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Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size

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Abstract

Do judicial dissents affect mass politics? The conventional wisdom is that unanimous rulings boost support for Supreme Court decisions, while division fuels popular opposition. However, empirical analysis of public reaction to unanimity and dissent is sparse, incomplete, and inconsistent. Through a series of survey experiments, I expand upon existing research on public opinion of judicial unity. I find that reaction to judicial consensus is dependent on the ideological salience of the issue involved and that, contrary to conventional wisdom and recent findings, dissent can foster acceptance of rulings among the Court's opponents by suggesting evidence of procedural justice.

Keywords

Supreme Court, public opinion, dissent, experiments

In May of 1954, the Supreme Court, led by Chief Justice Earl Warren, announced its unanimous decision in *Brown v. Board of Education* that racial segregation in public schools was unconstitutional. Although the justices were initially deeply divided on the issue in this case, Warren, fearing that divisions on the Court would feed public resistance to the ruling, artfully crafted and negotiated a unanimous opinion (Klarman 2004). In other words, the Court in *Brown* believed that the extent to which it was unified mattered to the public's perception of the decision.

This is just one example of a prevalent assumption regarding the relationship between the courts and the public: dissenting opinions are somehow damaging to a court's public image and political power. Following this logic, we would likely assume that a unanimous decision will meet less resistance from the public than a divided one. In addition, courts that more often present unified fronts may maintain a higher degree of public trust than those that are wrought with division. Versions of these assumptions appear frequently in discussions of the court's standing with the public at large.

In spite of this widespread conventional wisdom on the harm of judicial disunity to the court's popular legitimacy, there is scant research on its empirical veracity. The little scholarly research addressing this topic has varied in its assessment. For several decades, this slow-moving literature's position was that public attitudes toward the Supreme Court and its rulings are unaffected by majority size (Gibson, Caldeira, and Spence 2005; Marshall 1987; Peterson 1981), though one recent study has challenged this conclusion (Zink, Spriggs, and Scott 2009).

This paper examines public reaction to Supreme Court majority size through a series of survey experiments. Unlike prior work, these experiments consider the distinction between large and small non-unanimous majorities. While there exist separate lines of conventional wisdom as to how the public may react to a five-to-four decision versus one that is eight-to-one, the two are often conflated in the scholarly literature, blurring the practical differences in the way disunity is perceived. In addition, I consider the hypothesis that, in some instances, dissent may actually help rather than hinder public acceptance of judicial decisions. Though this is contrary to the conventional wisdom, it is consistent with well-established social psychological studies of the public's belief in the legitimacy of the legal system. While I find evidence that majority size does have an impact on public attitudes toward Court decisions, the results show that this effect varies—in its magnitude and direction—with the salience of the issue involved. Specifically, I find that the public is unmoved by the majority size in highly salient decisions, that those predisposed to oppose the court are more receptive to divided, moderately salient cases, and that

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large majorities in cases with low salience can move public attitudes in the direction of the decision.

Judicial and Political Concerns about Dissent

Historically, many of those on the federal bench have worried about the public opinion consequences of handing down a decision without a unified front. The aforementioned example of Warren's concern in *Brown* is but one high-profile example. In fact, after becoming the Supreme Court's fourth Chief Justice in 1801, John Marshall, in an effort to increase the Court's institutional legitimacy, discontinued the practice of each justice writing a separate, or *seriatim*, opinion in favor of a single, typically unanimous opinion of the Court for each case. Thomas Jefferson, a political adversary of Marshall's, was highly critical of this new approach and suggested that *seriatim* opinion writing be required so that Congress could maintain oversight over the behavior of individual judges (Moorhead 1952). Nevertheless, Marshall's new custom of a singular opinion for each case dominated the Court's rulings throughout his tenure, which saw a dramatic strengthening of the institutional position of the third branch.

Marshall's unanimity norm continued on the Court well into the twentieth century. Though justices did occasionally write separate opinions to dissent from the majority even as early as the Marshall Court, this was a relatively unusual occurrence until 1941 (Walker, Epstein, and Dixon 1988). Given this norm of avoiding dissent, it is not surprising that a number of practicing judges have viewed separate opinion writing negatively. Interestingly, many of their arguments point to external motives for judicial dissent. For instance, between his two Supreme Court appointments, soon-to-be Chief Justice Charles Evans Hughes (1928) wrote,

> There are some who think it desirable that dissents should not be disclosed as they detract from the force of judgment. Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time.

Hughes' statement appears to acknowledge the notion that judges are aware of and are concerned about the external force of public opinion when determining their vote. Hughes is clearly critical of Marshall's norm of unanimity; in fact, some even point to Hughes' tenure as Chief Justice as a starting point for a new norm of dissensus on the Court (Haynie 1992). However, in his criticism, he suggests that loss of public support for the judicial rulings may be the cost of abandoning the consensual norm.

Even after judicial dissent had grown to become more commonplace, Learned Hand (1958), while serving as a judge on the U.S. Court of Appeals for the Second Circuit, wrote,

> [T]he difficulty of securing unanimity . . . is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure that they will not be caught.

That is, Hand suspects that unanimity is essential for public confidence in and compliance with legal decisions.

This view is expressed not only in the extracurricular writings of federal judges, but in the written opinions of the Supreme Court Justices themselves. For instance, Justice Edward White, in *Pollock v. Farmers' Loan and Trust Co.* (1895) argued, "The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort." More recently, Justice Stephen Breyer stated in *Bush v. Gore* (2000), "And above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself." In fact, Davis (2011) argues that the justices will use dissents as a means of attracting media attention to their ideas and detracting public support from the majority.

Public voices expressing concern over the Court's division do not only arise from the judiciary itself. Recently, a number of figures in the news media have taken up the issue. However, unlike the above concerns, which chiefly warn against the dangers of any dissent whatsoever, media commentators are particularly troubled by the Supreme Court's apparent level of sharp, partisan divisions. For instance, in an op-ed column for the *New York Times*, Ross Douthat (2009) lamented that "settling so many vexing controversies with 5-to-4 votes . . . is an awfully poor way to run a republic." From abroad, David Pannick (2008) argued in an op-ed for the *Times* of London that Americans should elect Barack Obama because of the consequences that McCain's nominations would have on the partisan and closely divided American Supreme Court. These sentiments are similar to, though distinct from, those expressed by the judicial voices above. Whereas the concerns of Warren, Hand, and Hughes warn against the dangers of any dissent whatsoever, these political commentators seem to

view the threat to the Court's legitimacy as coming primarily from cases decided with only a bare majority of the Court. In other words, while an eight-to-one decision in *Brown* was not good enough for Warren, contemporary political commentators would welcome such rulings if it meant a decline in the number of sharply divided five-to-four outcomes.

Interestingly, there has been no suggestion in the conventional wisdom that dissent may actually *help* the Court improve its image, even though such an effect would be theoretically consistent with many aspects of our understanding of the sources of the Court's institutional legitimacy. For instance, several studies in the social psychology of law and legal obedience (Lind and Tyler 1988; Thibaut and Walker 1975; Tyler 2006) suggest that perceptions of procedural justice are central to our evaluation of legal decision making. In other words, the compliance and acceptance of a losing party in a legal dispute is shaped in large part by the extent to which that party perceived the resolution process to be fair. In addition, Caldeira and Gibson (1992) suggest that support for the Supreme Court is rooted in commitment to democratic values. Thus, it stands to reason that, when one sees evidence of debate on the Court, as shown by a dissenting opinion, rather than a monolithic, unilateral decision, she may interpret it as the result of a fair, democratic decision-making process in which both sides were heard (it matters not if divided rulings are *actually* more procedurally fair than unanimous ones; the public may use this as a heuristic even if it is incorrect). Though contrary to the popular concerns about the harm of dissent, it is within the realm of plausibility that dissenting opinions may satisfy our desire for a fair, democratic Court.

Public Response to Judicial Consensus

Although much scholarly literature has focused on the public opinion consequences of Supreme Court decisions, relatively few pieces have examined the role of the Court's majority size in swaying the masses. This is puzzling given the widespread assumption that decisions with larger majorities are more publicly accepted than those that are closely divided.

In fact, this assumed relationship is so prevalent that several studies of judicial politics have mentioned it in passing. For instance, Ulmer (1971) speculatively writes regarding Warren's opinion in *Brown v. Board of Education*, "[O]ne supposes that the unanimity of the Court enhanced the acceptability of the decision. Had there been dissents, it is possible that dissidents in the concerned publics might have rallied around the dissenters." While there is little direct evidence that the *Brown* opinion itself was able to sway public opinion (Murakami 2008), we cannot help but wonder how much less effective the *Brown* decision may have been if it were decided by a divided Court.

Several other scholars echo this assumption. For instance, Rathjen (1974) argues, "[A]n individual justice is likely to consider the fact that his separate opinion writing may be costly to the Court's authority." Likewise, Walker, Epstein, and Dixon (1988) state that separate opinion writing "may shake public confidence in the judiciary by bringing into question the certainty of the law." Furthermore, Wahlbeck, Spriggs, and Maltzman (1999) write, "Any signals suggesting disagreement on the Court possibly weaken the standing of the Court as an institution." However, while each of these publications point, in passing, to the notion that judicial disunity is likely to be a factor in affecting public support for the Court, they all do so in the absence of empirical evidence indicating this phenomenon. Thus, it is not only jurists, public officials, and political commentators who assume that there is a relationship between large Court majorities and public opinion; this conventional wisdom is taken for granted in academic circles as well.

Over the past several decades, a handful of studies have directly addressed the empirical truth of this assumption. Peterson's (1981) review of the literature on the causes and consequences of judicial dissent points out that the few existing studies of public opinion and the judiciary limited the plausibility of the argument that judicial dissent may weaken the court's perceived authority. He reasons that research (Lehne and Reynolds 1978; Murphy, Tanenhaus, and Kasnter 1973) has shown that people are largely unaware of the court's activities, making them unlikely to be affected by any particular judicial action. Moreover, he also argues that political elites are much more aware of the court's business, and yet they are largely unmoved by the level of judicial unity. As such, Peterson states that there is "indirect disconfirmation" for the hypothesis that dissent negatively affects perceptions of the institution's authority.

Though Peterson's reasoning is sound, research on the interaction between the judiciary and the public has developed greatly since the publication of his review three decades ago. Research over this time period has demonstrated that there is support for a number of ways that the court may indeed influence public opinion (Clawson, Kegler, and Waltenberg 2001; Franklin and Kosaki 1989; Gibson and Caldeir 2003; Grosskopf and Mondak 1998; Hoekstra 2003; Johnson and Martin 1998; Stoutenborough, Haider-Markel, and Allen 2006). In fact, the Court may have more capability to move public opinion than Congress does (Bartels and Mutz 2009). In addition, several of these works have built upon the field of

social psychology to explain how courts are able to influence public attitudes (Brickman and Peterson 2006; Johnson and Martin 1998). Thus, while Peterson's conclusion is not incorrect given the information available to him, it was, perhaps, premature.

Marshall (1987) was the first to tackle directly the issue of whether unanimity and dissent affect the public's reaction to judicial opinions. He did this within a larger study of the Court's legitimacy-conferring power. His research design used 18 Supreme Court cases for which opinion polls existed before and after the decision. In his analysis of the shifts in opinion before and after the Court's rulings, Marshall controlled for a number of factors thought to affect public reaction, including whether the opinion was unanimous. He found this variable to be statistically insignificant in explaining the opinion movement. However, it should be noted that only two of the decisions were unanimous. It should also be noted that this very small number of cases was not randomly selected either; his analysis was restricted to the meager number of cases for which sufficient data existed. Although this study marks a great first step in empirically analyzing the effects of judicial unity on the public, the small sample size, nonrandom selection of cases, and lack of variance on the variable of interest make it hard to generalize these results.

Nearly two decades later, Gibson, Caldeira, and Spence (2005) examined the role of the level of division as part of a larger study in the sources of the Court's legitimacy. In doing so, they introduced an experimental research design to the study court majority size. In their experimental survey design, the researchers gave their respondents vignettes about a fictitious case dealing with the treatment of Florida ballots in the wake of the 2,000 presidential election controversy. Among the manipulated variations in the vignettes was a phrase regarding the degree of division in the decision making: the court was either characterized as "nearly unanimous" or "divided along party lines." Their findings showed no significant difference in public acceptance of the decision between those given reports of a nearly unanimous decision and those told the decision was divided.

Following up on this research, Zink, Spriggs, and Scott (2009) noted the limitations of using the unusual and high-profile issue of the Florida ballot crisis so close in time to the actual events. To achieve a more generalizable result, Zink and his colleagues conducted a survey experiment that covered a variety of common political issues of varying levels of ideological salience. Their findings departed from those of Gibson and his colleagues: unanimous rulings appeared to boost support for Supreme Court decisions of all levels of salience among those respondents who agreed with the Court's ultimate policy position prior to the experiment. However, they did not find unanimity had any effect on the attitudes of respondents opposed to the policy content of the Court's ruling ex ante.

The extant literature on the public opinion effects of Supreme Court unity is thus not only sparse but inconsistent in its results. Two key limitations in the existing research may explain these troubles. First, while the more recent experimental work on this topic is more methodologically sound than earlier research, neither Zink and his colleagues' study nor that by Gibson and colleagues examine the isolated effect of judicial consensus. Gibson, Caldeira, and Spence's design manipulates a number of independent variables in addition to the level of division, such as the policy-making institution involved, adherence to the rule of law, and the practical consequences of the decision. Likewise, Zink, Spriggs, and Scott look at the Court's treatment of precedent simultaneously with the degree of unity. Thus, in both cases, the effect of judicial coalition size can only be applied independently if these variables are additive and not interactive. Without any evidence pointing to the fact that the unity variable was psychologically processed by respondents separately from the other treatment manipulations, these researchers run the risking of measuring not that variable's isolated effect but instead its interaction with the others.

Second, all prior work has dichotomized the majority size variable (i.e., rulings are presented as or grouped by being either unanimous or non-unanimous), thereby overlooking important theoretical nuances in the popular understanding of how judicial division affects public attitudes. Of course, the Supreme Court has nine justices, and a divided decision can have as little as one and as many as four dissenters. This distinction is important due to the popular attention given to five-to-four decisions. While popular concerns regarding judicial dissensus have largely been focusing on those cases where a single vote controls the ruling, this is not entirely the same as the legal truism considered by Warren in *Brown*; after all, Warren was determined to make *Brown* a unanimous decision, not one with simply a large majority. In other words, an eight-to-one decision would not have satisfied Warren, though it would satisfy the many contemporary public commentators who lament the sharp, narrow division on the Court. By failing to distinguish between a minimum winning coalition and a large but non-unanimous majority, prior work has conflated these two lines of conventional wisdom and thus fail to officiate between the two. As such, a key element in how majority size may manipulate public opinion is unobservable in earlier analyses.

Hypotheses and Experimental Design

This article uses a new survey experiment to address the theoretical concerns above. In this experiment, majority size is explicitly considered independently of other

factors. Furthermore, respondents are randomly assigned to one of four, rather than two, treatment groups based on majority size: unanimous, eight-to-one, five-to-four, and an untreated group where no information is given regarding majority size. (Details of the treatment specifications and survey instruments are described below.)

Hypotheses

The conventional wisdom that has emerged separately from the legal community and from the world of media pundits, political commentators, and public officials essentially form two competing hypotheses. We can label these the "pro-unanimity" hypothesis and the "antidivision" hypothesis, respectively.

The pro-unanimity hypothesis is modeled after the behavior and sentiments of Earl Warren and like-minded jurists. Stated simply, the pro-unanimity hypothesis argues that, *all else being equal, unanimity will increase support for Supreme Court decisions*. The corollary to this hypothesis is that *any dissent can be harmful to support for the Court's decision*. This hypothesis may best be understood as it relates to a hypothetical baseline level of support for a given Supreme Court decision. This baseline support can be defined as that which is independent of the level of division among the justices. By this logic, a unanimous decision would receive a level of public support higher than the baseline level. However, according to this hypothesis, *any dissent at all*, be it four votes or just one, would lower the level of public support below our hypothetical baseline. Based on his commitment to having the *Brown* decision delivered without a single dissent, it appears that Chief Justice Warren subscribed to this hypothesis.

The antidivision hypothesis, on the other hand, makes a slightly different prediction. It argues that, *all else being equal, close division will decrease support for Supreme Court decisions*. This view, put forth primarily by media pundits and political commentators, is particularly concerned about closely divided decisions because they indicate that public policy outcomes may hang solely on the political whims of the median justice. However, *these concerns would be assuaged by larger, non-unanimous majorities*. That is, while the previous perspective views the lone dissent in an eight-to-one decision as a potential rallying cry for Court opponents, this hypothesis suggests that such a decision is almost as good as unanimous and represents a near consensus on the Court. Thus, if we are again to imagine a baseline level of decisional support that is independent of the voting majority size, any decision that is unanimous or nearly unanimous (say, eight votes to one) will receive a higher level of support than that baseline, though closely divided decisions (five votes to four) will receive lower than the baseline level of support.

An alternative to these two hypotheses also exists. Though contrary to the mainstream conventional wisdom, it is possible that dissent may improve the level of public support for a decision, particularly among those who are politically opposed to the policy direction of the ruling. Given the aforementioned discussion of how perceptions of procedural justice may affect attitudes toward Supreme Court unity, we cannot discount this position. That is, if those predisposed to disagree with a Court's ruling want to be sure that their political allies on the Court had their say in the decision-making process, they will be more inclined to support (or at least accept) rulings that represent their view through a dissenting opinion. This possibility is further made plausible by the fact that no study, not even that by Zink, Spriggs, and Scott (2009), which found a positive unanimity effect among those already predisposed to agree with a ruling, has found that the political opponents of a decision are any more likely to have positive attitudes toward a Court ruling simply because it is unanimous. Because of the importance of having one's own political views represented in Court, I label this the "political agreement hypothesis." Thus, a unanimous decision would receive a lower level of support from its political opponents than their baseline level, while divided decisions (i.e., those where their side is being represented in the final outcome) will receive a higher level.

Of course, we ought not necessarily expect that a single hypothesis will uniformly explain public reaction to unanimity and dissent. There exists a strong possibility that popular response may be dependent on the issue at hand. Studies of social psychology (Petty and Cacioppo 1986), political behavior (Zaller 1992), and judicial politics (Brickman and Peterson 2006; Johnson and Martin 1998) demonstrate that one's ability to be persuaded (by a set of judges, for example) is dependent on how crystallized her prior attitudes are. Specifically, these findings suggest that individuals are difficult to persuade when they are entrenched in their opinions on a topic but are persuadable when they are only moderately engaged in the subject. As such, we might expect that opinions on highly salient "hot button" issues may be unmoved by the Court, as such issues may be central to an individual's political ideology. As such, I do not expect to find evidence for any of the above hypotheses with regard to this type of ruling.

However, the Court may be able to move opinion on issues of very low salience quite easily, as the public does not have much invested in their attitudes on these topics and may be quite willing to defer to perceived experts on the matter. Because of this, issues of such low salience are unlikely to invoke a response consistent with the political agreement hypothesis, as the initial level of agreement with a particular policy position is so weak.

Thus, issues of this nature seem to be a likely candidate for either the antidivision or pro-unanimity hypotheses. Given the lack of research investigating these two lines of conventional wisdom, I am agnostic as to which is more likely.

Issues that hold a level of salience somewhere in between very high and very low salience, however, may invoke a reaction consistent with any of the above hypotheses. Because of the moderate level of attachment, opinions are not so crystallized in the minds of the public that they cannot be moved. At the same time, they are not so latent that they are easily moved by the slightest suggestion from an authoritative body. Therefore, unlike with rulings of little interest to the masses, the political agreement hypothesis is still viable when it comes to moderately salient decisions. However, the conventional wisdom represented by the pro-unanimity and antidivision hypotheses suggest that attitude change ought to be driven by the legitimacy conferred by commanding judicial majorities. Thus, which of these opinion-change models fits cases of medium salience ought to be particularly telling of how the public perceives unanimity and dissent.

Experimental Design

The experimental survey instrument used here consisted of three parts: a pretreatment questionnaire, a series of vignettes describing (fabricated) Supreme Court cases, and a posttreatment questionnaire following each vignette. As mentioned above, unlike those used in prior work, the treatment groups are designed to focus only on the majority size of the court and are specified in such a way to gain leverage on the hypotheses described above. Furthermore, the experimental vignettes cover three issue areas that represent a range of ideological salience: gay rights (high salience), employee privacy (medium salience), and contract dispute resolution (low salience). This diversity in issue area is necessary to address the variability in opinion mobility discussed above.

The experimental survey was completed by a nationally representative sample via the Internet.[1] YouGov Polimetrix interviewed 658 respondents, which were then matched down to a sample of 600 based on demographic data from the 2006 American Community Survey. The respondents were interviewed between January 19 and 24, 2011, and were recruited through PollingPoint.com, a website that offers rewards points, which can be redeemed for merchandise, as incentive for completing online surveys.

To establish their ex ante positions on the above issues, they were first asked to complete a questionnaire that included questions about their positions on those issues. However, to avoid priming the respondents, the questionnaire also included a number of "distracter" questions asking for their position on issues that were not to be covered in the experiment (see appendix at http://prq.sagepub.com/supplemental/ for questionnaire wording).

In addition to the questions on their policy preferences, the respondents were asked to answer a series of questions regarding their institutional support for the Supreme Court. These questions are designed to capture the respondents' diffuse support for the Court (Caldeira and Gibson 1992; Gibson, Caldeira, and Spence 2003a) and are commonly used in the literature (Gibson, Caldeira, and Baird 1998; Gibson, Caldeira, and Spence 2005; Zink, Spriggs, and Scott 2009). Because individuals are most easily persuaded by those people and institutions that they find to be credible (Chaiken 1980; Petty, Cacioppo, and Goldman 1981), diffuse support is an important consideration in this analysis: those with little faith in the institution are unlikely to change their attitudes based on what the Court decides, regardless of how strong the vote among the justices is.

After completing the questionnaire, the respondents were then exposed to a series of short vignettes about a Supreme Court decision. Though each vignette was presented as a factual statement about the recent activity of the Court, they were, in fact, fabricated (though loosely based upon actual and potential cases). The vignettes were also manipulated to state that the Court was unanimous, divided eight-to-one, or divided five-to-four in its decision; furthermore, some respondents received a vignette that contained no information regarding the majority size (to be used as the baseline treatment group). In addition to randomly varying the majority size of the decision, the experiment also randomly varied the direction of the ruling to ensure that the results are not driven by an ideological preference for or against the decision. Thus, examples of the vignettes include, "By a vote of 8 to 1, the United States Supreme Court recently ruled that states may ban same sex unions, which grant homosexual couples many of the rights given to married couples," "By a unanimous vote, the United States Supreme Court recently ruled that employers may not read text messages on their employees' company issued phones," and, "The United States Supreme Court recently ruled that people disputing contracts must pursue mediation or arbitration before resorting to lawsuits." A complete list of vignettes is available in the appendix.[2]

Although the issue areas mentioned in the vignettes were selected based on speculation regarding their relative salience to respondents, the survey data do corroborate these assumptions. Looking at Table 1, we can see that among both ex ante opponents and supporters, the average strength of the respondents' ex ante position on

Table 1. Proportion of Respondents Holding Strong Ex Ante Positions.

Issue	Ex ante supporters	Ex ante opponents
Same-sex unions	0.688 (.029)	0.746 (.027)
Employee privacy	0.519 (.031)	0.537 (.031)
Contract dispute resolution	0.258 (.028)	0.235 (.026)

Note. Cells contain proportion of respondents indicating strong ex ante support or opposition with standard errors in parentheses.

the topic declines along with the level of salience. It is worth remembering that, as the outcome of the Court decision was randomly varied from respondent to respondent, ex ante support and opposition do not denote a specific ideology or policy preference; it only indicates whether the position of the respondent prior to treatment was the same as that described in the vignette randomly assigned to her. More than two-thirds of those predisposed to agree and nearly three-fourths of those predisposed to disagree with the Court's decision on same-sex unions were strongly predisposed to do so. Meanwhile just more than half of both ex ante supporters and opponents of the Court's decision on employee privacy held a strong prior position, and this figure drops to about one-fourth for the issue of contract dispute resolution.

Following each vignette, respondents were asked if they agreed with the Court's ruling in the case. If they did not agree, they were asked if they accepted the ruling and felt it ought to be considered the final word on the matter or if they instead thought that there ought to be an effort to challenge the ruling and get it changed.[3]

Covariate Balance

Proper covariate balance between experimental treatment groups is necessary to infer a causal relationship from the research design described above. The benefit of a randomized experiment is that it increases the likelihood of this balance. However, concerns that, with just one shot at a sample population, the dice may not land in a way that yields optimal balance across treatment groups. As such, experimental social scientists have developed methods to either preempt or correct for this outcome (Moore 2010). Genetic matching, or GenMatch, is a statistical technique that can be used for this purpose after the data have been collected. While it is common for researchers to utilize regression models when analyzing experimental data, these impose a functional form of assumptions that may not be warranted (Sekhon 2009). GenMatch, on the other hand, is a method that keeps the experimental ideal in mind by using an evolutionary search algorithm to assign weights that will produce optimal balance between treatment and control (Sekhon 2011). Matching has become an increasingly common method of causal inference in the social sciences, including the study of judicial politics (Boyd, Epstein, and Martin 2010; Epstein, Ho, King, and Segal 2005; Gordon and Huber 2007).[4]

There are several covariates that, if imbalanced, may seriously bring the above results into question. As noted, institutional support for the Court is likely to color one's survey responses. Those who hold deep respect for the Court are more likely to be persuaded by its ruling than those who think little of the institution. As discussed above, the respondents were asked to answer several questions, common to the extant literature, targeting their diffuse support of the Supreme Court. I take a factor analysis of the responses to these questions, which produces two underlying factors of diffuse support for the United States Supreme Court. Thus, I match on both of these factors (which are coded such that higher scores are more supportive of the Court).

Moreover, we should expect balance in the strength of the respondents' ex ante positions on the issue in question. After all, it would certainly be problematic if, when comparing two treatment groups, one group contained significantly more respondents with strong—rather than mild—preferences on the policy at hand; that group would most definitely be less mobile in their posttreatment attitudes, regardless of any other factor. This is coded as a dummy variable where 1 indicates a strong ex ante position (i.e., the respondent indicated that they strongly agree or disagree with the policy position, as opposed to somewhat agreeing or disagreeing with it).

Similarly, it is important to have statistical balance on the overall ideological position of the relevant policy issue. Because the ideological direction of the Court decisions described in the treatment vignette is varied at random, this variable is essential if we are to avoid the assumption that mobility on the issue attitude is symmetrical. That is, it is possible that, say, opponents of same-sex unions are more likely to adjust their opinions in light of a Court decision than supporters are. Thus, balance on the direction of the respondents' prior positions will assure that such an asymmetry, if it exists, will not bias the results. These variables are coded on a 0 to 1 scale where higher values represent attitudes that are more favorable to same-sex unions, employee privacy, and the use of mediation to settle contract disputes, respectively.

Likewise, one's level of civic engagement may affect her ability to internalize and be persuaded by the Court's decisions. After all, individuals are more persuadable when they feel their opinions have important consequences (Chaiken 1980; Petty and Cacioppa 1979), and politically active and engaged individuals may be more likely to link their political preferences to real public policy consequences. As a heuristic for political engagement, I look at balance on both the respondents' interest in current events and their voter registration. News interest is coded on a 0 to

1 scale, with higher values indicating more interest, and voter registration is coded as a dummy variable, where 1 indicates that the respondent is registered to vote.

In addition, we ought to ensure balance on the political ideology and partisan identification of the respondents. Again, it is important to avoid the assumption that the ability to be swayed by the Supreme Court is symmetrical across the political spectrum. In fact, some have found evidence that, in the wake of *Bush v. Gore*, individuals may indeed view the Court differently according to their party identification and ideology (Mate and Wright 2008). These variables are both coded on a 0 to 1 scale, with higher values indicating a respondent is more conservative and Republican, respectively.

It is also important to factor in the several demographic characteristics of the respondents. A number of studies examining public opinion of the Supreme Court have found it necessary to control for such population characteristics (Clawson and Waltenburg 2009; Franklin and Kosaki 1989; Gibson, Caldeira, and Spence 2003b; Johnson and Martin 1998; Mate and Wright 2008). I thus factor in variables for income, age, sex, race, religiosity, and geography. Sex, race, and geography are coded as dummy variables where 1 indicates that a respondent is male, nonwhite, and from the American South, respectively. Each respondent's age is simply coded as her age in years. Religiosity is taken as a factor analysis of several questions regarding church attendance, frequency of prayer, and the importance of religion in the respondents' life; the variable is coded such that higher values indicate higher levels of religiosity. Income is coded based on the respondents' self-placement into one of fourteen annual income categories, with higher values representing higher categories of income.[5]

Given this, I compare each vote majority treatment group to the baseline group (which is treated as a control group) and employ GenMatch to improve balance on the covariates listed above (as well as on the propensity of being assigned to the treatment group). As seen in Tables 2, 3, and 4, this technique results in an overall improvement of balance, allowing for a fair comparison of responses across treatment groups. Prior to matching, more than a dozen of these comparisons showed significant differences in the covariate means of the treated and untreated groups. After matching, however, nearly all of these differences were eliminated. In fact, only one statistically significant difference that remains: as seen in Table 4, respondents in the eight-to-one treatment group who were also ex ante opponents to the contract dispute resolution vignette they received were slightly more Democratic than their counterparts in the untreated group after matching. However, prior to matching, these groups were imbalanced on the strength of the ex ante positions—with the untreated group feeling more strongly about contract dispute resolution methods than the eight-to-one group. Given the nonpartisan nature of the dependent variable in this instance and the relatively strong potential for prior position strength to bias the results, this is an acceptable trade-off.

Results

Figures 1, 2, and 3 show the postmatching levels of support for the Supreme Court decisions for the various treatment groups compared with the untreated (baseline) group. As seen in Figure 1, among those respondents who received vignettes that matched their prior attitudes, roughly 85 percent in the untreated group agreed with and accepted the Court's decision on same sex unions. Among those given a vignette that clashed with their beliefs, only 12 percent agreed with the Court's ruling, but more than twice as many—28 percent—accepted it. Clearly, there is a great deal of difference between ex ante supporters and opponents in their posttreatment evaluations of the Court decisions across the board. However, relatively little difference between treatment groups exists on the issue of same-sex unions. Although differences in agreement and acceptance rates between the baseline and treatment groups are as large as 10 percent, they fail standard statistical significance tests. Thus, regardless of the respondent's prior position on the issue, there appears to be no relationship between the size of the majority by which the Court decides the same-sex union case and the tendency of the respondents to agree with or to accept that decision. Although this finding breaks with that of Zink, Spriggs, and Scott (2009), it is consistent with the theoretical expectations stated above.

Turning to the medium salience issue of employee privacy, Figure 2 also shows no evidence that majority size affects agreement with the Court. While there remains a strong difference between the proportion of ex ante supporters and opponents who agree with the ruling, the treatment groups do not differ significantly from the baseline rates of agreement of 87 and 19 percent, respectively. However, looking at the estimates for acceptance of the Court's decision on employee privacy tells a much different story. Although, among ex ante supporters, there is no significant difference between the baseline level of acceptance, 90 percent, and any of the treatment groups, Figure 2 does show statistically significant estimates among ex ante opponents. For those respondents, assignment to the eight-to-one and five-to-four treatment groups both produce estimates for the rate of decisional acceptance that are about 25 percentage points higher than the baseline level of 32 percent. That is, while only a third of the untreated respondents accepted the privacy ruling if they were predisposed to disagree with it, more than half of them accepted if they were told the Court was divided

Table 2. Covariate Balance Before and After Matching Same Sex Unions.

	Ex Ante Supporters							Ex Ante Opponents					
		Before Matching			After Matching				Before Matching			After Matching		
Covariate	N.T. (mean)	5–4 − N.T	8–1 − N.T	9–0 − N.T	5–4 − N.T	8–1 − N.T	9–0 − N.T	N.T. (mean)	5–4 − N.T	8–1 − N.T	9–0 − N.T	5–4 − N.T	8–1 − N.T	9–0 − N.T
Strong ex ante position	0.69	0.03	0.02	−0.09	−0.03	0.07	−0.02	0.72	0.00	0.07	0.03	0.00	−0.03	0.02
Gay rights	0.61	−0.03	−0.07	−0.09	0.03	−0.03	−0.05	0.60	0.12	0.02	−0.02	0.03	−0.01	0.00
Diffuse support (1)	0.07	−0.08	0.03	−0.08	−0.07	0.06	−0.03	0.02	−0.09	0.08	0.07	0.03	−0.03	−0.01
Diffuse support (2)	0.00	0.00	0.01	−0.04	−0.02	0.00	0.00	−0.02	0.04	−0.02	0.04	−0.01	0.01	−0.01
News interest	0.54	0.17**	0.16**	0.15**	−0.02	0.02	0.02	0.71	−0.02	0.01	−0.01	0.01	0.01	−0.01
Voter registration	0.81	0.04	0.10	0.07	−0.08	0.02	0.00	0.95	−0.11	−0.09	−0.09	0.00	0.00	0.00
Political ideology	0.50	0.02	0.04	0.09	0.04	0.06	0.01	0.53	−0.08	−0.07	0.03	−0.01	0.00	0.00
Party identification	0.43	0.05	0.03	0.06	0.05	0.07	0.05	0.40	−0.02	0.02	0.02	0.02	0.01	0.00
Income	7.10	0.23	0.65	0.39	−0.19	−0.20	0.14	7.72	−0.30	0.01	−0.99	0.21	−0.34	−0.12
Age	44.17	6.19*	5.26	2.73	−1.08	1.41	0.05	47.09	−2.19	1.41	1.40	−0.59	0.90	0.29
Sex	0.61	−0.13	−0.15	−0.10	−0.02	0.00	−0.10	0.47	0.04	−0.08	−0.03	0.02	0.05	0.00
Race	0.34	−0.14	−0.06	−0.04	−0.05	−0.03	0.00	0.26	0.03	0.11	0.03	−0.02	0.02	0.00
Religiosity	−0.01	−0.12	−0.01	−0.01	0.00	0.10	0.06	−0.11	−0.04	0.08	0.06	−0.05	−0.01	0.02
South	0.32	0.13	0.05	0.02	0.10	0.00	0.07	0.36	0.09	0.02	−0.06	0.03	0.00	0.00

Note. Table displays the covariate means of the no-treatment group (N.T.) and difference in means between the no-treatment and treatment groups.
*$p < .05$. **$p < .01$. ***$p < .001$.

Table 3. Covariate Balance Before and After Matching Employee Privacy.

	Ex Ante Supporters							Ex Ante Opponents					
		Before Matching			After Matching				Before Matching			After Matching		
Covariate	N.T. (mean)	5–4 − N.T	8–1 − N.T	9–0 − N.T.	5–4 − N.T.	8–1 − N.T.	9–0 − N.T.	N.T. (mean)	5–4 − N.T.	8–1 − N.T.	9–0 − N.T.	5–4 − N.T.	8–1 − N.T.	9–0 − N.T.
Strong ex ante position	0.41	0.19*	0.18*	0.09	−0.03	−0.04	−0.03	0.51	−0.07	0.19*	0.00	−0.10	0.03	−0.04
Employee privacy rights	0.39	0.06	0.02	−0.01	0.05	−0.03	−0.02	0.41	0.02	0.03	−0.03	−0.02	0.08	−0.03
Diffuse support (1)	−0.09	0.25	0.30*	−0.11	0.02	0.11	−0.14	0.01	−0.12	0.09	0.07	−0.04	−0.05	0.02
Diffuse support (2)	0.02	−0.06	−0.03	−0.05	0.01	0.00	−0.01	0.01	0.01	−0.01	−0.01	0.01	0.03	0.01
News interest	0.68	−0.01	−0.04	0.03	−0.03	−0.02	−0.01	0.66	0.00	0.10*	0.02	0.00	0.04	−0.01
Voter registration	0.84	0.06	0.08	0.01	0.03	0.00	0.04	0.85	0.01	0.07	−0.02	0.01	0.07	0.00
Political ideology	0.50	0.09	0.02	0.05	0.01	0.02	0.04	0.52	0.00	−0.07	0.02	0.02	0.00	−0.02
Party identification	0.39	0.12	0.05	0.09	0.00	0.04	0.00	0.42	0.47	−0.06	0.03	0.00	0.02	0.00
Income	7.57	0.10	0.62	−0.28	−0.23	−0.14	0.32	6.99	−0.14	1.24*	−0.47	−0.30	−0.34	−0.30
Age	49.25	−3.73	−3.02	−0.89	−1.70	−0.58	−1.09	46.59	2.17	2.54	0.61	2.26	1.56	−0.60
Sex	0.38	0.20*	0.11	0.01	−0.03	−0.01	0.01	0.41	0.10	0.16	0.05	0.04	−0.05	−0.04
Race	0.33	−0.08	−0.09	−0.03	−0.09	−0.06	−0.01	0.41	−0.17*	−0.14	−0.11	−0.10	−0.01	0.00
Religiosity	0.00	−0.11	−0.01	0.06	0.02	0.06	−0.01	0.25	0.01	−0.12	−0.28**	0.03	−0.05	−0.04
South	0.28	0.13	0.09	0.09	0.00	−0.07	0.07	0.42	−0.11	−0.02	0.02	−0.03	0.04	−0.05

Note. Table displays the covariate means of the no-treatment group (N.T.) and difference in means between the no-treatment and treatment groups.
*$p < .05$. **$p < .01$. ***$p < .001$.

Table 4. Covariate Balance Before and After Matching Contract Dispute Resolution.

	Ex Ante Supporters							*Ex Ante* Opponents					
		Before Matching			After Matching				Before Matching			After Matching		
Covariate	N.T. (mean)	5–4 − N.T.	8–1 − N.T.	9–0 − N.T.	5–4 − N.T.	8–1 − N.T.	9–0 − N.T.	N.T. (mean)	5–4 − N.T.	8–1 − N.T.	9–0 − N.T.	5–4 − N.T.	8–1 − N.T	9–0 − N.T
Strong ex ante position	0.21	0.10	0.05	0.05	0.00	0.02	−0.03	0.35	−0.11	−0.18*	−0.15*	0.00	0.00	−0.03
Mediation over lawsuits	0.77	0.11*	0.04	0.07	0.04	0.02	0.03	0.83	0.00	−0.04	0.03	0.03	0.04	0.03
Diffuse support (1)	−0.07	0.21	0.04	0.18	0.04	−0.04	−0.01	−0.10	0.10	0.10	0.14	0.02	−0.01	0.15
Diffuse support (2)	−0.08	0.04	0.12***	0.09*	0.01	0.02	0.00	0.02	−0.03	−0.05	0.01	−0.02	−0.03	0.03
News interest	0.69	0.01	0.01	0.06	−0.01	0.01	−0.02	0.62	0.04	0.08	0.10*	0.01	−0.02	0.05
Voter registration	0.87	0.06	−0.02	0.00	0.05	0.02	0.00	0.84	0.00	0.08	0.08	0.00	0.10	0.02
Political ideology	0.50	−0.02	0.05	0.11*	0.04	0.03	0.03	0.52	0.00	−0.03	0.03	0.02	−0.04	0.00
Party identification	0.46	−0.05	0.01	0.04	0.03	−0.02	0.02	0.44	−0.02	−0.08	0.02	0.02	−0.15*	0.00
Income	6.84	1.18	0.65	1.13	0.50	−0.18	0.35	6.95	0.61	0.62	−0.04	0.06	0.08	0.30
Age	48.16	2.99	−0.15	1.25	2.71	1.34	−1.65	46.83	−0.93	−1.96	4.79	−0.49	0.35	3.35
Sex	0.44	0.01	0.08	0.04	−0.10	−0.05	−0.05	0.46	0.06	0.05	0.05	−0.05	−0.12	0.02
Race	0.29	−0.15*	−0.03	0.00	−0.03	0.02	−0.08	0.25	0.09	0.04	0.05	0.00	0.02	0.00
Religiosity	−0.06	−0.22	0.00	0.00	−0.05	0.10	−0.10	0.03	0.08	−0.02	0.09	−0.02	0.04	0.07
South	0.27	0.12	0.05	0.16	0.00	0.00	−0.02	0.37	0.06	0.08	0.00	−0.02	0.02	−0.05

Note. Table displays the covariate means of the no-treatment group (N.T.) and difference in means between the no-treatment and treatment groups.
*$p < .05$. **$p < .01$. ***$p < .001$.

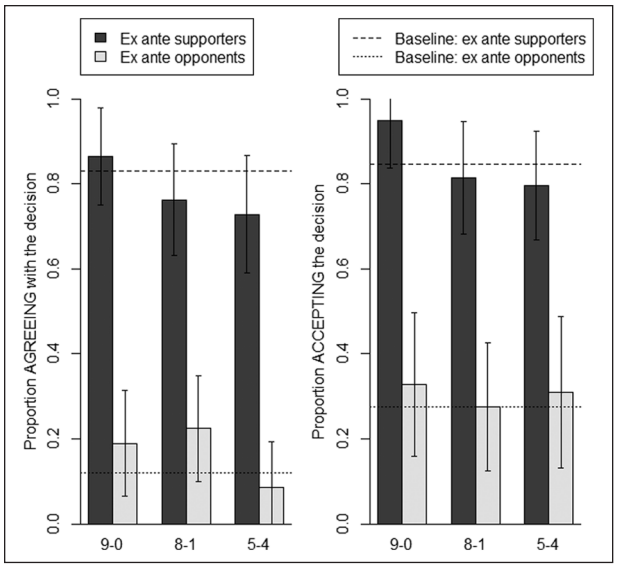

Figure 1. Reaction to the court's decision: Same sex unions.

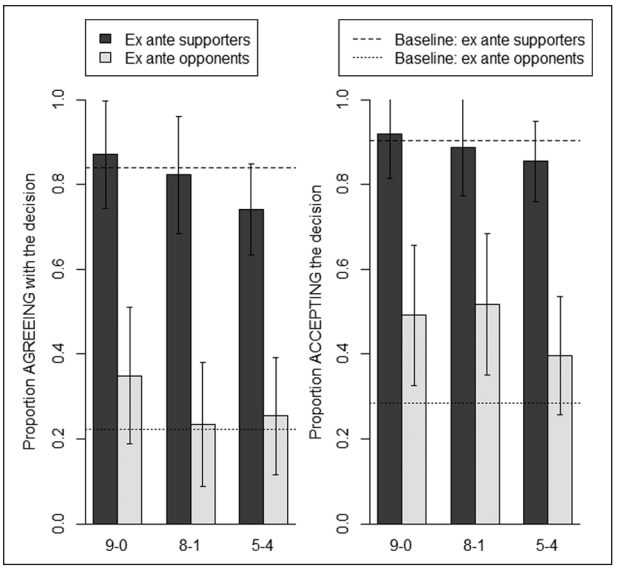

Figure 3. Reaction to the court's decision: Contract dispute resolution.

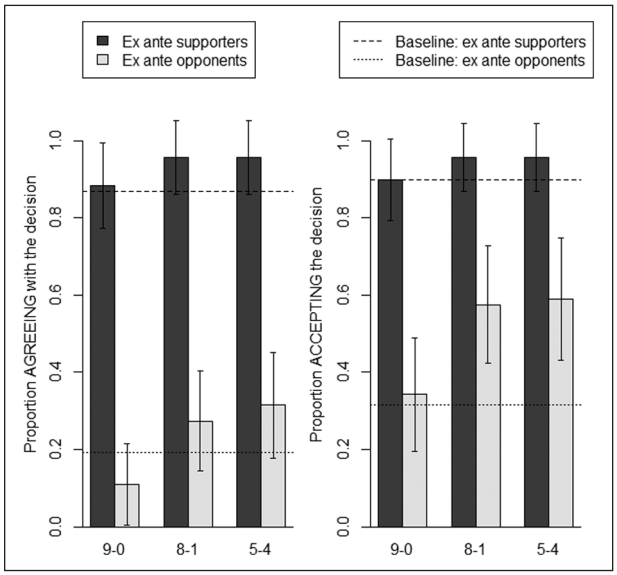

Figure 2. Reaction to the court's decision: Employee privacy.

when making its ruling. Hence, it appears that any degree of dissent, whether the vote is eight-to-one or five-to-four, makes ex ante opponents more receptive to the Court's ruling. This is consistent with the political agreement hypothesis described above.

Meanwhile, the rate of agreement with the Court's decision on contract dispute resolution, as shown in Figure 3, is unaffected by majority size. The agreement rates of the treatment groups among ex ante supporters do not significantly differ from the baseline rate of 84 percent, nor do those among ex ante opponents differ significantly from their baseline agreement rate of 22 percent. However, the rate of acceptance once again shows a different result. Although the acceptance rate of ex ante supporters is unaffected, Figure 3 shows that those ex ante opponents of the decision who were exposed to large majorities are more accepting of the Court's decision on this issue. Specifically, respondents assigned to either the unanimous or eight-to-one treatment groups accepted the Court's ruling at a rate just more than 20 percent higher than the baseline of 29 percent. This, contrary to the employee privacy issue, supports the antidivision hypothesis, at least among those predisposed to have hostile attitudes toward the Court's ruling. Although these results do not show narrow division to hurt ex ante opponents' specific support for the Court ruling, large majorities, unanimous and non-unanimous, do appear to boost it considerably, at least where this issue of low ideological salience is concerned.

Discussion

The findings presented here give us a much different and far more nuanced view of the interaction of judicial majority size and public opinion than has been described previously in the scholarly literature. In some respects, this experiment shows an inability of the Court to move public opinion, at least in ways previously considered possible. First, this study finds no evidence that majority size affects individuals' level of agreement with Court decisions. Given the difficult burden of fully reversing public attitudes on policy issues with a single statement

of the Court's ruling, this study's finding on the "agreement" variable is fully expected. Second, I also find no evidence that those who already agree with the ultimate outcome of the decision can be moved by the number of justices casting dissenting votes. However, due to the high level of agreement and acceptance from ex ante supporters, this, too, is unsurprising as there is little upward room for the respondents' opinions to move. Even though these results meet theoretical expectations, they do depart from findings in previous work (Zink, Spriggs, and Scott 2009).

Instead, this study finds that ex ante opponents of the Court's policies may be persuaded to accept judicial decisions with which they disagree. The presence and dynamics of this effect, however, appear to be contingent on the salience of the policy under review. The results show no evidence that the level of Supreme Court unity has any impact on public opinion of highly salient same-sex unions rulings. On the other hand, the results do show that, among ex ante opponents, any level of division on the Court leads to higher acceptance rates of the somewhat salient employee privacy decisions. Meanwhile, unanimity and near unanimity are associated with higher acceptance rates of the decisions regarding contract dispute resolution, which is of low salience. Together, this suggests that the way in which court division affects public opinion is highly dependent on the salience of the issue at hand.

If we are to generalize these results, it appears that an individual's attitudes are likely to be too crystallized on issues of high salience for the level of unity on the Court to make any significant difference. However, on somewhat less salient issues, individuals may be moved by the level of division, although this appears to happen in a way that reflects support for the dissidents on the Court. In other words, the higher acceptance levels may reflect warmer feelings toward a Court that has members receptive to the respondent's position. This shows a lack of strategic thinking on the part of the respondent, as more closely divided decisions require fewer judges to change their vote (or be replaced by new judges) in subsequent litigation. Regardless, it is consistent with theories of public perceptions of procedural justice (Lind and Tyler 1988). When it comes to issues on which individuals are not likely to have very strong opinions, large majorities are likely to persuade ex ante opponents to accept adverse opinions.

The significance of this should not be taken lightly. As noted earlier, the effort by Chief Justice Warren and the initial majority in *Brown* to construct an opinion that could be signed by every justice of the Court was largely motivated by concerns about legitimacy. However, if the findings here are applicable to that case, it had no real bearing on the acceptance of the ruling, as the dispute was highly salient. By the same token, five to four rulings in widely reported cases do not appear to significantly detract from popular acceptance. If the Court's ambiguous and gradualist approach to remedying the problem of school segregation was the cost of unanimity in *Brown*, these findings suggest that sacrifice may have been unnecessary. Moreover, in those cases where a judicial unified front may bolster public support, there is little public interest or attention, making these cases less important to the Court's overall standing in society.

Still, given these results, it is possible that, with the proper publicity, the Court could build its political capital with the public over time by standing united on issues of low salience and representing a diversity of opinions on those of somewhat higher salience. While it is difficult to assess this type of long-term effect, particularly in a short-term study such as this, these results do suggest that such a long-term view of the Court ought to be considered in future research. In addition, as this work is the first to suggest that dissent may bolster public perception of the Court's decisions, further research ought to be done to dissect the role of judicial disagreement in popular understandings of procedural fairness. Regardless, the implications of these findings are that a Court strategically trying to build its reserve of public confidence is not best off acting unanimously as much as possible; rather it is better off acting unanimously selectively.

Notes

1. Survey data are available online at https://sites.google.com/site/mikesalamone/research/.
2. Although many experiments offer longer, more detailed vignettes (such as mock newspaper articles), pretesting among an undergraduate sample suggested that most respondents did not read these longer vignettes beyond the first few sentences. Given this, it did not seem to be worth the additional resources needed offer a lengthier, more time-consuming treatment.
3. It is assumed that those who agree with the decision also accept it. I did not directly ask about this because asking a respondent if she thought a decision ought to be challenged after she already indicated she agrees with that decision could cause her confusion and therefore produce less reliable results.
4. Regardless, logit and probit analyses yield similar results to those following the matching specification followed here.
5. The income categories are (1) less than $10,000, (2) $10,000 to $14,999, (3) $15,000 to $19,999, (4) $20,000 to $24,999, (5) $25,000 to $29,999, (6) $30,000 to $39,999, (7) $40,000 to $49,999, (8) $50,000 to $59,999, (9) $60,000 to $69,999, (10) $70,000 to $79,000, (11) $80,000 to $99,999, (12) $100,000 to $119,999, (13) $120,000 to $149,999, and (14) $150,000 or more.

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