ON THE CAPACITY OF THE ROBERTS COURT TO GENERATE CONSEQUENTIAL PRECEDENT*

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Will the Roberts Court produce decisions of consequence in the foreseeable future? Or will its contributions be more modest? We address these questions not by reviewing the doctrine developed by the Court but rather by considering its capacity to generate important precedents.

That consideration centers on an account we have previously called "ideological diversity." To state it simply, the idea is that the greater the ideological homogeneity of the majority coalition, the higher the likelihood that it will produce a consequential, perhaps landmark, decision. As such, the account stands in marked contrast to more common approaches in the legal academy that see the nature of judicial rulings as a choice the Justices consciously make regarding whether to be "minimal" or not. To us, most Justices—including most on the Roberts

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Court—seek to generate decisions that advance their preferred view of the law. But their ability to do so is structured in no small part by the preferences of their colleagues in the majority coalition.

In what follows, we explain our account and then move to several empirical tests of it. Finding that data drawn from the 1953 through 2004 Terms support the idea that ideologically close majorities are more able to produce consequential decisions, we turn to the Roberts Court. In a nutshell, our analysis suggests that when five of its members coalesce—as they are prone to do—the Roberts Court bears the hallmarks of an institution capable of producing dramatic decisions. On the other hand, unanimous decisions—also hardly rare events on this Court—are far less likely to generate consequential precedent.

It is not often in the law that so few have so quickly changed so much.

—Justice Stephen Breyer, speaking on the final day of the 2006 Term[1]

INTRODUCTION

To some commentators, Justice Breyer's words, while provocative, overstate the case. Writing about the decisions that prompted Breyer's remark—the school assignment cases—Mark Tushnet declares, "[a]s law, Justice Kennedy's opinion is, or can fairly be read to be, quite *narrow*."[2] Speaking of *Bell Atlantic v. Twombly*,[3] the 2006 Term case on antitrust conspiracies, Einer Elhauge suggests that "it is quite *insignificant*, notwithstanding the view of [some bloggers] that it 'will almost certainly be the most practically significant case of this term.' "[4] More generally, Michael Dorf asserts that the swing Justice on the Court, Anthony Kennedy, is "temperamentally in tune with [a] more modest approach."[5]

To other commentators, Justice Breyer's claim was neither controversial nor provocative; it was the truth. According to the editors of the *San Francisco Chronicle*, "[t]he Supreme Court has taken an undeniable turn to the right under Roberts and Alito, which could well become one of the enduring legacies of President Bush's tenure."[6] To the veteran Supreme Court reporter Linda Greenhouse, "[i]t was the Supreme Court that conservatives had long yearned for and that liberals feared."[7] And to Professor Richard Fallon, "[t]he

1. Justice Breyer included this comment in his oral but not written dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. __, 127 S. Ct. 2738 (2007). Interested readers can listen to Justice Breyer's oral opinion announcement at http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion/. Justice Breyer's quote occurs at 0:32:53.

2. Posting of Mark Tushnet to Balkinization, http://balkin.blogspot.com/2007/07/reading-school-integration-cases-like.html (July 4, 2007, 11:09 EST) (emphasis added).

3. 550 U.S. __, 127 S. Ct. 1955 (2007).

4. Posting of Einer Elhauge to The Volokh Conspiracy, http://www.volokh.com/posts/1179785703.shtml (May 21, 2007, 18:15 EST) (emphasis added) (alteration in original) (quoting Baseball Crank, http://baseballcrank.com/archives2/law_2006/ (May 21, 2007, 11:02 EST)).

5. *Morning Edition: The Roberts Court and the Role of Precedent* (National Public Radio broadcast July 3, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=11688820.

6. Editorial, *Supreme Court's Unsettling Turn*, S.F. CHRON., July 5, 2007, at B4.

7. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1. Greenhouse continued, "[b]y the time the Roberts court ended its first full term on Thursday, the picture was clear. This was a more conservative court, sometimes muscularly so, sometimes more tentatively, its majority sometimes

fact that the Roberts Court could do so much in its first term makes it more likely that it will continue this way."[8]

Has Professor Fallon got it right? Will this Court go on to generate consequential law in the foreseeable future? Or will its contributions be more modest, as Professor Dorf suggests? We address these questions not by reviewing doctrine produced by the Roberts Court, but rather by considering its capacity to generate important precedent.

That consideration centers on an account we previously have called "ideological diversity."[9] To state it simply, the idea is that the greater the ideological homogeneity of the majority coalition, the higher the likelihood that it will produce a consequential, perhaps landmark, decision. As such, this account stands in marked contrast to more common approaches in the legal academy that see the nature of judicial rulings as a *choice* the Justices consciously make regarding whether to be "minimal" or not, to formulate a "rule" or "standard."[10] In our view, most Justices—including most on the Roberts Court—seek to generate precedents of consequence that advance their preferred view of the law. But their ability to do so is structured in no small part by the preferences of their colleagues in the majority coalition.

We begin with an explanation of our account and then move to several empirical tests (Parts I and II, respectively). Finding that data drawn from the 1953 through 2004 Terms support the idea that ideologically close majorities are more able to produce consequential decisions, we turn in Part III to the Roberts Court. In a nutshell, our

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differing on methodology but agreeing on the outcome in cases big and small." *Id.* Nina Totenberg, another veteran reporter, agreed:

> For decades conservatives have yearned for control of the U.S. Supreme Court. . . . For decades, they have been frustrated in achieving that goal, despite having as many as seven Republican appointees on the court. This term, though, conservatives seem to have reached the promised land. With new Chief Justice John Roberts at the helm and Justice Samuel Alito replacing [J]ustice Sandra Day O'Connor, the direction of the court for this term, at least, has been transformed.

Morning Edition: The Roberts Court and the Role of Precedent, *supra* note 5.

8. Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA TODAY, June 29, 2007, at 8A, *available at* http://www.usatoday.com/news/washington/2007-06-28-supreme-court-right_N.htm.

9. Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361 (2008).

10. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

analysis suggests that both Professors Fallon and Dorf offer plausible predictions. When five of its members coalesce—as they are so uniquely prone to do—the Roberts Court bears the hallmark of an institution capable of producing dramatic decisions. On the other hand, unanimous decisions—oddly enough, hardly rare events on the Court despite the ideological heterogeneity of its members—are far less likely to generate consequential precedent.

I. THEORIZING ABOUT THE RELATIONSHIP BETWEEN IDEOLOGICAL DIVERSITY AND CONSEQUENTIAL PRECEDENT

Our primary purpose in this Article is to illuminate the Roberts Court's capacity to generate decisions of consequence. To do so, we hypothesize that one distinct dimension of the institutional context should be highly correlated with Supreme Court decisions of note: the ideological makeup of the majority coalition.[11]

We begin, in Part I.A, by briefly explaining what we mean by decisions of consequence. In Part I.B, we sketch out our central argument and provide some justification for it. In Part II, we supply empirical support for the account.

Because we have advanced and explained this argument elsewhere,[12] we do not use the words "succinctly," "briefly," and "sketch" by accident. Our point here is not to retread old ground but rather to provide readers with enough information about our claims so that they can evaluate their application to the Roberts Court.

A. Defining Decisions of Consequence

In our account, ideological homogeneity is more likely than ideological diversity to produce "consequential," "noteworthy," "important," or "path-breaking" precedent, but what do we mean by these terms? Because decisions generating important precedent can come in various forms, no single answer to this question likely will suffice.[13]

To some commentators, ourselves included, the precedent established in a decision may be consequential if it clearly and effectively breaks new legal ground. For example, *Mapp v. Ohio*[14]

11. We focus on the ideological makeup of the majority primarily, but not exclusively. We consider other factors *infra* Part III.

12. *See* Staudt, Friedman & Epstein, *supra* note 9.

13. We draw the discussion in this Part from Staudt, Friedman & Epstein, *supra* note 9.

14. 367 U.S. 643 (1961).

required state courts to apply the exclusionary rule upon finding the government violated the Fourth Amendment.[15] This ruling was crisp and tidal in its impact. Although one might have supposed imposing the exclusionary rule ought not matter much—after all, none of the states were claiming an entitlement to ignore the Fourth Amendment—the strong negative reaction of officials indicated *Mapp* would require a great change in their practices.[16] The same was true of *Engel v. Vitale*,[17] prohibiting prayer in schools.[18] "For several days," reported Anthony Lewis in the *New York Times*, "all the serious business of the Congress of the United States was put aside while members spent their time denouncing the Supreme Court."[19]

Even if a decision does not make clear, new law, however, it can still be noteworthy if it signals a major change in the Court's direction. *Reed v. Reed*[20] stands as an example here. *Reed* was the first case in which the Supreme Court struck down a distinction based on sex as unconstitutional.[21] It established little in the way of a new rule; the Court seemed only to apply rational basis scrutiny in deciding the case. Yet, no one watching could doubt that a shift had occurred. As Gerald Gunther said in reaction, "[i]t is difficult to understand [the *Reed*] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis."[22]

One particular kind of change in direction may be even more noteworthy: the overruling case. By their very nature, overruling cases often will establish a clear rule (the opposite of the pre-existing rule).[23] Yet, even when they are less clear about the precise legal

15. *Id.* at 655.

16. Criminal procedure expert Professor Yale Kamisar said that to listen to the reaction of the police "[y]ou would have thought we had just passed the Fourth Amendment at a constitutional convention." Yale Kamisar, *When* Wasn't *There a "Crime Crisis"?*, 39 F.R.D. 450, 459 (1965). Kamisar quoted New York's Deputy Police Commissioner, who said the case "was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants." *Id.* at 458.

17. 370 U.S. 421 (1962).

18. *Id.* at 424.

19. Anthony Lewis, *Court Again Under Fire*, N.Y. TIMES, July 1, 1962, at 10E.

20. 404 U.S. 71 (1971).

21. *See id.* at 77.

22. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972).

23. Thus, *Gideon v. Wainwright*, 372 U.S. 335 (1963), measures up under two criteria. It established a clear rule that felony defendants facing jail time were entitled to have lawyers provided if they were indigent. *Gideon*, 372 U.S. at 344–45. And *Gideon* scores again as an overruling case: the majority overturned (and without much sympathy) the prior "special circumstances" rule of *Betts v. Brady*, 316 U.S. 455 (1942). *Id.*

rule, they may still signal an important change of direction. In *Garcia v. San Antonio Metropolitan Transit Authority*,[24] the Supreme Court clearly overruled *National League of Cities v. Usery*.[25] What precisely *Garcia* portended was a matter of some doubt, as the Court's later federalism cases made quite clear.[26] Still, it was well understood at the time that an important shift had occurred.[27]

Some cases are important because of what they do as much as for what they say. A Supreme Court decision overturning an act of Congress is almost always consequential. Of course, there are some laws that were so trivial, or that were invalidated in such trivial respects, that perhaps the law actually changes little.[28] Still, most of the time when a congressional law is overturned, the impact is of importance. The Justices at least state rhetorically that they think long and hard before overturning congressional enactments, and these are relatively rare events.

B. *Explaining the Relationship Between Ideological Homogeneity and Consequential Precedent*

If we suppose that the foregoing is a fair, if incomplete, representation of decisions generating precedent of note, how do they come about? That is, assuming that the Justices in the majority can transform any dispute into a major (or minor!) ruling, what explains their choice? Several possibilities present themselves, but we stress the effect of *ideological diversity* on the nature of the decision the Justices render. On this account, the greater the homogeneity of the majority, the higher the likelihood of a consequential decision.

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24. 469 U.S. 528 (1985).

25. 426 U.S. 833 (1976), *overruled by Garcia*, 469 U.S. at 531.

26. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995).

27. *See* Linda Greenhouse, *Justices Enhance Federal Powers over the State*, N.Y. TIMES, Feb. 20, 1985, at A1 ("Taking the rare step of overruling one of its own recent precedents, the Supreme Court today significantly enhanced the power of the Federal Government to regulate state activities that had been considered immune from Federal control."); Al Kamen, *Court Widens Hill's Power*, WASH. POST, Feb. 20, 1985, at A1 ("A divided Supreme Court yesterday reversed itself on a major states' rights issue and ruled 5 to 4 that Congress has broad power to impose its will on state and local governments, even in areas that traditionally have been left to their discretion.").

28. *See* LAWRENCE BAUM, THE SUPREME COURT 169 (8th ed. 2004) (arguing "many of the Court's decisions declaring statutes unconstitutional have been unimportant to the policy goals of Congress and the [P]resident"). An example might be *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), in which the Court struck down a law concerning the amount of money the United States would pay to companies for the purchase of a lock and dam in the Monongahela river. *Id.* at 344–45.

To some scholars, this idea may seem counterintuitive or even just plain wrong. Students of constitutional law, for example, will be quick to point to cases such as *Wickard v. Filburn*,[29] *Reed v. Reed*,[30] *United States v. Nixon*,[31] and, of course, *Brown v. Board of Education*[32]—all of which were consequential under any definition and all of which were produced by unanimous, seemingly ideologically diverse Courts.[33] More generally, these same scholars might contend that it is when the Court speaks in one voice that it best is able to generate consequential precedent.[34]

Unless all sitting Justices have preferences that rest on the same (or nearly the same) ideal point in policy space—a null set, by the way—the contention that the Supreme Court does most when it speaks with one voice defies logic. To see why, consider Figure 1, which depicts ideological estimates for the 2006 Term Court,[35] and think about the task confronting a Justice, any Justice, hoping to produce a unanimous opinion. Even if all nine agree on the disposition, she must draft an opinion that accommodates colleagues as diverse as Stevens and Thomas. In many instances, this will be a near-heroic quest given the laundry list of issues over which the Justices can divide—including, but certainly not limited to, overruling

29. 317 U.S. 111 (1942).

30. 404 U.S. 71 (1971).

31. 418 U.S. 683 (1974).

32. 347 U.S. 483 (1954).

33. On our account, the ability to generate consequential precedent is less about size than about ideological homogeneity, though the two can certainly be related. We return to this point *infra* Part III.

34. If not consequential, such precedent is at least efficacious. *See, e.g.*, BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 168–69 (2d ed. 1999) (arguing that unanimous decisions tend to create "final, clear, and persuasive policy"); Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86, 92 (1976) (contending that clear majority decisions lead to more effective policy implementation); John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62 (stating that clear majority opinions carry more precedential weight).

35. *See infra* Figure 1. More specifically, these are Andrew D. Martin and Kevin M. Quinn's ideal point estimates. Martin and Quinn derive them from the votes cast by the Justices and via a Bayesian modeling strategy. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 134–52 (2002) (employing "Markov Chain Monte Carlo methods to fit a Bayesian model of ideal points for all Justices serving on the U.S. Supreme Court from 1953 through 1999"). The updated Martin and Quinn ideal point estimates, along with all other data used in this study, are available at http://epstein.law.northwestern.edu/research/RobertsCt.html.

or distinguishing a prior precedent, as the 2006 Term all too well indicated.[36]

Then again, even if the opinion writer were able to pull it off and unite the Court, would the resulting decision produce as consequential a ruling as, say, an opinion that accommodated the (typically smallest number of) Justices closest in ideological space? Chief Justice Roberts thinks not. His often-stated goal of bringing greater consensus to the Court rests on the belief that "[t]he broader the agreement among the Justices, the more likely it is a decision on the narrowest possible grounds."[37]

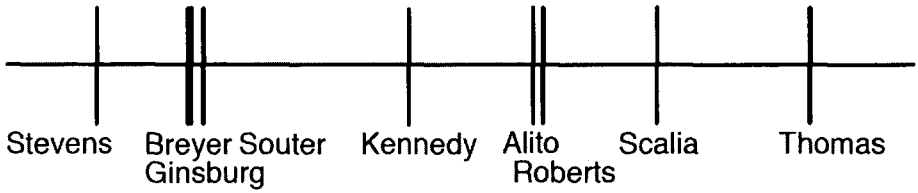

Figure 1: Martin-Quinn ideal point estimates for the 2006 Term Court. The further to the left, the more liberal the estimate. The estimates range from -2.57 for Stevens to 4.29 for Thomas.[38]

We agree that the greater the number of Justices in the majority, the narrower the decision will be. Our conclusion is consistent with countless analyses of group decisionmaking in many different contexts. Social scientists now conclude that dispersion of ideological preferences among the members of winning coalitions will lead to greater levels of conflict than when members are all located on or near the same point in a policy space.[39] It is this very conflict among

36. *See, e.g.*, Hein v. Freedom from Religion Found., 557 U.S. __, __, 127 S. Ct. 2553, 2671–72 (2007) (debating how the Court should treat the doctrine of stare decisis). For other examples of the issues over which members of the majority negotiate, see generally LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

37. Editorial, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16.

38. For more details, see *supra* note 35.

39. Social scientists have found that important and noteworthy laws are far more likely to emerge when the same political party controls both Congress and the executive branch; a divided government, in contrast, impairs the lawmakers' ability to enact consequential law. *See* James J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. REV. POL. SCI. 821, 826–28 (1999); Sean Q. Kelly, *Divided We Govern: A Reassessment*, 25 POLITY 475, 477 (arguing that "divided government does have a significant impact on the emergence of innovative policy"). *But see* Keith Krehbiel,

members of the Court—specifically among members of the majority coalition—we argue, that ultimately impedes the production of a consequential decision.[40]

II. TESTING THE "IDEOLOGICAL DIVERSITY" ACCOUNT OF CONSEQUENTIAL PRECEDENT

While empirical studies have validated the idea that bodies as diverse as Congress, unions, and corporations, among others, are more effective when they are homogeneous,[41] scholars of the Court have yet to put it to the test. Accordingly, we ask whether this account of ideological diversity holds for the Justices. That is, do majority coalitions with homogenous preferences produce a different kind of opinion than majorities with ideologically dispersed preferences?

In what follows, we explain how we addressed this question empirically in previous work[42]; we also provide a taste of our initial

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Institutional and Partisan Sources of Gridlock: A Theory of Divided and Unified Government, 8 J. THEORETICAL POL. 7, 36 (1996) (theorizing that unified governments should be no more effective than divided governments). Within the House and Senate chambers individually, scholars also have found that when the majority party becomes more homogenous, it becomes both more powerful and better able to achieve its policy ambitions. *See* David Brody, Richard Brody & David Epstein, *Heterogeneous Parties and Political Organization: The U.S. Senate, 1880–1920*, 14 LEGIS. STUD. Q. 205, 218–21 (1989) (noting that homogenous parties are able to appoint powerful and effective committee leaders).

These findings about group effectiveness are, we hasten to note, quite robust and replicated in many different contexts, including those outside the government sector. Scholars interested in decisionmaking in the private firm environment, for example, have found that management teams tend to be quite a bit more successful when they consist of like-minded thinkers than when they are populated by individuals with diverse preferences. *See* Martin Kilduff, Rienhard Angelmar & Ajay Mehra, *Top Management-Team Diversity and Firm Performance: Examining the Role of Cognitions*, 11 ORG. SCI. 21, 30 (2000) (finding diversity in top management negatively correlated with market share increases). Similarly, interest groups, unions, and religious organizations seem to be more powerful and effective in their missions when they are comprised of individuals with homogenous preferences. *See* Brad Christerson & Michael Emerson, *The Costs of Diversity in Religious Organizations: An In-depth Case Study*, 64 SOC. OF RELIGION 163, 165 (2003) (noting that theorists contend that the most successful religious organizations cater to homogeneous groups); Rebecca S. Demsetz, *Voting Behavior in Union Representation Elections: The Influence of Skill Homogeneity and Skill Group Size*, 47 INDUS. & LAB. REL. REV. 99, 112 (1993) (concluding that homogeneous labor unions are more readily organized than heterogeneous groups).

40. *See generally* Staudt, Friedman & Epstein, *supra* note 9. For example, we deal with the question of why the median voter theory does not undercut our account that ideological heterogeneity leads to less consequential decisions. *Id.* at 3–4. The answer, in short, lies in the ability of each Justice to write separately. *Id.*

41. *See supra* note 39.

42. Staudt, Friedman & Epstein, *supra* note 9.

findings. Part II.B presents the results of a fresh, more expansive test. Both sets of results support the idea that the less diverse the majority, the higher the likelihood of producing consequential law.

A. *A Previous and Initial Test*

In an earlier study, we assessed the ideological diversity account for a limited set of decisions—those handed down between the 1953 and 2004 Terms implicating questions of state or federal constitutional law.[43] Conducting that analysis required us to develop a measure of (1) the dependent variable—whether a constitutional law decision is consequential or not—and of (2) the key causal variable—the ideological diversity of the majority coalition. Finally, because ideological diversity is surely not the only factor that contributes to the production of consequential precedent, we (3) theorized about (and measured) additional covariates.

As to the first, we relied on what is surely a reliable and efficient and (we believe) valid proxy for consequential decisions: those reported on the front page of the *New York Times* on the day after the Justices handed down their decision (hereinafter the "NYT measure").[44] David Mayhew introduced this approach in his now-famous 1991 book, *Divided We Govern*,[45] which investigated important legislation emerging from Congress during periods of divided government. Since then, countless legislative scholars also have used this measure, and Epstein and Segal found it to be appropriate for identifying salient Supreme Court cases.[46] For our purposes, it stands to reason that if the Supreme Court issues an opinion of consequence, a newspaper of record like the *Times* will cover it. *Roe v. Wade*[47] provides an example. As history has born out, *Roe* was an important case. Yet, on the day that the Court handed it down Lyndon Johnson died, Henry Kissinger arrived in Paris for the last round of the Vietnam peace talks, and GM recalled thirty-seven million cars. Nonetheless, *Roe* still made it to the front page of the *Times*. More generally, while a small fraction of cases might have made it onto Epstein and Segal's list because they were newsworthy, and not noteworthy, we challenge scholars to identify

43. *Id.*

44. *See infra* note 58 (describing this variable and all others in the analysis).

45. DAVID R. MAYHEW, DIVIDED WE GOVERN 9 (2d ed. 2005).

46. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72–81 (2000).

47. 410 U.S. 113 (1971).

many other important, consequential, or cutting-edge cases that the *Times failed* to report on its front page.[48]

Moving to the second task, measuring the primary independent variable—ideological homogeneity or, if you prefer, heterogeneity—political scientists have offered a number of creative approaches.[49] For our purposes, though, the Martin-Quinn ideal point estimates are nearly ideal.[50] Martin and Quinn derive their point estimates from the votes cast by each Justice using a Bayesian modeling strategy. They are dynamic, valid, reliable, and, last but not least, available for each Term and Justice in our study.[51]

With the Martin-Quinn ideal point estimates in hand, we turned to Harold J. Spaeth's *U.S. Supreme Court Database* to identify the members of the majority *vote* coalition in each constitutional case decided between the 1953 and 2005 Terms.[52] To each member we

48. There are, of course, potential problems and criticisms of this approach. Because we address many in our previous work, *see* Staudt, Friedman & Epstein, *supra* note 9, suffice it to note here that the NYT measure has several advantages over other possible measures. Primarily, it is reliable, capable of updating (and backdating), and *not* biased in favor of liberal or conservative decisions or particular types of cases. Epstein and Segal demonstrate as much, subjecting the NYT measure to a battery of tests to assess biases and cross-validating it. Epstein & Segal, *supra* note 46, at 73–77. The measure performs well on all their tests. Epstein and Segal demonstrate that the "percentage of liberal decisions (58.2) covered on the front page of the *Times* roughly matches the overall figure of 52.2 percent." *See id.* at 76. For a discussion of the approach from a critical perspective in the context of the legislative activity, see Sean Kelly, *Divided We Govern: A Reassessment*, 25 POLITY 475, 477–78 (1993).

49. For a discussion of various other measurers, see Martin & Quinn, *supra* note 35, at 136–37 (general discussion of approaches to estimating ideal points); and Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1800–12 (2006) (describing three methods used to determine the political preferences of Justices).

50. Martin & Quinn, *supra* note 35, at 137–52; *see, e.g.*, *supra* Figure 1. Their updated ideal point estimates, along with all other data used in this study, are available at http://epstein.law.northwestern.edu/research/RobertsCt.html.

51. Despite their relative youth, the Martin-Quinn scores have received a good deal of play in the law reviews. *See, e.g.*, Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 134–39 (2003); Andrew D. Martin, Kevin Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1275–317 (2005); Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1209 n.1; Paul J. Wahlbeck, *The Chief Justice and the Institutional Judiciary: Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1754 (2006).

52. The database identifies scores of attributes of all Supreme Court cases decided on their merits since the 1953 Term. The S. Sidney Ulmer Project, http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm (last visited Mar. 23, 2008). For this initial study, we relied on the October 2006 version, with analu=0 and dec_type=1 or 7. We also studied only constitutional law decisions (i.e., we selected authdecl/authdec2=1, 2, or 7). Finally, as our emphasis on *vote* indicates, we examined majority vote, not opinion, coalitions. For

attached his or her Martin-Quinn ideal point estimate, and then computed a simple but powerful measure of homogeneity—the Martin-Quinn *standard deviation* of the majority vote coalition in each case.[53]

The final step in the analysis consisted of developing other factors that may affect the production of consequential decisions. We focused on three: the number of Justices in the majority, the ideology of the majority, and the total number of cases decided in the Term.[54] The first, the size of the majority, reflects the expectation that the more Justices who sign on to a majority opinion, the less it is likely to accomplish. That is because, in line with our earlier discussion, adding Justices, each presumably with his or her preferences regarding the decision, may serve to dilute the impact that could be achieved by a smaller number of sympathetic Justices. Relatedly, while it does not necessarily follow that larger coalitions are more heterogeneous, on average it (mostly) holds for the Supreme Court of the United States.[55] The second factor—the ideology of the majority rather than the dispersion of this ideology—captures the (admittedly arguable, though nonetheless pervasive) view that majorities populated with liberals are more likely to render cutting-edge

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the more expansive test we offer in Part III, we considered both vote and opinion coalitions. *See also infra* Appendix.

53. *See infra* note 58 (describing this variable and all others in the analysis).

54. Given our measure of the dependent variable and our focus (in the initial analysis) on constitutional law disputes, we controlled for two other variables: when the Court alters its own precedent or overturns a law passed by Congress. To incorporate them, we relied on Spaeth's codings under the variables, alt prec (alteration of precedent) and uncon (overturn federal law). *See supra* note 52.

55. For the data we used in Staudt, Friedman & Epstein, *supra* note 9, the number of Justices in the majority vote coalition (for coalitions of size five or greater) and the mean standard deviation of the Martin-Quinn ideal point estimate (our measure of ideological diversity) are as follows. Note that higher numbers on the ideological diversity measure indicate greater ideological heterogeneity.

Majority Size	Ideological Diversity
4	1.71
5	1.52
6	1.72
7	1.83
8	2.07
9	2.21

For a graphical depiction of this relationship, see *infra* Figure 6.

decisions.[56] While it is no doubt the case that conservatives can be as activist as liberals, it is also true that since 1937 liberal activism has more frequently taken the form of expanding precedents, and thus might garner more attention. This particularly is the case given that—as some have argued—the conservative revolution at times has been one of "stealth," quietly cutting back on existing rules rather than doing so overtly. Thus, during the Burger Court, commentators warned of a "covert counterrevolution."[57] Finally, it is possible that the more cases the Court decides in any given Term, the less able any given majority is to produce big decisions. Perhaps keeping up with their docket makes it difficult to devote sustained attention to any one major project. This may not hold true; however, doing important things does not necessarily take many words or much time. Still, given the possibility, we believe it important to consider and control for the number of majority opinions issued.

In short, for this initial analysis (again, of constitutional law only), we posited that three variables, in addition to ideological diversity, are likely to affect the ability of the Court's majority to produce a consequential decision: its size, its ideology, and the number of decisions handed down in a given Term.[58] We learned that all four variables exert statistically significant effects. Most importantly, we found that regardless of the size of the majority, the more homogeneous the Court, the more likely it is to produce a

56. *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY 1 (2004) ("For decades ... the standard conservative view of the Supreme Court has amounted to a critique of liberal 'judicial activism.' ").

57. Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 319 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983)).

58. *See also supra* note 54. A description of the variables in our analysis is as follows (N=2573).

Variable	Mean	Std. Dev.	Min.	Max.
Consequential Constitutional Law Cases	0.23	0.42	0	1
Ideological Diversity of the Majority	1.85	0.57	0.36	3.99
Number of Justices in the Majority	6.83	1.54	4	9
Ideology of the Majority	0.15	0.97	-2.25	2.01
Number of Cases	115.15	24.98	65	151
Overturn Precedent	0.04	0.19	0	1
Overturn Federal Law	0.03	0.16	0	1

Note that for this initial analysis, for *Ideological Diversity of the Majority* and *Number of Justices in the Majority*, we defined "majority" as the vote majority, and not the opinion majority.

consequential decision. With all other variables held at their mean (or mode), including the *Number of Justices in the Majority*, the probability of an extremely heterogeneous majority generating a noteworthy decision is just .09[59]; that figure increases to .33[60] if the majority is extremely homogeneous. The size of the majority, though, is hardly substantively irrelevant. All else being equal, a minimum-winning vote (e.g. five-to-four) will produce a consequential decision in about one out of every four cases.[61] At the highest levels of homogeneity, that figure increases to forty percent.[62] For unanimous majorities, conversely, the predicted probability of generating an important decision never exceeds .26 even when they are highly homogeneous;[63] the odds drop as low as .07 when they are highly heterogeneous.[64]

B. A New, More Expansive Analysis

The takeaway from these preliminary results is impossible to escape: it is the homogeneous, five-person coalition and not the unanimous Court that is more likely to generate consequential precedent—consequential *constitutional* precedent, that is. Recall that the tests described above rested exclusively on an analysis of the Court's 2,573 constitutional law decisions—or, less than half the Court's plenary docket.

For purposes of analyzing the Roberts Court's institutional capacity to generate consequential precedent—whether in the constitutional realm or beyond—we now expand our analysis to include all 5,610 cases decided following oral argument with a signed opinion and handed down since the 1953 Term *but before* Justice Alito joined the Court.[65] All other variables remain as we defined them above.[66]

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59. The 95% confidence interval is [.06, .15].

60. The 95% confidence interval is [.26, .41].

61. .26 with a 95% confidence interval of [.23, .29].

62. The 95% confidence interval is [.33, .47].

63. The 95% confidence interval is [.18, .36].

64. The 95% confidence interval is [.04, .10].

65. That is, we exclude cases after O'Connor's departure. We reserve post-O'Connor cases for the analysis in Part IV.

66. Because our emphasis is no longer exclusively on constitutional law, we omit a variable indicating whether the Court overturned a federal law. We also exclude the variable on the alteration of precedent because seventy-five percent of those alterations came in constitutional cases. For more details on these variables, see *supra* note 58. It is worth noting, though, that inclusion of one or both variables changes neither the statistical results nor our substantive interpretation of them.

Further, we now consider two different approaches to assessing the members of the majority coalition. For the initial analysis reported in Part III.A, we studied only the composition of the *vote* coalition (that is, all members of the majority who vote with the majority) out of belief that the opinion writer must contend with each member. An alternative is to focus on the members of the majority opinion coalition (i.e., those who vote with the majority and do not concur separately). For this more expansive test, we consider both the composition of the vote coalition and the members of the majority opinion coalition.

As it turns out, this is a difference without meaning for our analysis. As Table 1 and the Appendix show, regardless of whether we examine the opinion or vote coalition, the estimate of *Ideological Diversity of the Majority* remains statistically significant and correctly signed.[67] In other words, and in line with our account and the initial analysis, higher degrees of ideological homogeneity remain statistically associated with higher odds of producing a decision of consequence.

As for those variables we do include, the table below summarizes them (for majority vote coalitions) (N=5610):

Variable	Mean	Std. Dev.	Min.	Max.
Ideological Diversity of the Majority	1.92	0.57	0.21	4.13
Number of Justices in the Majority	7.04	1.55	4	9
Ideology of the Majority	0.07	0.89	-2.28	2.02
Number of Cases	112.62	24.33	35	151

Note that the minimum number of cases is 35. This is the number decided in 2005 prior to Alito's arrival.

67. To keep the discussion manageable, the text focuses on vote coalitions; the Appendix replicates the analysis for majority opinion coalitions.

Variable	Coefficient	(Std. Err.)
Ideological Diversity of the	-0.356*	(0.078)
Majority	-0.212*	(0.027)
Number of Justices in the Majority	-0.226*	(0.046)
Ideology of the Majority	-0.002	(0.001)
Number of Cases	0.727*	(0.233)
Constant		
N	5610	
Log-likelihood	-2411.06	
$^{x}(4)$	157.91	

Table 1: The effect of the ideological diversity of the majority vote coalition on the creation of a consequential decision. * $p < .05$. Standard errors are robust. For results pertaining to the majority opinion coalition, see Table 3 in the Appendix.

But how much higher? Do the statistical results—especially those pertaining to ideological diversity—exert strong substantive effects on the law?[68] To address these questions we consider several plausible scenarios, with Figure 2 displaying the most relevant for our project. Figure 2 shows the effect of homogeneity on the probability of the Court producing salient precedent when we set the size of the majority at five, seven, and nine persons—in other words, the (approximate) minimum, mean, and maximum values of *Number of Justices in the Majority*.

68. By design, the analyses that follow replicate those appearing in our early work but, of course, rely on the expanded database. Also, and once again, for purposes of streamlining the discussion in the text, we focus on the majority vote coalitions rather than the opinion coalitions. The Appendix houses the results for majority opinion coalitions.

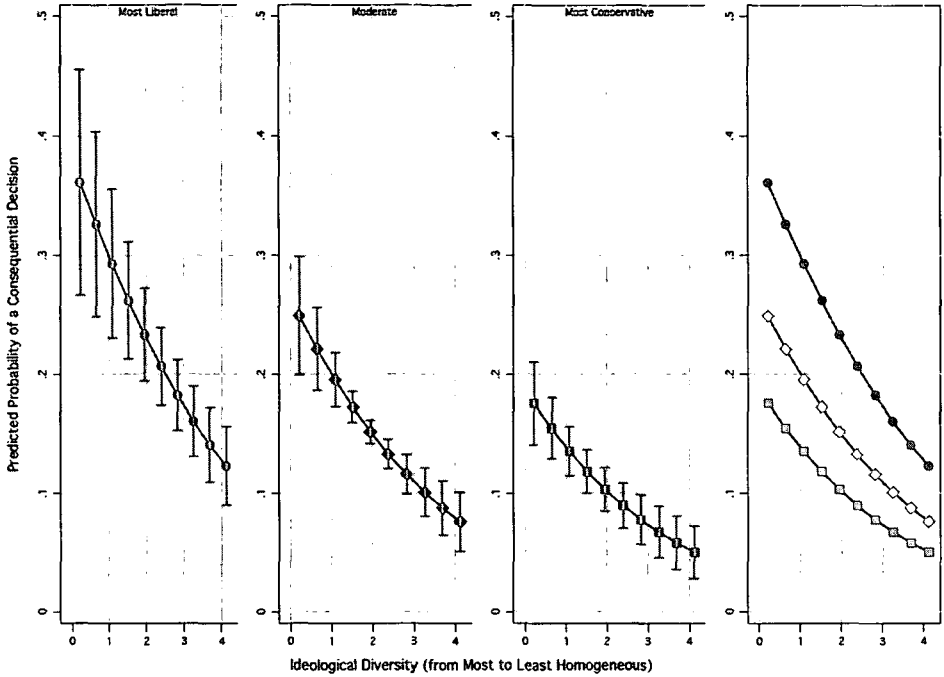

Figure 2: The effect of ideological diversity, for three sizes of the majority vote coalition, on the likelihood of generating consequential precedent. The panels show the predicted probability of the Court producing an important decision when we set the size of the Court's majority at its (approximate) minimum (five), mean (seven), and maximum (nine) values over the range of *Ideological Diversity* (the closer to zero the more ideologically homogeneous the majority). In all panels, *Ideology of the Majority* and *Number of Cases* are set at their means. The vertical lines represent 95% confidence intervals. We generated this figure using SPost.

Focusing first on the ideological diversity account, the conclusion from Figure 2 is clear: regardless of the size of the majority, the more homogeneous the majority coalition, the more likely it is to produce a consequential decision. With all other variables held at their mean, including the size of the majority, the probability of an extremely heterogeneous majority generating a noteworthy decision is just .08;[69]

69. The 95% confidence interval is [.05, .10].

that figure increases to .25[70] if the majority is extremely homogeneous.

The *Number of Justices in the Majority*, though, and just as we might suspect, is hardly trivial. All else being equal, a five-to-four coalition will produce a consequential decision in slightly more than one out of every five cases.[71] When those five Justices are ideologically closely aligned (i.e., at the highest levels of homogeneity), that figure increases to thirty-four percent.[72] For unanimous majorities, conversely, the predicted probability of generating an important decision never exceeds .18 even when they are highly homogeneous;[73] the odds drop as low as .05 when they are highly heterogeneous.[74] So once again, anecdotal evidence aside, the unanimous Court is far less likely to generate decisions of consequence than the ideologically homogeneous, five-person coalition.

Ideology plays yet another role in the production of noteworthy decisions. In line with the conventional wisdom, it turns out that liberal majorities are more likely to produce "big" decisions than their more conservative counterparts. Consider Figure 3, in which we depict the change in the predicted probability of a consequential opinion across the range of values of *Ideological Diversity* for very liberal, more moderate, and very conservative majority coalitions.[75] Notice that the likelihood of even an extremely homogeneous conservative majority generating a consequential decision is never much greater than one in five; for the extremely liberal (and homogeneous) coalition, it could reach as high as nearly fifty percent.[76]

70. The 95% confidence interval is [.20, .30].
71. .22 with a 95% confidence interval of [.20, .24].
72. The 95% confidence interval is [.28, .39].
73. The 95% confidence interval is [.13, .23].
74. The 95% confidence interval is [.03, .07].
75. The other variables are set at their mean or mode.
76. The predicted percent is thirty-six, with a 95% confidence interval of [.27, .45].

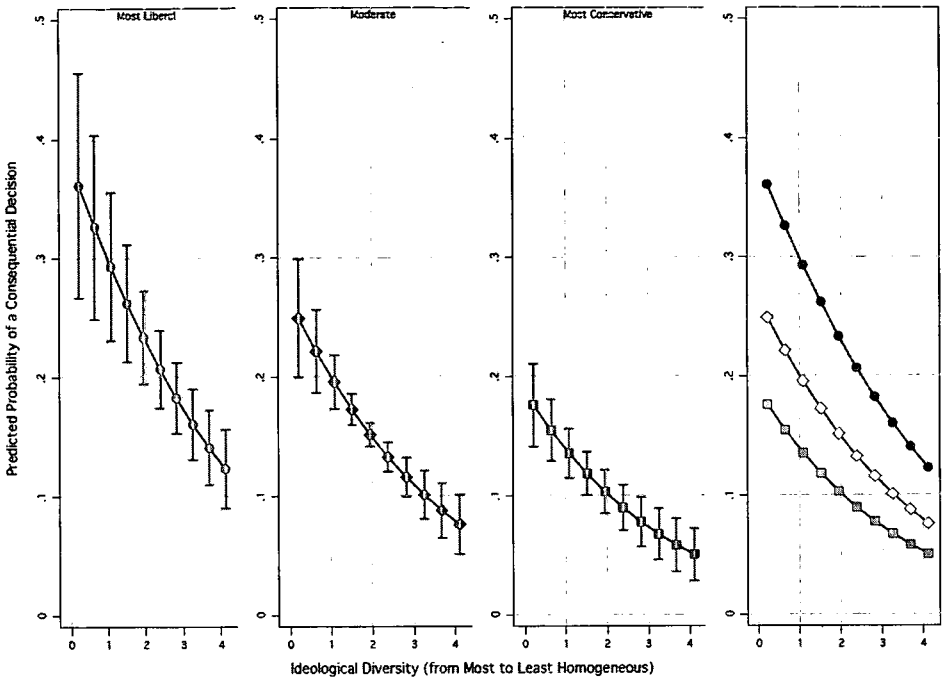

Figure 3: The effect of ideological diversity, by the ideology of the majority vote coalition, on the likelihood of generating consequential precedent. The panels show the predicted probability of the Court producing an important decision when we set the ideology of the majority coalition at its most liberal, moderate (average), and most conservative levels over the range of *Ideological Diversity* (the closer to zero the more ideologically homogeneous the majority). In all panels, *Number of Justices in the Majority* and *Number of Cases* are set at their means. The vertical lines represent 95% confidence intervals. We generated this figure using SPost.

Then again, it bears repeating that the results in Figure 3 reflect, as they must, our dataset. Were it to include pre-1937 cases—specifically, the period of conservative activism during the *Lochner* era—or, we might speculate, the post-2006 Term cases, an entirely different result might have obtained.

Even with this caveat, the analyses presented so far are revealing. At the least they tell us that the ideological diversity of the majority matters—and matters a lot—for the production of decisions generating consequential precedent. Likewise, and perhaps not surprisingly, so does the majority's size and its ideology.

III. THE ROBERTS COURT AND MAJORITY COALITIONS

How does the Roberts Court, since Alito joined it,[77] measure up along these three dimensions? At first blush, quite nicely. Of the eleven decisions of note during this period (shown in Table 2) most seem in line with our account. Eight were the product of minimum-winning votes, but more importantly, they were generated by (more or less) the most ideologically homogeneous coalitions available on this Court: Kennedy joining the four liberals or four conservatives.[78]

77. Justice Alito took his judicial oath on January 31, 2006, the same day that Justice O'Connor's service on the Court terminated. *See* Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (providing data on Supreme Court appointments, oaths, and departures from 1789 to present). All previous analyses end with O'Connor's departure on January 31, 2006. The analyses that follow begin with her departure.

78. Owing in part to Thomas's extreme conservatism, when Kennedy joins the four liberals, the majority is more ideologically homogeneous than when he joins the four conservatives (1.099 versus 1.476).

Cases	Vote
Rapanos v. United States[79] (2006)	5-4 (Roberts, Scalia, Kennedy, Thomas, Alito in the majority)
LULAC v. Perry[80] (2006)	5-4 (Roberts, Scalia, Kennedy, Thomas, Alito in the majority)
Gonzales v. Carhart[81] (2007)	5-4 (Roberts, Scalia, Kennedy, Thomas, Alito in the majority)
Ledbetter v. Goodyear Tire[82] (2007)	5-4 (Roberts, Scalia, Kennedy, Thomas, Alito in the majority)
FEC v. Wisconsin Right to Life[83] (2007)	5-4 (Roberts, Scalia, Kennedy, Thomas, Alito in the majority)
Parents v. Seattle School District[84] (2007)	5-4 (Roberts, Scalia, Kennedy, Thomas, Alito in the majority)
Massachusetts v. EPA[85] (2007)	5-4 (Stevens, Souter, Ginsburg, Breyer, Kennedy in the majority)
Hamdan v. Rumsfeld[86] (2006)	5-3 (Stevens, Souter, Ginsburg, Breyer, Kennedy in the majority)
Randall v. Sorrell[87] (2006)	6-3 (Roberts, Scalia, Kennedy, Thomas, Breyer, Alito in the majority)
Tellabs v. Makor Issues[88] (2007)	8-1 (all but Stevens in the majority)
Hill v. McDonough[89] (2006)	9-0

Table 2: Decisions of consequence produced by the Roberts Court since Justice Alito's arrival. These are cases that appeared on the front page of the *New York Times* on the day after the Court handed them down.

But merely glancing at the data cannot reveal the whole story. Actually, it may be downright misleading. For example, even if the Roberts Court's coalitions are minimum-winning and ideologically connected, they may not be especially homogeneous. Indeed, given the gap between Kennedy and the Justices to his right and left—not

79. 547 U.S. 715 (2006).
80. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).
81. 550 U.S. __, 127 S. Ct. 1610 (2007).
82. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. __, 127 S. Ct. 2162 (2007).
83. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. __, 127 S. Ct. 2652 (2007).
84. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, 127 S. Ct. 2738 (2007).
85. 549 U.S. __, 127 S. Ct. 1438 (2007).
86. 548 U.S. 557 (2006).
87. 548 U.S. 230 (2006).
88. Tellabs v. Makor Issues & Rights, Ltd., 551 U.S. __, 127 S. Ct. 2499 (2007).
89. 547 U.S. 573 (2006).

to mention Thomas's extremism[90]—it is possible that even larger coalitions formed in early eras were more ideologically homogeneous than the five-person coalitions of the Roberts Court.

Shedding light on the Roberts Court Justices' ability to generate consequential decisions thus requires a more systematic approach. We take such an approach below, contemplating how the current Court compares to its predecessors on the three factors that proved significant in our statistical model—the ideology of the majority coalition, its size, and, of course, its diversity.

A. Ideology

Overall, and likely to the surprise of no one, the Roberts Court is significantly more conservative than the average Court sitting since the 1953 Term.[91] For our analysis, however, the important question is not the overall ideology of the Court but rather the ideology of those Justices who form majority coalitions. This reflects our finding that liberal majorities, even controlling for their size and homogeneity, are more likely to produce precedent of consequence—at least for the data we have available here.

By this criterion, the majority vote coalitions on the Roberts Court remain, on average, more conservative than is typical. While they do not, as we show in Figure 4, surpass those formed in several earlier Terms—most notably in 1975 and 1992—they are noticeably more right-leaning than any since 2000.

90. *See supra* Figure 1.

91. We base this statement on a t-test ($p < .05$) comparing the 2006 Term mean of the Martin-Quinn ideal point estimate of the 2006 Term (.365) with all Terms between 1953 and 2005 (-.048).

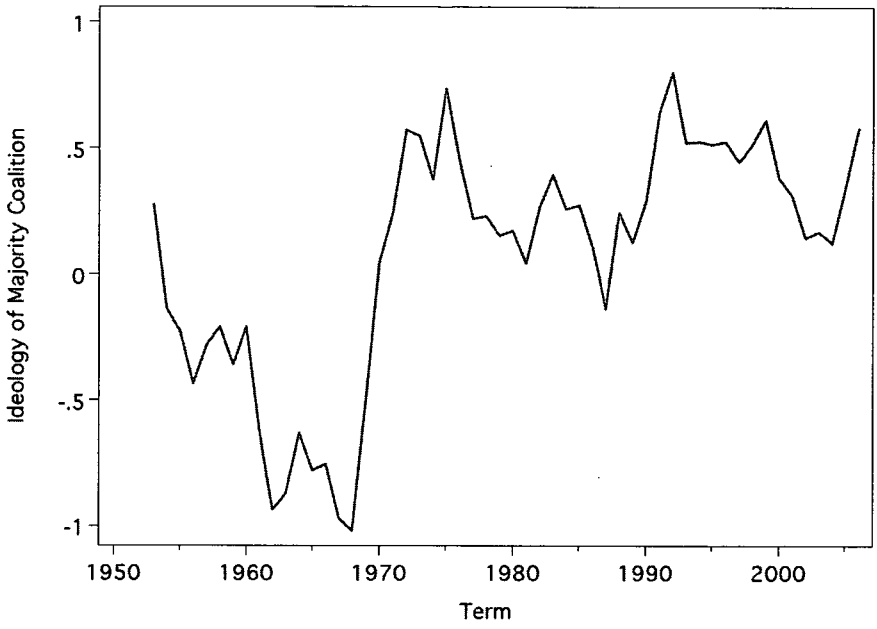

Figure 4: The mean ideology of majority coalitions formed each Term since 1953. The higher the number, the more conservative the majority.

What does this suggest for the Roberts Court's ability to generate consequential decisions? Overall, recall that our results in Figure 3 show a positive association between the liberalism of the majority coalition and the likelihood of it generating a consequential decision. With all other variables held at their mean, moving from extreme levels of liberalism to extreme levels of conservatism reduces the predicted probability of observing a consequential decision by about fifty-six percent.[92] For the post-Alito Roberts Court, with the mean level of liberalism of its majority vote coalitions at .59, we predict that, holding all else at its mean, the average coalition has about a .14 probability of generating a consequential decision. This is below average for the entire pre-Alito period but only marginally so.[93]

92. From a predicted probability of .24 [.20, .28] to .10 [.09, .12].

93. As we note in the text, the predicted probability of producing a consequential decision for a Court with a mean level of liberalism of .59 for its majority vote coalitions is about .14 [.12, .15], with all other variables set at their means. Holding all variables (including the *Ideology of the Majority* vote coalition) at their mean yields a predicted probability of .15 [.14, .16].

In fact, the decline is so small that it tempers any conclusions we might reach about the Roberts Court—at least conclusions based solely on its ideology. Also dampening our enthusiasm for making predictions are, once again, the data we have available to us—drawn from the post-*Lochner* era. Yet a final and even more crucial cautionary note here is that we base our forecast of .14 on the "on average" size of the majority coalition. The Roberts Court, however, is hardly average on this dimension.

B. Size

This brings us to the issue of size. Recall that a smaller majority is more likely to generate consequential decisions, even after controlling for its size and ideology. Focusing on the 1953 through 2005 Terms (up until O'Connor's departure), our results suggest that moving from the smallest majority vote coalition to the largest (a unanimous vote) leads to a fifty-nine percent decline in the likelihood of producing a consequential decision.[94] Looking at opinion coalitions shows an even starker difference, from a probability of .46[95] for the smallest to .08 for the largest (again, 9).[96]

If commentary on the Roberts Court were any indication, the Roberts Court should shine on this dimension. By the conclusion of the 2006 Term, story after story and blog after blog emphasized the number of minimum-winning (i.e., five-to-four vote) cases. As Kermit Roosevelt put it, "With a flurry of 5-to-4 decisions handed down at the end of June, the Supreme Court served notice that things are changing at One First Street."[97] At the *Fox News Sunday Roundtable*, Chris Wallace introduced his summary of the Term with these words: "In the nineteen five-to-four decisions that broke along ideological grounds, the conservatives prevailed in thirteen cases."[98] Charles Lane's numbers were different, but the sentiment was the same:

> This term, the Justices split 5 to 4 in 24 cases, a third of the total. Kennedy sided with the four most conservative Justices—Roberts, Alito, Antonin Scalia and Clarence Thomas—in 13 of the 5 to 4 cases, while backing liberals John Paul Stevens, David

94. From 25.64 [22.53, 28.74] to 10.62 [9.31, 11.93]. From a predicted probability of .24 [.20, .28] to .10 [.09, .12].

95. The 95% confidence interval is [.40, .53].

96. The 95% confidence interval is [.07, .09].

97. Kermit Roosevelt, *How To Judge the Roberts Supreme Court*, CHRISTIAN SCI. MONITOR, July 6, 2007, at 9.

98. *Fox News Sunday* (Fox News television broadcast July 1, 2007).

> H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer just six times. In five other 5 to 4 cases, the court did not split along liberal-conservative lines.[99]

And yet, the empirical story is more complicated—and more interesting. On the one hand, we observe no significant difference, on average, between the size of majority vote coalitions produced by the Roberts Court and all previous years since 1953.[100] The mean number of Justices in the majority prior to Roberts's arrival is 7.04; after Alito's arrival it decreased ever so slightly, to 6.97.[101]

On the other hand, the distributions are quite different, as Figure 5 indicates. Note that in both panels, decisions by five- and nine-person majorities comprise the largest proportion. But prior to Alito, they accounted for just about half (.49) of all decisions; since his arrival, that figure has jumped to over two-thirds (.67). To put it another way, coalitions of sizes six, seven, and eight were not rare events in the pre-Alito years, but they are now.

99. Charles Lane, *Narrow Victories Move Roberts Court to the Right*, WASH. POST, June 29, 2007, at A4.

100. The same results obtain if we examine majority opinion coalitions. Prior to Alito's arrival, the mean size of majority coalitions was 6.57; after Alito, the figure is 6.60, a trivial difference.

101. For the 2006 Term alone, the mean is 6.94.

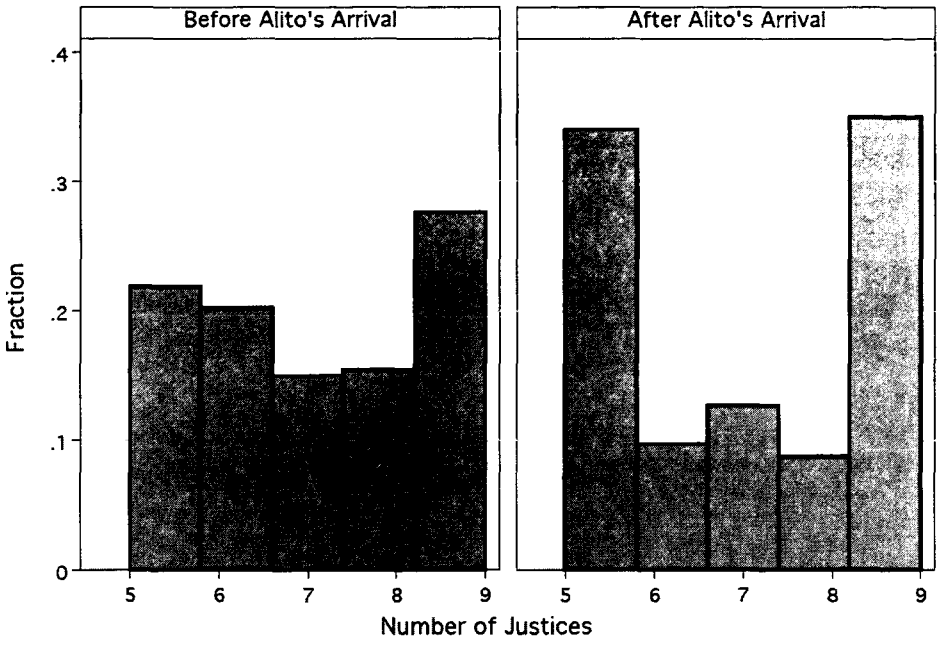

Figure 5: The number of Justices in the majority vote coalition before and after Alito's arrival. The figure excludes the forty-nine four-person majority coalitions, all of which were prior to the 1988 Term.

The cause of this phenomenon deserves further investigation. For our purposes, suffice it to note that the commentators were not altogether wrong to place emphasis on the narrow margin of Roberts Court's decisions. While more than a third were unanimous—compared with .27 for the period prior to Alito—an unusually large percentage were five-to-four (34.65 versus 21.64). Thus emerges an interesting prediction for the current Court's ability to generate consequential decisions: because on average and controlling for all other relevant factors the smaller the majority, the higher the probability of producing important precedent, the dominating five-person coalitions may bode well (or poorly, depending on one's perspective).

This much we already are observing. Recall that of the 101 decisions produced by the Roberts Court Justices since Alito's arrival, eleven register on our indicator of case importance.[102] Of the eleven, to reiterate, eight were produced by minimum-winning majorities. To

102. *See supra* Table 2.

put it another way, of the thirty-four closely divided decisions, over twenty-five percent resulted in a consequential decision.

C. Ideological Diversity

Finally we come to the chief explanation of interest, ideological diversity. We know that prior to Alito's arrival, and holding all other variables at their mean, moving from maximum levels of homogeneity to the minimum increases the odds of a consequential decision by over 200 percent (from .08 to .25). Reestimating the model to include all cases through the 2006 Term, of course, does not change the picture, as only 101 of the 5,711 total cases were post-Alito. And though we are hesitant to reestimate it with only the post-Alito cases because the number is so small, we can use our data to probe the relationship.

For starters, as we have noted throughout, the size of the coalition and its ideological diversity need not be positively related. Nonetheless, that has typically held for the Supreme Court. In other words, as we show in Figure 6, smaller majorities tend to be more homogeneous. Observe that for all but one Term, sizable gaps exist between the ideological diversity of five- versus nine-Justice majority coalitions.

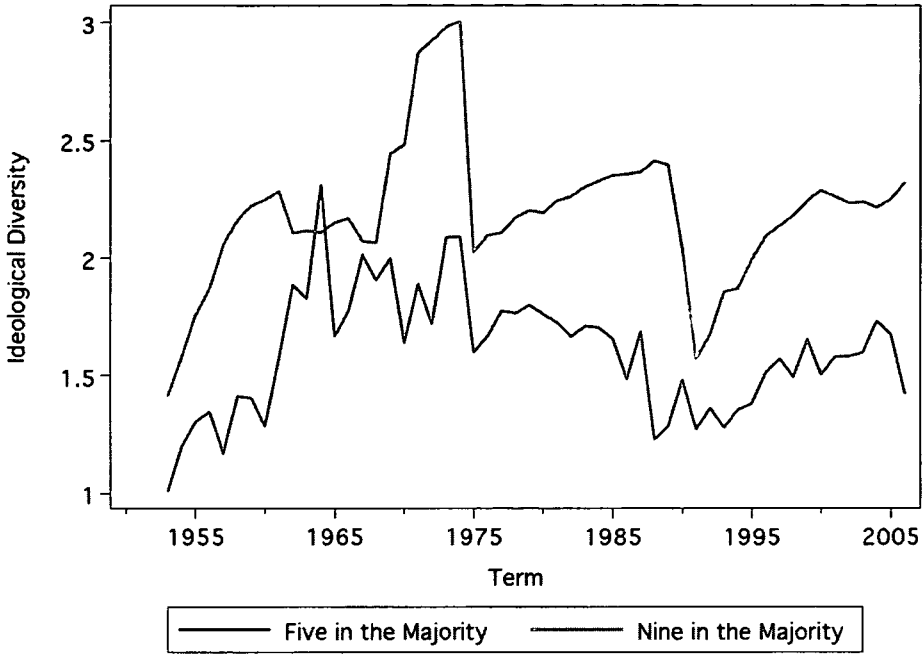

Figure 6: The relationship between ideological diversity and the size of the majority vote coalition for two sizes: minimum-winning (five) and unanimous (unanimous).

Returning to the Roberts Court, note that when its Justices produce minimum-winning coalitions—as they are (comparatively) inclined to do—the level of homogeneity also is comparatively high (1.60 versus 1.50 since O'Connor left).[103] But when the Roberts Court Justices reach unanimous decisions, as they are also prone to do, the degree of heterogeneity is, on average, higher than in all previous eras (2.21 for all previous years; 2.30 for the Roberts Court).

It is from these data that the primary implications for the Roberts Court's production of consequential precedent become clear. When this diverse group of Justices is able to agree on the resolution of a dispute, they are highly unlikely to generate a consequential

103. This difference is not statistically significant. But, as we discuss momentarily in the text, *see also infra* note 107, when we compare the relative homogeneity of five-person coalitions reaching "liberal" decisions, the Roberts Court is significantly more homogeneous than all other Courts since 1953; but when it reaches conservative decisions, it is significantly more heterogeneous. The suggestion here is that when Kennedy joins with the four liberals, the resulting precedent is likely to be more consequential than when he joins with the four conservatives.

decision. Reestimating the model to include all the Terms in our dataset (1953–2006), and setting the variables in accord with a plausible scenario for the Roberts Court, indicates that fewer than one out of every ten decisions is likely to produce consequential precedent.[104] Such a result, it seems to us, squares nicely with the Chief Justice's intuition about consensus leading to decisions reached on the "narrowest possible grounds."[105] Alternatively, given the slightly higher-than-average homogeneity of the five-person majority coalitions on the Roberts Court, the continued production of minimum-winning decisions may lead to highly consequential precedent: based on a plausible scenario for the Roberts Court, consequential precedent may result in perhaps as many as one out of every four decisions.[106] Interestingly enough, though, it is when Justice Kennedy joins the four liberals, rather than the four conservatives, that the Roberts Court is likely to be at its most potent. This reflects not only the comparative ideology of the two coalitions, but also their relative homogeneity.[107] Owing in part to Justice Thomas's extremism, the left wing (when joined by Justice Kennedy) is less ideologically diverse than the right (again when joined by Justice Kennedy).[108]

CONCLUSION

Predictions about the Roberts Court based on two short Terms—actually one and a half!—abound. And we have now added to the pile with our suggestion that minimum-winning coalitions on this Court could produce reasonably consequential precedent.

We do so, though, with eyes wide open. Every existing forecast—ours not excepted—is necessarily tentative, even uncertain.

104. The predicted probability is .09 [.08, .11].

105. Hope Yen, *Roberts Seeks Greater Consensus on Court*, WASH. POST, May 21, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678_pf.html (quoting Justice Roberts's speech to Georgetown University Law graduates).

106. The predicted probability is .22 [.19, .25].

107. When we set all variables at their means (including ideology), but allow *Ideological Diversity of the Majority* to reflect its five-to-four values for the Roberts Court, the predicted probability of a five-to-four liberal majority on Court producing a consequential decision is .27 [.23, .30]; that figure for conservative majorities is .23 [.20, .26]. Of course the gap between those probabilities increases if we also set *Ideology of the Majority* to its Roberts Court values (.36 [.31, .41] versus .18 [.14, .21]).

108. *See supra* note 78.

Justices drift,[109] Justices come and go. In our analysis, for example, were Justices Kennedy and Alito to move to the left, as Justice O'Connor did in the last few years of her career, our conclusions would be quite different. Moreover, were the Chief Justice able to achieve greater consensus—a seemingly quixotic, though nonetheless pet project of his—the Roberts Court may end up as "modest" as Professor Dorf suggests.

On the other hand, should our predictions hold, it is Professor Fallon and Justice Breyer who may have the better case. In light of the Justices' propensity toward small majority coalitions and the homogeneity of those coalitions, this Court may turn out to be one on which "so few . . . so quickly changed so much."[110]

APPENDIX: MAJORITY OPINION COALITIONS

In the text, we focus the analysis on majority vote coalitions. Because a case can be made that it is majority opinion coalitions that are more relevant to the ideological diversity account, in what follows we replicate the analyses in Part II for opinion coalitions. As it turns out, the results are virtually indistinguishable.

A. Statistical Results

In Table 1, we report the estimated coefficients of analysis that center on the majority vote coalition. Below, in Table 3, we consider the majority opinion coalition. Note that the estimate of *Ideological Diversity* remains statistically significant and correctly signed. Hence, again and in line with our account, higher degrees of ideological homogeneity are statistically associated with higher odds of producing consequential precedent.

109. *See, e.g.*, Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

110. *See supra* note 1 and accompanying text.

Variable	Coefficient	(Std. Err.)
Ideological Diversity of the Majority	-0.338*	(0.073)
Number of Justices in the Majority	-0.289*	(0.026)
Ideology of the Majority	-0.233*	(0.042)
Number of Cases	-0.003*	(0.001)
Constant	1.103*	(0.230)
N	5602	
Log-likelihood	-2356.509	
$^{x}(4)$	231.22	

Table 3: The effect of the ideological diversity of the majority opinion coalition on the creation of a consequential decision. * $p < .05$. Standard errors are robust.

B. Substantive Results

In the text, we considered the substantive impact of the statistical results under a variety of plausible scenarios. We began with the one most relevant to our analysis, the effect of homogeneity on the probability of the Court producing salient precedent when we set the size of the majority vote coalition at five, seven, and nine persons—in other words, the (approximate) minimum, mean, and maximum values of *Number of Justices in the Majority*.[111] Figure 7 replicates the analysis for the majority opinion coalition.

111. *See supra* Figure 2.

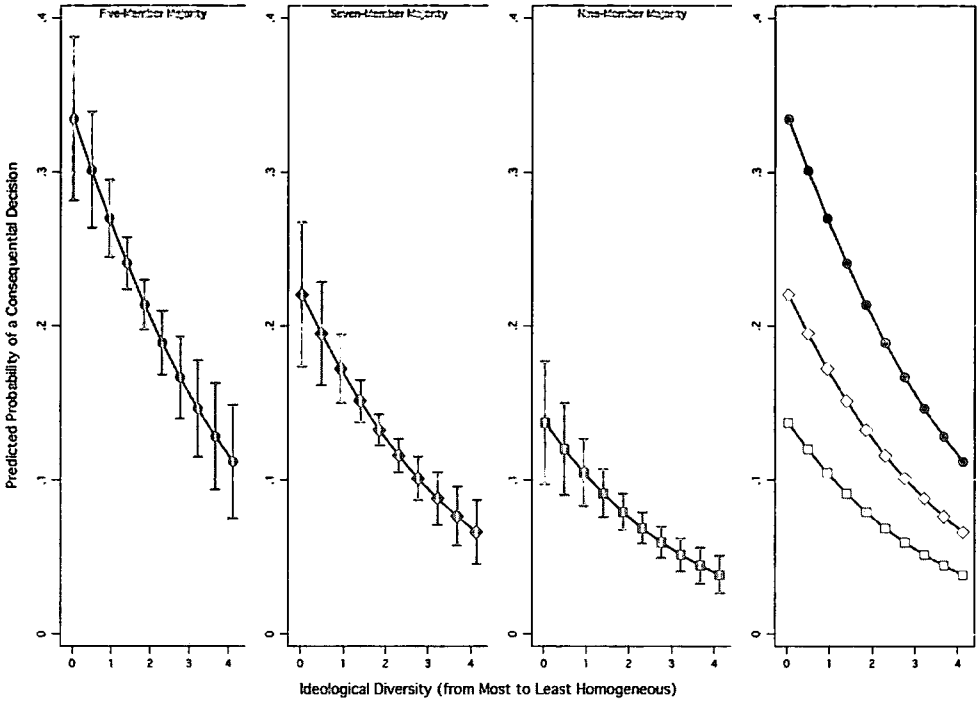

Figure 7: The effect of ideological diversity, for three sizes of the majority opinion coalition, on the likelihood of producing a consequential precedent. The panels show the predicted probability of the Court producing an important decision when we set the size of the Court's majority at its (approximate) minimum (five), mean (seven), and maximum (nine) values over the range of *Ideological Diversity* (the closer to zero the more ideologically homogeneous the majority). In all panels, *Ideology of the Majority* and *Number of Cases* are set at their means. The vertical lines represent 95% confidence intervals. We generated this figure using SPost.

Just as in the analysis of majority vote coalitions,[112] the results indicate that the more homogeneous the majority, the more likely it is to produce a consequential decision—regardless of the size of the opinion coalition. Setting all other variables at their means, a very heterogeneous majority opinion coalition is quite unlikely to produce a consequential decision even if it is small (the predicted probability is .11 [.07, .15]); for five-Justice homogeneous opinion coalitions, the

112. *See supra* Figure 2.

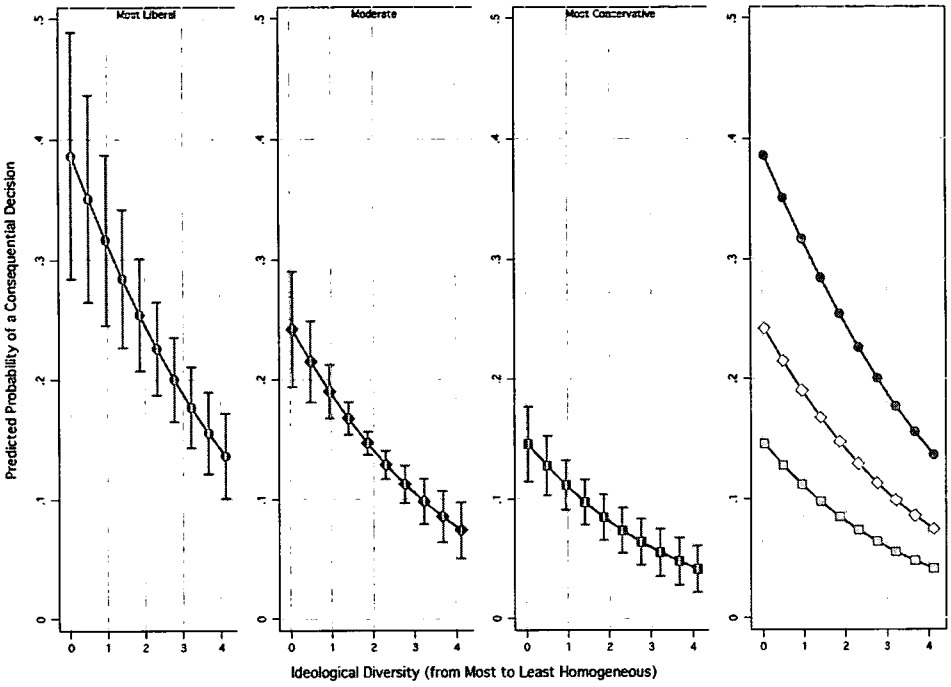

Figure 8: The effect of ideological diversity, by the ideology of the majority opinion coalition, on the likelihood of producing a consequential precedent. The panels show the predicted probability of the Court producing an important decision when we set the ideology of the majority coalition at its most liberal, moderate (average), and most conservative levels over the range of *Ideological Diversity* (the closer to zero the more ideologically homogeneous the majority). In all panels, *Number of Justices in the Majority* and *Number of Case*s are set at their means. The vertical lines represent 95% confidence intervals. We generated this figure using SPost.

113. *See supra* Figure 3.