.29	4	391
Marshall	11184	3	34.3	14	0.42	1	326
Scalia	8891	4	40.8	7	0.20	10	218
Black	7327	5	22.6	25	0.11	20	324
White	7208	6	27.4	20	0.21	9	263
Rehnquist	6856	7	23.5	24	0.23	6	292
Frankfurter	6771	8	25.6	22	0.02	29	264
Douglas	6688	9	11.9	35	0.05	27	562
Blackmun	6419	10	28.0	19	0.33	3	229
Breyer	6215	11	42.9	6	0.15	14	145
Thomas	5584	12	36.5	9	0.03	28	153
Harlan	4653	13	17.8	29	0.07	24	262
Powell	4520	14	35.9	12	0.33	2	126
O’Connor	4399	15	37.0	8	0.14	17	119
Souter	4338	16	44.7	5	0.00	31	97
Kennedy	3866	17	45.0	4	0.29	5	86
Ginsburg	3110	18	29.9	16	0.22	7	104
Stewart	2681	19	13.8	33	0.07	23	195
Alito	2477	20	45.9	3	0.00	34	54
Jackson	2206	21	21.4	28	0.05	26	103
Burger	2090	22	21.5	27	0.14	16	97
Sotomayor	1937	23	62.5	1	0.00	33	31
Rutledge	1797	24	35.9	11	0.16	12	50
Clark	1432	25	14.2	32	0.18	11	101
Murphy	1392	26	22.4	26	0.15	15	62
Reed	1381	27	17.3	30	0.09	22	80
Warren	1343	28	28.6	17	0.21	8	47
Roberts	1126	29	36.3	10	0.00	35	31
Burton	792	30	15.2	31	0.00	36	52
Kagan	738	31	61.5	2	0.00	32	12
Goldberg	706	32	35.3	13	0.10	21	20
Fortas	626	33	24.1	23	0.12	19	26
Whittaker	493	34	12.3	34	0.13	18	40
Vinson	366	35	28.2	18	0.15	13	13
Minton	239	36	7.0	36	0.06	25	34

Table 1: Putting the “Diss” in “Dissent”: Ranking the Justices on the Negativity of their Dissenting Opinions. Table includes all dissenting opinions written through the 2014 term by justices who joined the Court in 1937 or later.

young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then

is pressed, “No, where are you really from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”

Likewise, consider Sotomayor’s “jaw-dropping” “atomic bomb” of a dissenting opinion about police brutality in *Utah v. Streiff* (Stern 2016), in which she wrote

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

This provides some facial validity to the rankings shown in Table 1.

Results

The empirical results displayed in Table 2 provide at least some support for each of our expectations about the use of memorable language in dissenting opinions. The Emotional Language Hypothesis receives asymmetric empirical support, although that support does emerge where we most expect it. An increase in the number of negative emotion words in a dissent is a statistically significant predictor of an increase in the probability that the dissent is cited by a majority opinion.¹⁸ But positive emotion words do not have a statistically significant impact. The Distinctive Language Hypothesis is supported by the evidence. An increase in number of infrequently-used words increases the chances of a dissent being cited in the future. Using past tense verbs indicate more specific language, and this pattern is

¹⁸All discussion of statistical significance is at the 0.05 level.

statistically linked to fewer cites, as anticipated by the Generality Hypothesis. However, third person pronouns and the use of present or future tense verbs does not have a statistically significant impact. Finally, using more first person pronouns does lead to a dissent having greater influence. Although, this effect may not be due to first person pronouns making a dissent more generally applicable, they do seem to make the text more memorable. This asymmetric evidence fits well with the findings of D’Argembeau and Van der Linden (2005), who suggested that negative emotion is more easily recalled than positive emotion.

	Coef.	S.E.
Negative Emotion Words	0.0016*	(0.0004)
Positive Emotion Words	0.0004	(0.0006)
Distinctive Words	0.0009*	(0.0004)
Indefinite Articles	-0.0002	(0.0005)
First Person Pronouns	0.0022*	(0.0010)
Third Person Pronouns	-0.0013	(0.0007)
Past Tense Verbs	-0.0013*	(0.0004)
Present/Future Tense Verbs	0.0002	(0.0003)
“I Dissent”	-0.0240	(0.0346)
ln(Word Count)	0.2211*	(0.0273)
Minimum Winning Coalition	0.1087*	(0.0258)
Ideological Distance	-0.0311*	(0.0084)
Prop. of Same Issue on Docket	0.4833*	(0.1341)
Age of Dissent	-0.0297*	(0.0023)
Age of Dissent ²	0.0003*	(0.0000)
Intercept	-3.8296*	(0.1839)
N	224,838	

Table 2: Probit regression estimates of the effect of linguistic construction of a dissent and control variables on whether a majority opinion of the Supreme Court cited the dissent in each subsequent term through 2014. Robust standard errors clustered on the dissent and are reported in parentheses next to each coefficient. * denotes a p-value less than 0.05.

Additional support for our theory comes from the coefficient for “I Dissent.” Recall that we hypothesized that, because this phrase signals disagreement, but not in a memorable way, it should *not* be associated with an increased probability of citation. While one must be cautious about interpreting a null result with meaning, the lack of a statistically significant relationship between this variable and the probability of citation fits well with our theory: using the bellicose phrase “I dissent” does not appear to significantly alter the future impact

of a dissent on later Courts. Moreover, since the norm surrounding the significance of this phrase did not fully develop until the Warren Court, it is worth noting that the effect of using the phrase “I dissent” does not become statistically significant if the model is run using only the data from the Warren Court forward.

Our results indicate that language matters, but how much does it matter? Evaluating the substantive impact of the linguistic features of a dissent is somewhat complicated by the very small baseline probability that a dissent will be cited in any given term. When all variables are set to their median values, the baseline predicted probability of citation is 0.003. Part of the reason why this number is so small is that the long time span of our dataset results in the median age of a dissent being 22 years. As Figure 2 illustrates, the probability of citation, never very high to begin with, decreases dramatically over the early life of a dissent. In order to evaluate predicted probabilities at a level that will produce more meaningful results, we use the median age of cited dissents at the time of citation, which is nine years. Even with this more relevant age, the predicted probability of dissent is still only 0.007.

Figure 3 shows the predicted probability of citation over 99% of the values in the dataset for the four linguistic features that significantly predict future citation. As discussed above, the context guarantees that absolute effect sizes will be quite small, so examining relative effect sizes is more useful. Moving the number of negative emotion words from its 25% value to its 75% value in the data results in an increase of 0.0008, which is 11% of the baseline rate. A similar change in distinctive words results in an increase of 0.0006 (8% of the baseline rate) and such a change in first person pronouns leads to an increase of 0.0005 (7% of the baseline rate). The effect of past verbs has the largest effect, resulting in a decrease of 0.0012 (17% of the baseline rate). Table 3 in the Appendix provides similar estimates for all variables. Although these effect sizes are quite modest, even in relative terms, the potential upside—influencing future legal development—may very well be sufficiently valuable to motivate justices to pay careful attention to their linguistic choices.

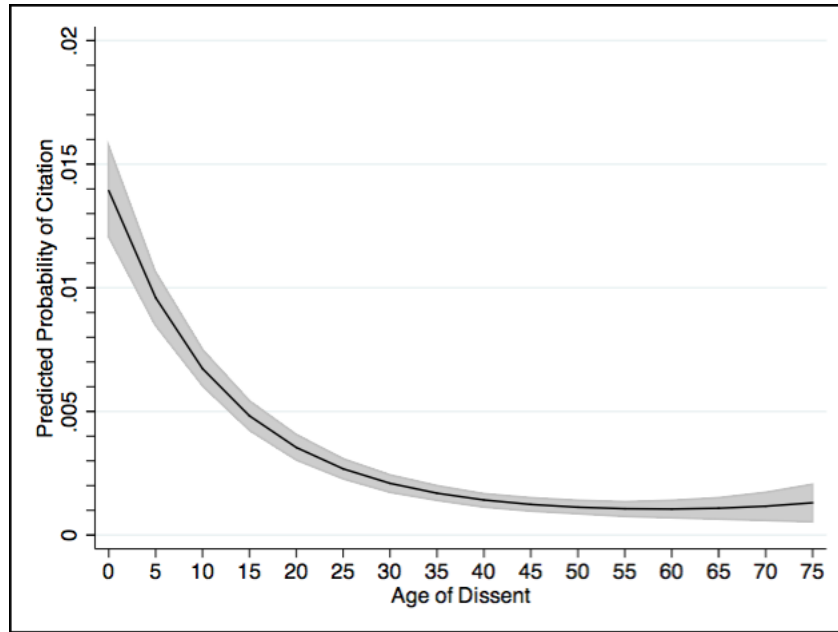


Figure 2: The predicted probability a dissent is cited in a majority opinion in a particular term over the range of possible values of a dissent’s age. All other variables are held at their median value.

The control variables all perform as expected. Longer dissents and those written in cases with a minimum winning coalition are more likely to be cited. The dynamics of potential citing Courts play the expected role as well. Citation to a dissent is more likely in terms in which the ideological median of the Court is closer to the ideology of the justice who authored the dissent. Citation is also more likely in terms where the Court hears a greater proportion of cases addressing the same broad issue area as the dissent.

Discussion and Conclusions

Dissenting opinions are costly to write but provide limited immediate short-term policy gains for the opinion author. Yet, judges often justify their decision to dissent on the notion that their dissents can influence long-term legal development (Hand 1958). Aside from historical anecdote, we know little about the influence of dissenting opinions on later decisions.

In this paper, we sought to quantify the influence of dissenting opinions on the development of the law. We found that dissenting opinions are rarely cited. Indeed, only a handful of dissenting opinions are cited by a majority opinion in a given term, and only 17% of the

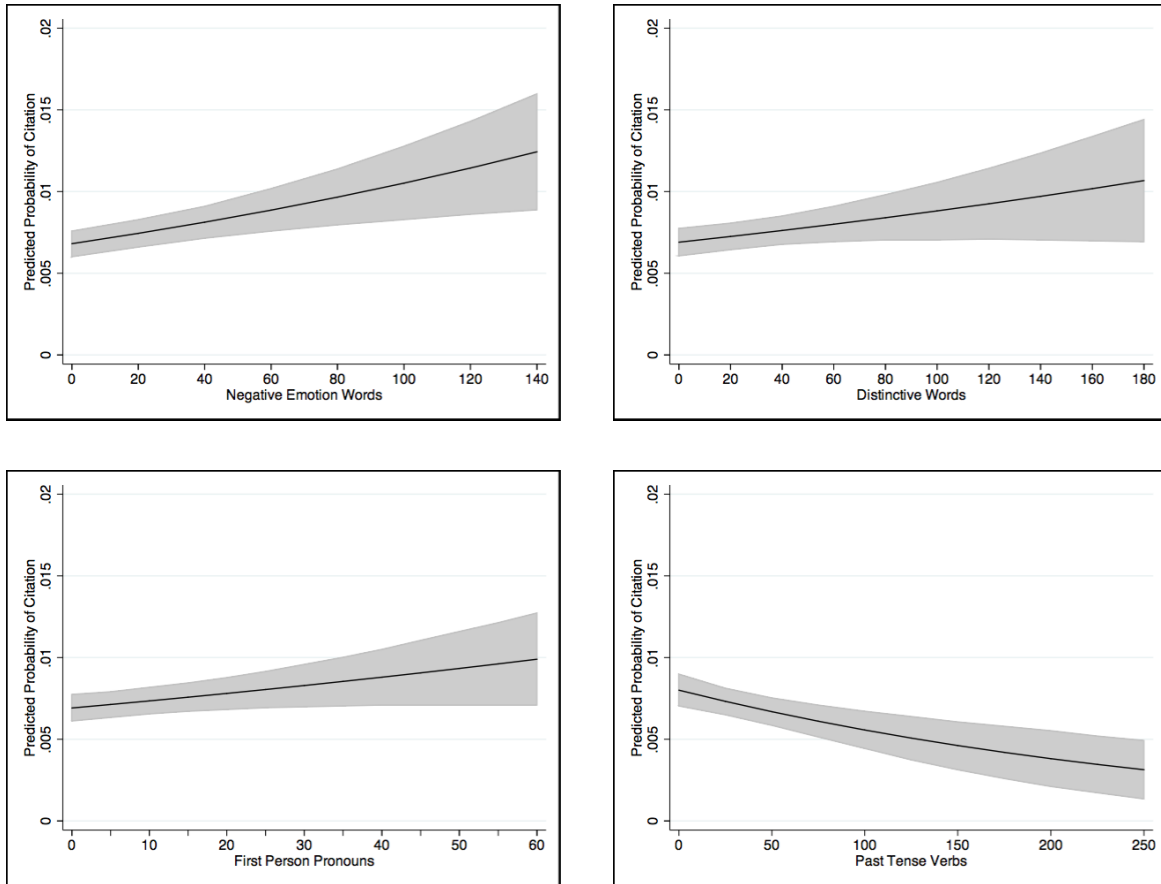


Figure 3: The predicted probability a dissent is cited in a majority opinion in a particular term over a range of values for four statistically significant variables. The age of the dissent is fixed at nine (the median age of a cited dissent), and all other variables are held at their median in the full dataset.

dissenting opinions written between 1937 and 2014 have ever been cited by a subsequent majority opinion.

Why are some dissents cited while others are not? To answer this question, we proposed that dissenting opinions framed in memorable language are more likely to be subsequently cited. This idea is unique. Indeed, in an appraisal of Justice Scalia’s jurisprudence, famed constitutional law scholar Erwin Chemerinsky (2000) writes “Nothing is gained substantively or rhetorically by calling a colleague’s position ‘appalling’ or ‘ludicrous’ or ‘ridiculous’” (385). We suggest there might be. On the contrary, we have presented evidence that those dissents written in *memorable language* are most likely to be cited in a given term. In this sense, Justice Scalia had it exactly correct: by imbuing separate opinions with memorable language,

judges are able to make those opinions more meaningful in future terms.

In particular, our results suggest a “Sore Loser Benefit”. Framing dissenting opinions in negative emotional language is a particularly strong strategy for dissenting justices to employ if they want their dissenting opinions to be cited in the future. Indeed, only negative emotional language is related to an effect on legal development in the long-term. Framing a dissenting opinion in positive emotional language has no effect on the probability that it is cited in the future. Likewise, in line with the computer science literature on memorable language, we found that dissenting opinions written both in more distinctive and more more general language are also more likely to be cited. Finally, we added the observation that in the context of judicial opinions use of the first person appears to be associated with greater memorability as well.

Importantly, we tested our theory—that memorable language drives legal influence—against the principal competing explanation for the influence of dissenting opinions, namely that dissenting opinions that are issued over strenuous objections are more likely to become influential in the future. Using a key norm of judicial opinion-writing—the use of “I dissent”—we found no evidence that such dissents are more likely to be cited in the future. Indeed, the driving forces behind future citation appear to be a combination of memorable language, opportunity, and ideology, but not a strenuously felt dissent.

In this sense, though our focus in this paper is on the effect of language on citation behavior, our results have clear implications for dissenting opinion writers: be more caustic, witty, general, and personally involved on things you care about becoming law down the line. Bland dissenting opinions may fail to rile one’s colleagues, thereby preserving a sense of collegiality on the Court, but they are also impotent dissents with even less long-term influence than the average dissent.

An obvious follow-up question concerns the broader consequences of such memorable language for the Court’s legitimacy. Dating back at least to Justice Marshall’s belief that the Court should speak as one united voice, commentators have long worried (Pound 1953)

about the potential for dissenting opinions to harm the esteem in which the public holds the Court. Our findings may therefore be concerning; by encouraging judges to engage in memorable dissents, these results may also raise the specter of decreased legitimacy for the institution. And there is good reason to worry: Gibson and Nelson (2016) find that perceived politicization—the feeling that the justices are acting like politicians—is a far bigger threat to the Court’s support than either a belief that the justices decide cases in accordance with their policy preferences or dissatisfaction with the Court’s decisions. Thus, justices who wish to write efficacious dissents must balance the desire to be memorable with a desire to appear nonpoliticized.

Finally, we note that the metrics we use to measure memorable language in judicial opinions have broad applicability to a wide array of political phenomena. Importantly, recent research on political behavior has sought to determine the extent to which voter behavior is influenced by emotions (Civettini and Redlawsk 2009). Examining the strategic use of rhetoric by campaigns to stoke these emotions seems an important area of further inquiry. Similarly, research on media and politics has played close attention to the use of framing effects to affect public opinion (Prior 2008); future work that mines the linguistic effects of such framing will only deepen our understanding of the media’s effect on popular opinion.

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Appendix

	Change	95 % CI
Negative Emotion Words	0.0008	[0.0004, 0.0012]
Positive Emotion Words	0.0002	[-0.0006, 0.0011]
Distinctive Words	0.0006	[0.0001, 0.0011]
First Person Pronouns	0.0005	[0.0001, 0.0010]
Third Person Pronouns	-0.0006	[-0.0012, 0.00002]
Indefinite Articles	-0.0003	[-0.0014, 0.0008]
Past Tense Verbs	-0.0012	[-0.002, -0.0004]
Present/Future Tense Verbs	0.0004	[-0.0009, 0.0016]
"I Dissent"	-0.0005	[-0.0018, 0.0008]
ln(Word Count)	0.0068	[0.0049, 0.0087]
Minimum Winning Coalition	0.0025	[0.0013, 0.0037]
Ideological Distance	-0.0014	[-0.0021, -0.0006]
Prop. of Same Issue on Docket	0.0013	[0.0006, 0.0021]
Age of Dissent	-0.0047	[-0.0052, -0.0041]

Table 3: The change in the predicted number of citations when moving each dichotomous variable from 0 to 1 and moving each continuous variable from its 25th percentile to its 75th percentile (while the age of the dissent is fixed at nine, the median age of a cited dissent, and all other variables are held at their median). The relevant 95% confidence interval appears in brackets next to each predicted change.