Why We Should Study Judicial Behavior

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Washington University in St. Louis
School of Law & Department of Political Science

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C. Herman Pritchett

Sometime in the fall of 1940 I was reading the current issue of the Supreme Court Reporter in my office, [when I saw] the inscription on the Social Science Research Building:

When you cannot measure, your knowledge is meager and unsatisfactory.

Sonia Sotomayor

Position: Pitcher

At Bats:	341
Home Runs:	35
Strikeouts:	25

Antonin Scalia

Position: Right Fielder

At Bats:	2418
Home Runs:	263
Strikeouts:	230

WashULaw

U.S. Supreme Court, 2015

More Liberal **More Conservative**

RBG

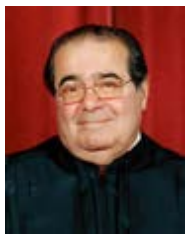
SS

EK

SB

AK

JR


AS

SA

CT

U.S. Supreme Court, 2015

More Liberal

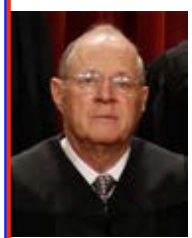
RBG

SS

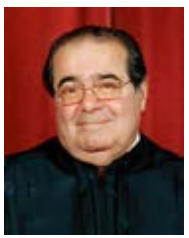
EK

SB

More Conservative


AK

JR


AS

SA

CT

Fields

Campaign Contributions and Voting for Business Litigants

	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	*Labor Cases*	*Tort Cases*	*Contract Cases*
$1000 Contribution from Business Group	0.0003[a] (1.69)	0.0004[+] (2.27)	0.0005[a] (1.69)	0.0002[+] (2.02)
Log Likelihood	-8509	-1301	-4043	-2798
Business Groups' Share of Total Contributions	0.003* (2.55)	0.006* (2.88)	0.005* (2.57)	0.004* (2.90)
Log Likelihood	-8497	-1295	-4032	-2790

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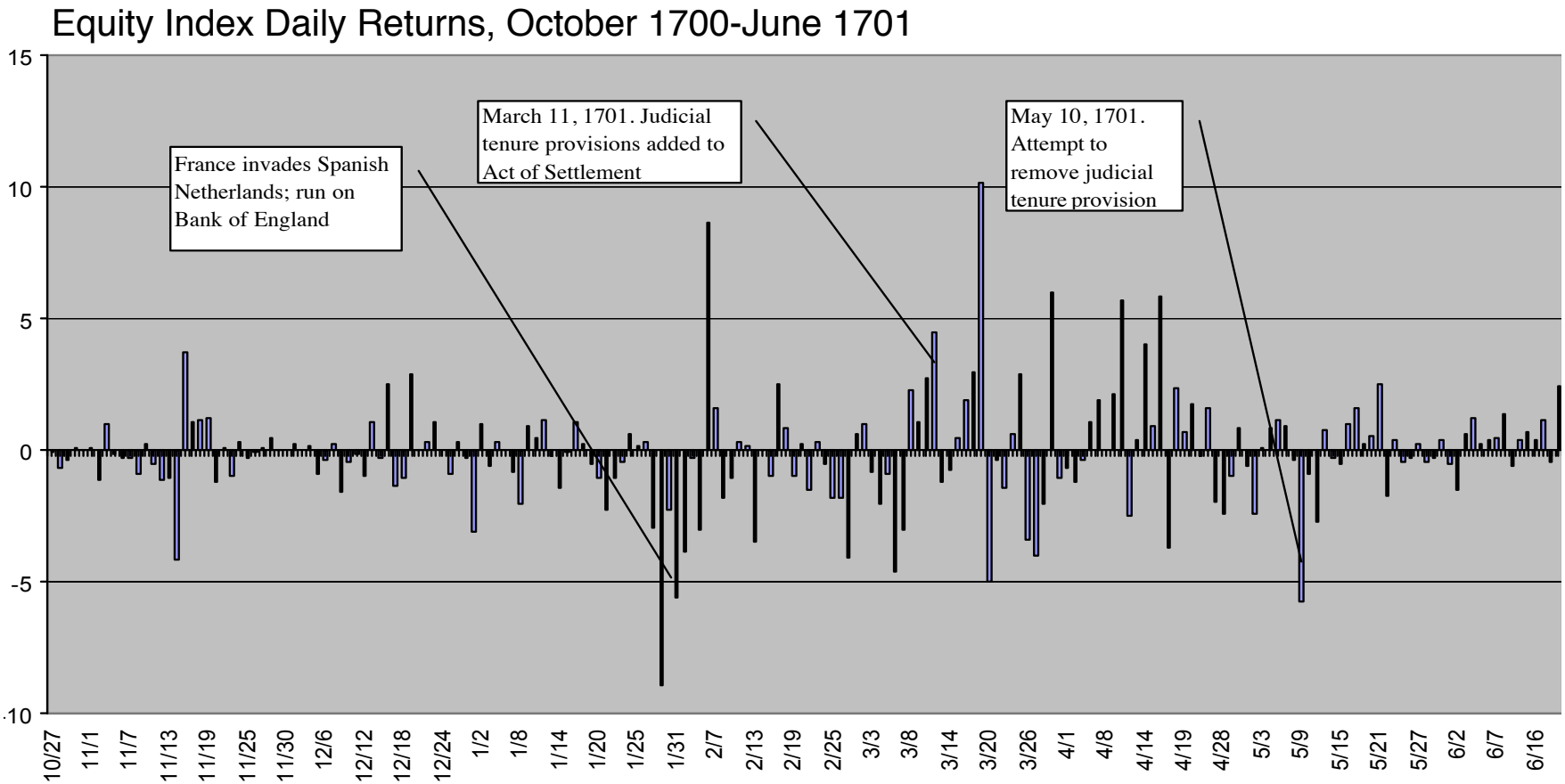
We've run out of lab rats, Henderson... Put this on and come with us.


Equity Index Daily Returns, October 1700-June 1701
15
10
5
0
-5
-10
France invades Spanish Netherlands; run on Bank of England
March 11, 1701. Judicial tenure provisions added to Act of Settlement
May 10, 1701. Attempt to remove judicial tenure provision
10/27
11/1
11/7
11/13
11/19
11/25
11/30
12/6
12/12
12/18
12/24
1/2
1/8
1/14
1/20
1/25
1/31
2/7
2/13
2/19
2/25
3/3
3/8
3/14
3/20
3/26
4/1
4/8
4/14
4/19
4/28
5/3
5/9
5/15
5/21
5/27
6/2
6/7
6/16

World-Wide

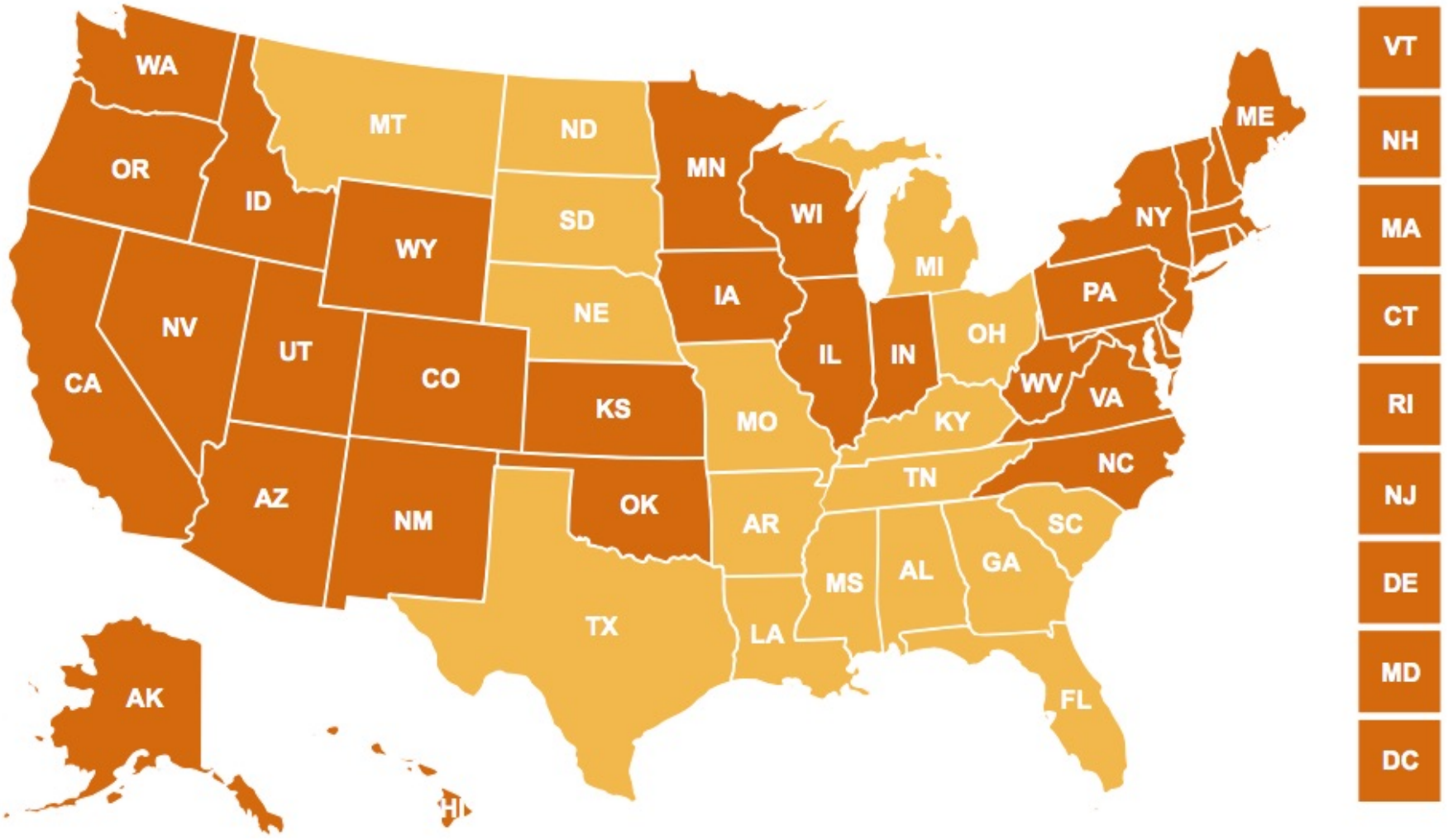
WashULaw

RUSSIA
CHINA
INDIA
KAZAKHSTAN
MONGOLIA
IRAN
AFGHANISTAN
PAKISTAN
Arctic Ocean
Indian Ocean
Arabian Sea
Bay of Bengal
Scale 1:48,000,000
Azimuthal Equal-Area Projection
800 Kilometers
800 Miles

WashULaw

Norwegian Sea
Svalbard (NORWAY)
Arctic Ocean
Barents Sea
Kara Sea
Laptev Sea
East Siberian Sea
Wrangel Island
Bering Sea
North Sea
NORWAY
Oslo
SWEDEN
Stockholm
FINLAND
Helsinki
Murmansk
NOVAYA ZEMLYA
SEVERNAYA ZEMLYA
NEW SIBERIAN ISLANDS
Cherskiy
Anadyr
U.S. Provideniya
Tiksi
Noril'sk
Magadan
Petropavlovsk-Kamchatskiy
Arctic Circle
Saint Petersburg
Arkhangel'sk
Moscow
Nizhniy Novgorod
Kazan'
Perm
Yekaterinburg
Chelyabinsk
Samara
Ufa
Saratov
Volgograd
Rostov
Voronezh
Kharkiv
Donets'k
UKRAINE
BELARUS
Minsk
Vilnius
Riga
Tallinn
Kyiv
Sea of Okhotsk
KURIL ISLANDS
Occupied by the Soviet Union in 1945, administered by Russia, claimed by Japan.
Sakhalin
Sapporo
Sea of Japan
JAPAN
Tokyo
Yokohama
Nagoya
Osaka
Fukuoka
KAZAKHSTAN
Astana
Qaraghandy (Karaganda)
Atyraü (Atyrau)
Aral Sea
Caspian Sea
Lake Balkhash
Baku
Tbilisi
Yerevan
AZERBAIJAN
ARM.
GEO.
Tabriz
Tehran
Esfahān
Mashhad
IRAN
Shīrāz
UZBEKISTAN
TURKMENISTAN
Ashgabat
Tashkent
Bishkek
KYRGYZSTAN
Dushanbe
TAJIKISTAN
Kashi
AFGHANISTAN
Kabul
Kandahār
Islamabad
Faisalābād
Quetta
Lahore
PAKISTAN
Ludhiāna
New Delhi
Jaipur
Lucknow
Kānpur
Patna
Karāchi
Ahmadābād
Indore
Surat
Mumbai
Nāgpur
INDIA
Kolkata
Dhaka
BANGLADESH
NEPAL
Kathmandu
BHUTAN
Thimphu
Lhasa
CHINA
Zhengzhou
Nanjing
Xi'an
Shanghai
Wuhan
Hangzhou
Chengdu
Chongqing
Changsha
Nanchang
Guiyang
Kunming
Guangzhou
Hong Kong S.A.R.
Macau S.A.R.
Taipei
Taiwan
East China Sea
Okinawa
RYUKU ISLANDS (JAPAN)
Tropic of Cancer
Philippine Sea
Hanoi
Haiphong
Nanning
LAOS
Vientiane
Da Nang
VIETNAM
CAMBODIA
Phnom Penh
Ho Chi Minh City
South China Sea
Hainan Dao
Luzon
Manila
Quezon City
PHILIPPINES
Cebu
Mindanao
Davao
Sulu Sea
SPRATLY ISLANDS
Gulf of Thailand
Celebes Sea
Bandar Seri Begawan
BRUNEI
MALAYSIA
Kuala Lumpur
SINGAPORE
Singapore
Borneo
Sulawesi
Pontianak
Sumatra
Palembang
Ambon
Banda Sea
Makassar
INDONESIA
Dili
Jakarta
Semarang
Surabaya
Bandung
Java
Java Sea
TIMOR-LESTE
Timor
Timor Sea
Indian Ocean
0 800 Kilometers
0 800 Miles
Oman
Muscat
Abu Dhabi
U.A.E.
Doha
QATAR
Bandar Abbās
Persian Gulf
SAUDI ARABIA

WashULaw


WA
OR
CA
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AZ
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NM
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LA
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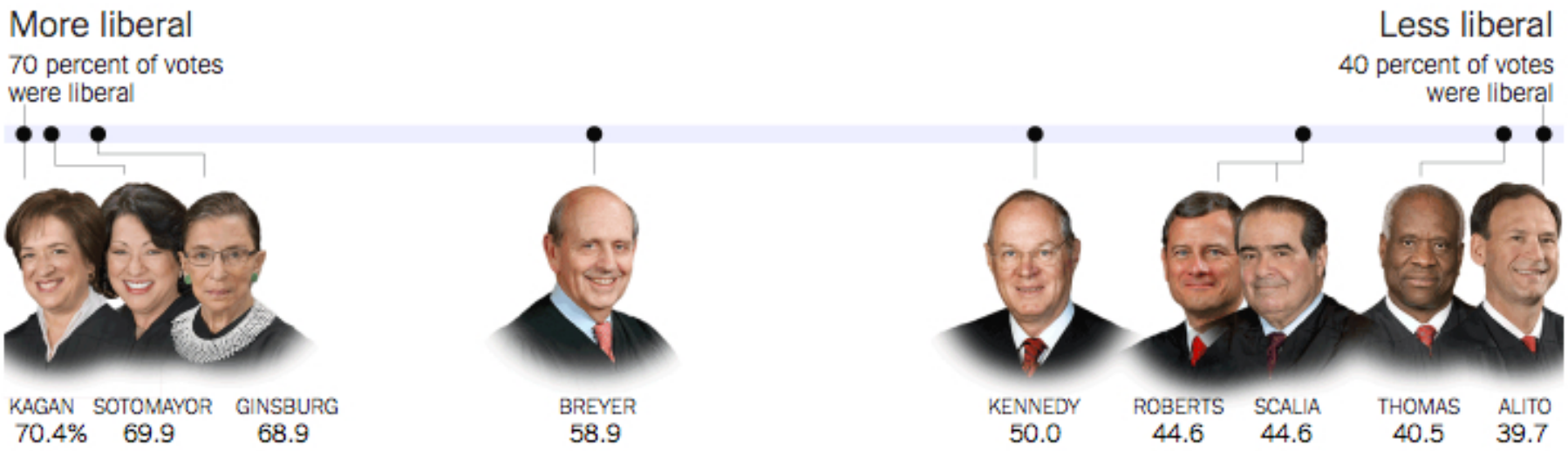
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
ME
AK
HI
VT
NH
MA
CT
RI
NJ
DE
MD
DC

SWEDEN
ICELAND
FINLAND
RUSSIA
NORWAY
Saint Petersburg
LATVIA
Copenhagen
U.K.
BELARUS
IRELAND
Amsterdam
Berlin
Warsaw
London
POLAND
GERMANY
Brussels
Kiev
Vienna
Paris
UKRAINE
KAZAKHSTAN
MONGOLIA
Milan
Budapest
FRANCE
Bucharest
Ürümqi
Madrid
Istanbul
Baku
Tashkent
ITALY
Ankara
Lisbon
SPAIN
Athens
TURKEY
CHINA
Algiers
Tunis
Tehran
SYRIA
Baghdad
Damascus
IRAN
Lahore
Xi'an
Chengdu
IRAQ
Amman
Cairo
Kuwait City
Delhi
ALGERIA
PAKISTAN
Chongqing
MOROCCO
LIBYA
EGYPT
Karachi
Riyadh
Dhaka
Ahmadabad
Jeddah
SAUDI ARABIA
INDIA
Kolkata
Hanoi
MALI
SUDAN
Mumbai
Hyderabad
Rangoon
NIGER
Khartoum
Sanaa
Pune
CHAD
YEMEN
Bangalore
Bangkok
Kano
Madras
Conakry
Addis Ababa
SOUTH SUDAN
ETHIOPIA
Abidjan
SOMALIA
Colombo
Yaoundé
Accra
Mogadishu
Kuala Lumpur
Singapore
KENYA

UNITED STATES
REPORTS
"C. C. A."
ALL CIRCUITS
HARRISON
PAUL J. THOMPSON
13
19
20
I. D. FAIRCHILD
DIGEST
VOLS. 11-20

Data

WashULaw



Significant clusters and gaps appear when the justices are ranked from most to least liberal.

- The Individual Judge
- The Collegial Court
- Judicial Selection & Retention
- Courts and the Elected Branches
- Agenda Setting
- Interactions between Higher and Lower Courts
- Litigants, Lawyers, & Interest Groups
- Public Opinion & Macroevents

Talk Organization

- Provide some basic information about courts

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- Cover a few substantive topics

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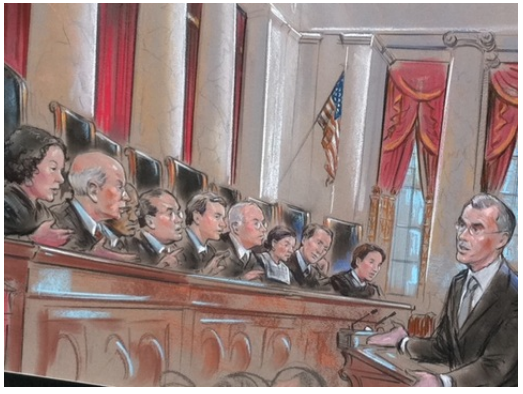
- Offer some thoughts on the future of Judicial Behavior

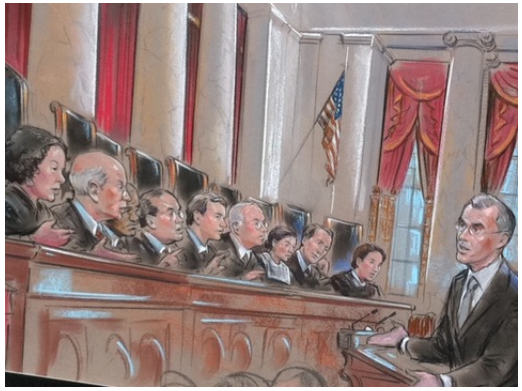
High Courts
(Supreme Court,
Court of Cassation)



Courts of Appeals

Trial Courts
(Courts of First Instance,
District Courts)

High Courts
(Supreme Court,
Court of Cassation)



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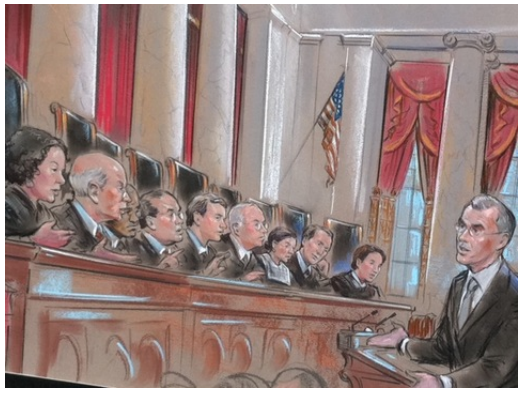

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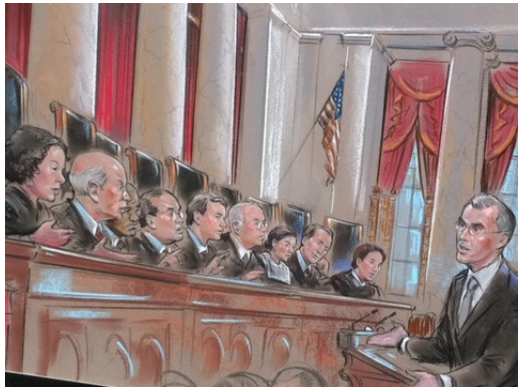

Courts of Appeals

Trial Courts
(Courts of First Instance,
District Courts)

Individuals

Legislators

Muncipalities

European Model

European Model

American Model

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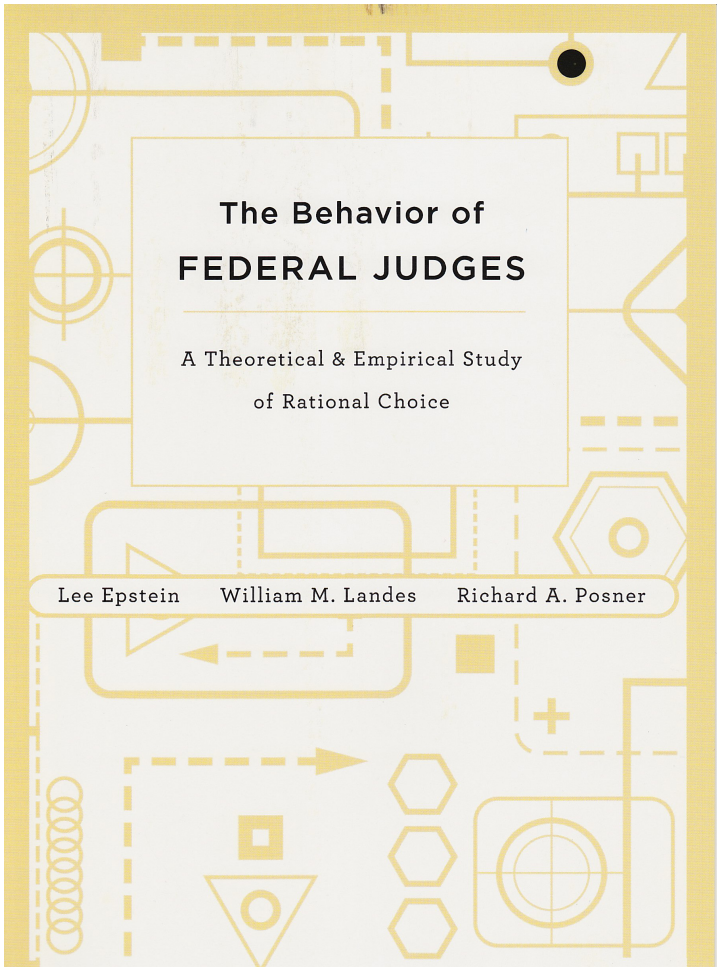


We present a realist model of judging, which views the judge as a participant in a labor market—the judicial labor market.

A judge so viewed is motivated and constrained, as other workers are, by personal and institutional concerns, by costs and benefits, by expectations, and by the tools and methods that the worker uses in her job.

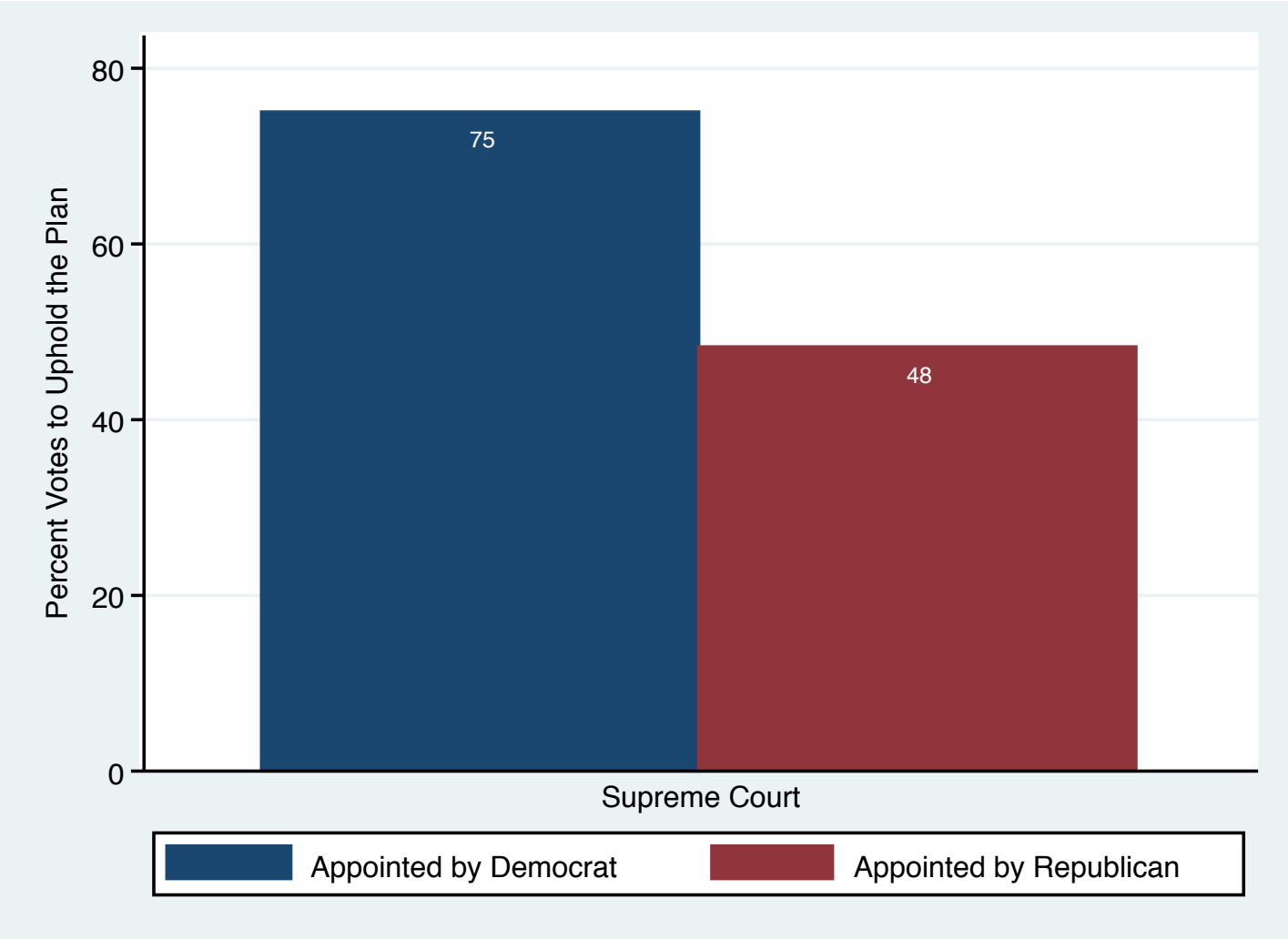
Our Book

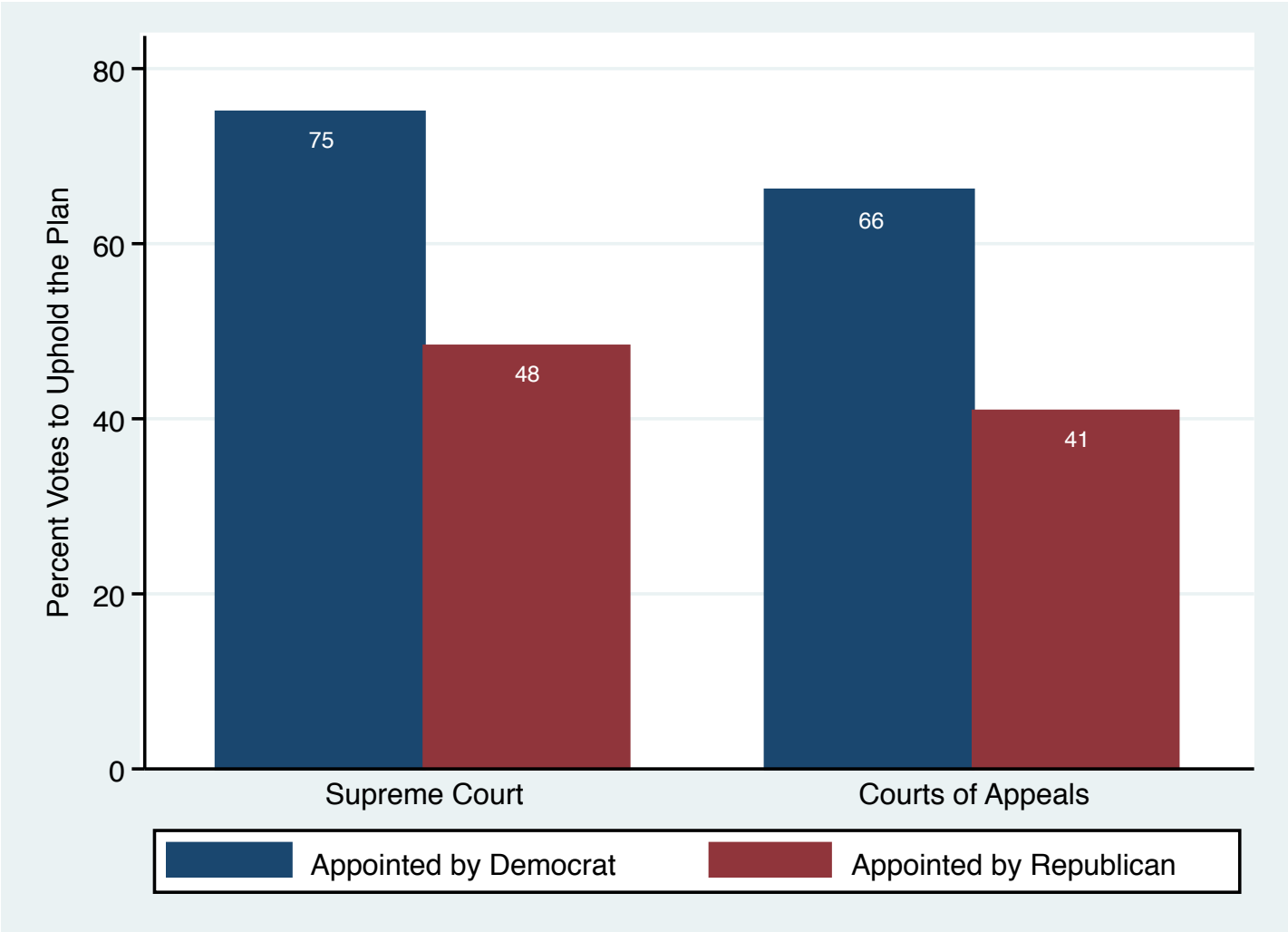
Our Book

Legacy, Promotion, Policy, Leisure, Craft, Recognition, Job Satisfaction, $
THE GEORGE
WASHINGTON
HOME OF THE

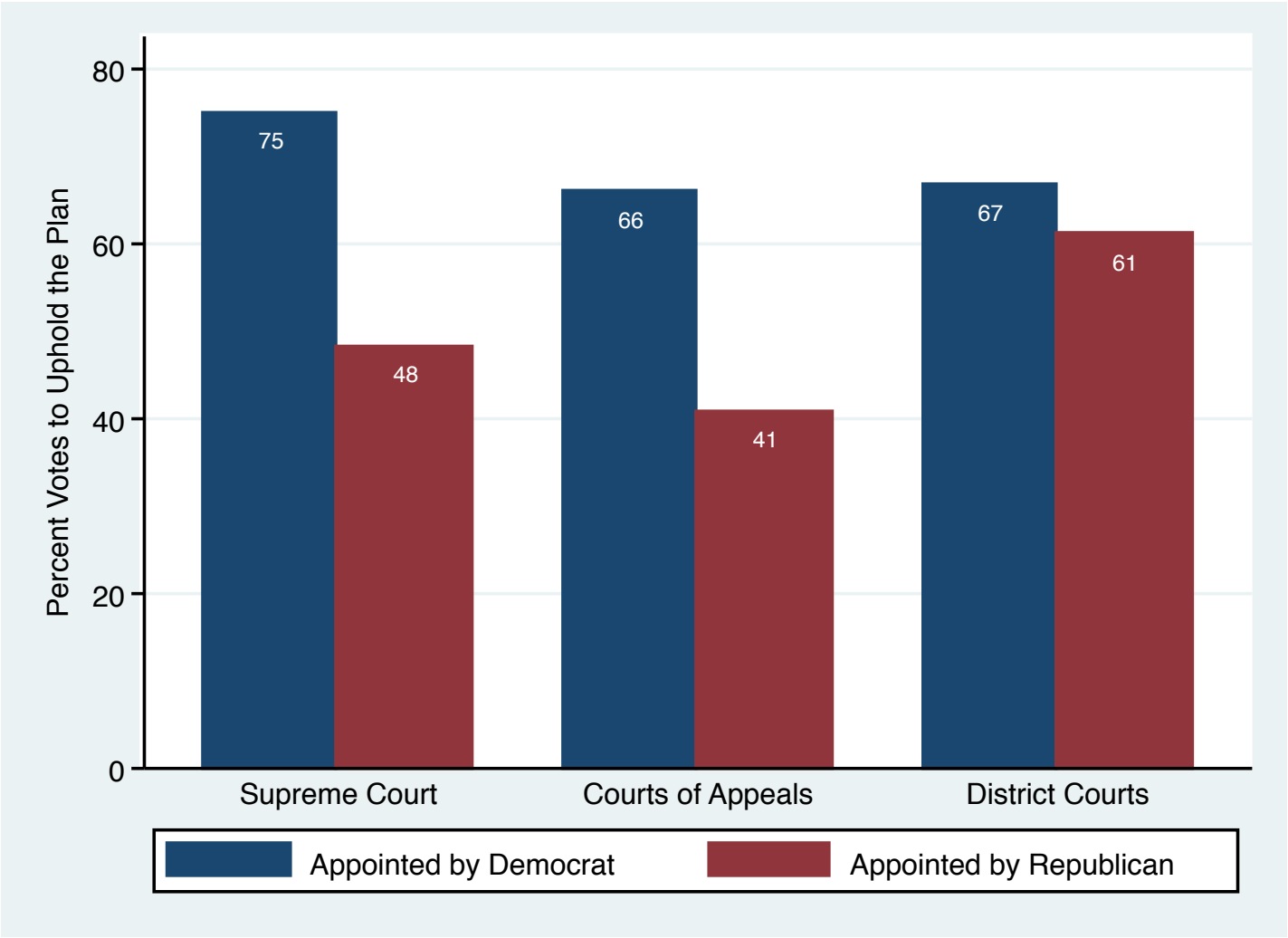
WashULaw

Legacy, Promotion,
Policy, Leisure, Craft,
Recognition, Job
Satisfaction, $
THE GEORGE
WASHINGTON
HOME OF THE


80
60
40
20
0
Percent Votes to Uphold the Plan
75
48
Supreme Court
Appointed by Democrat
Appointed by Republican


Percent Votes to Uphold the Plan
80
60
40
20
0
75
48
66
41
Supreme Court
Courts of Appeals
Appointed by Democrat
Appointed by Republican

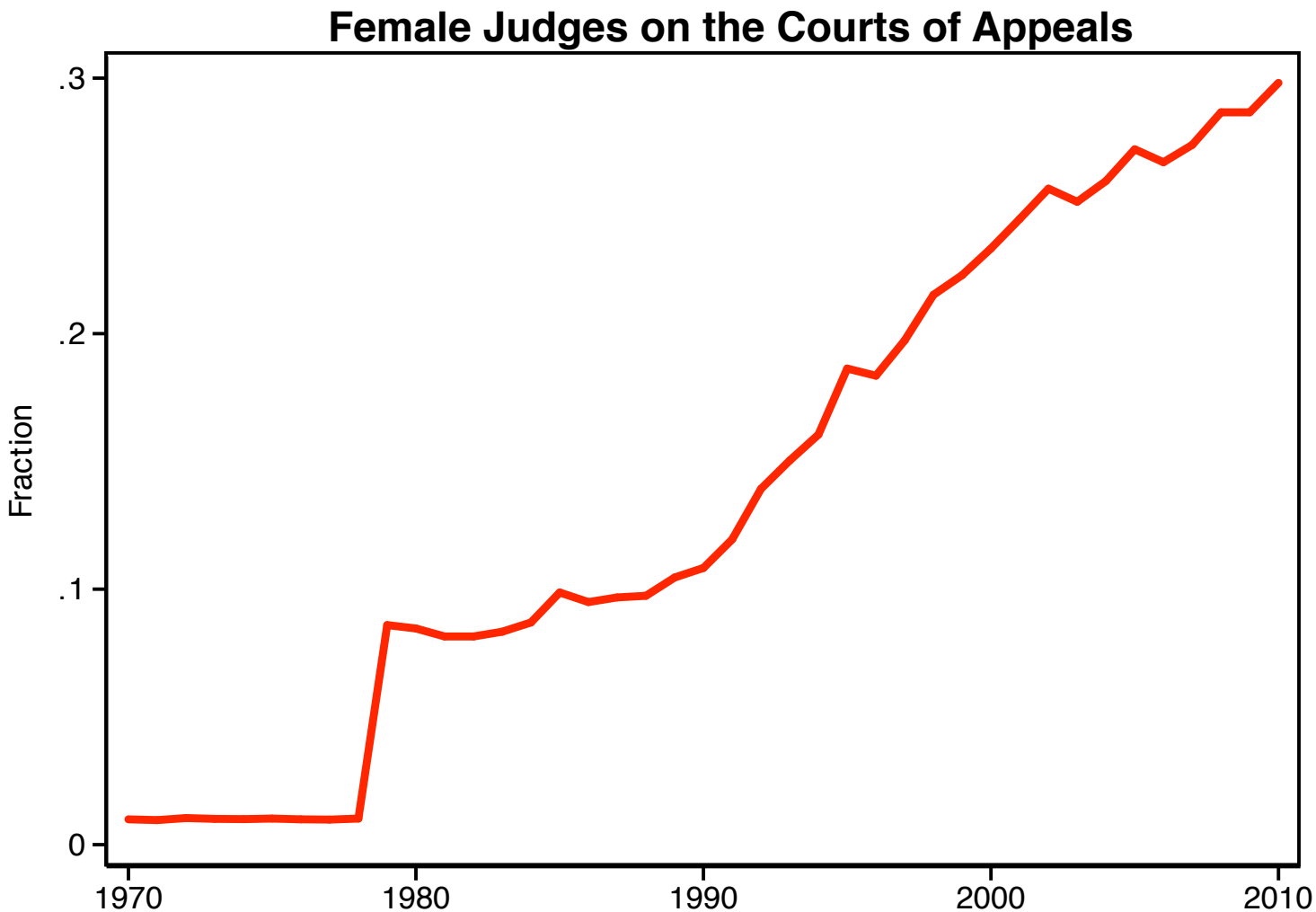
WashULaw


Percent Votes to Uphold the Plan
0
20
40
60
80
75
48
66
41
67
61
Supreme Court
Courts of Appeals
District Courts
Appointed by Democrat
Appointed by Republican

WashULaw

Gender

Gender


Female Judges on the Courts of Appeals
Fraction
.3
.2
.1
0
1970
1980
1990
2000
2010

Gender

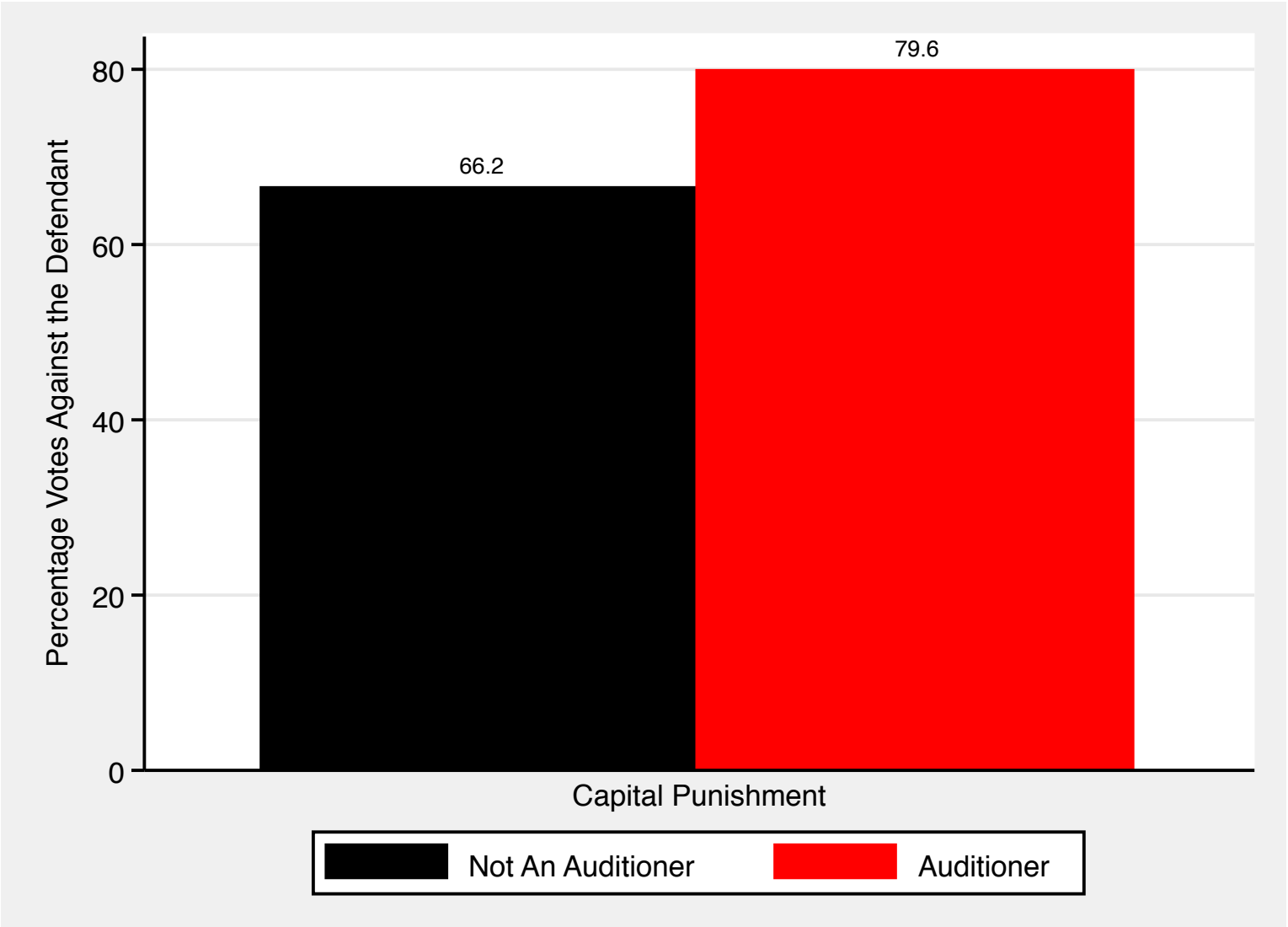
Gender

Gender

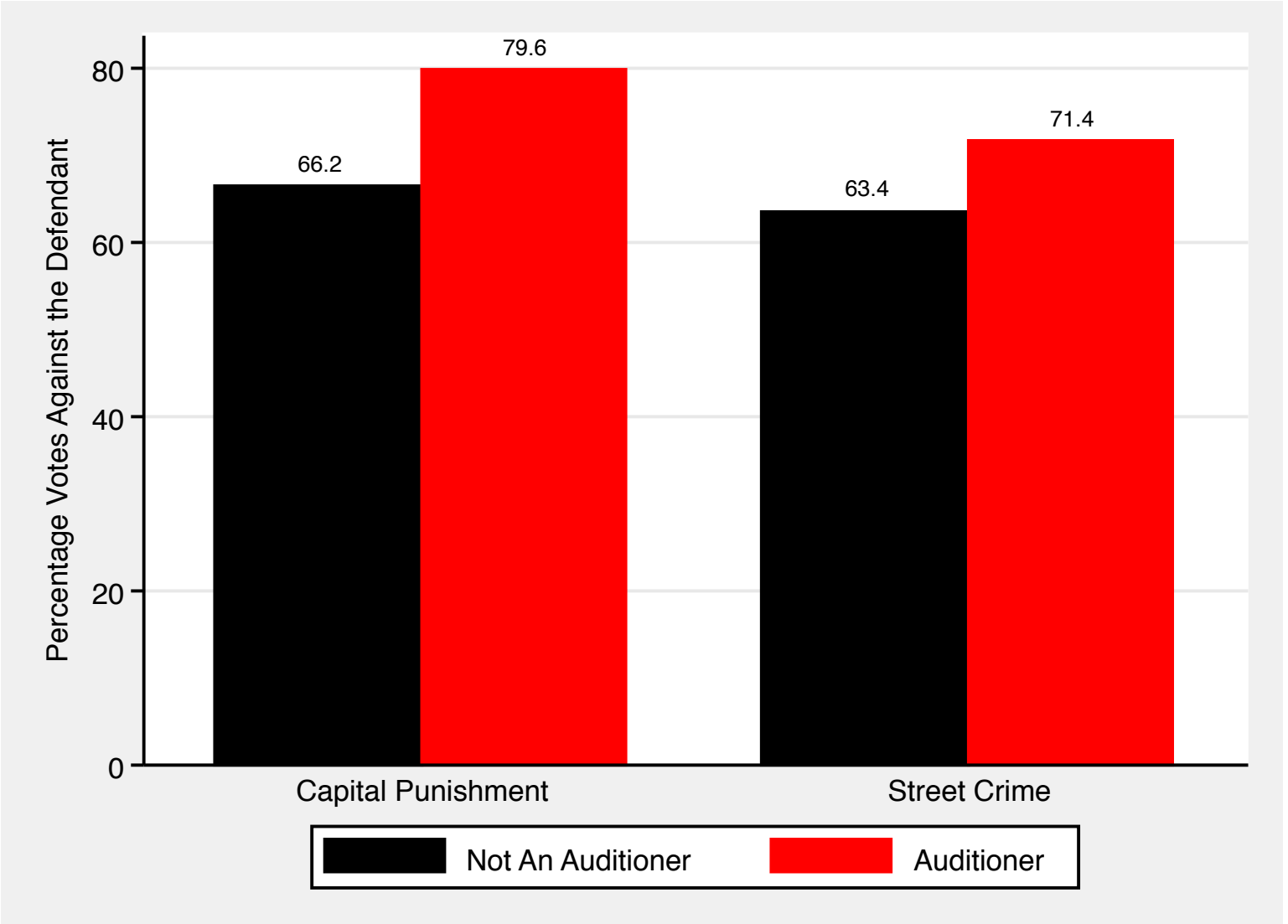
Gender

The "Auditioners"

The "Auditioners"



The "Auditioners"



WashULaw

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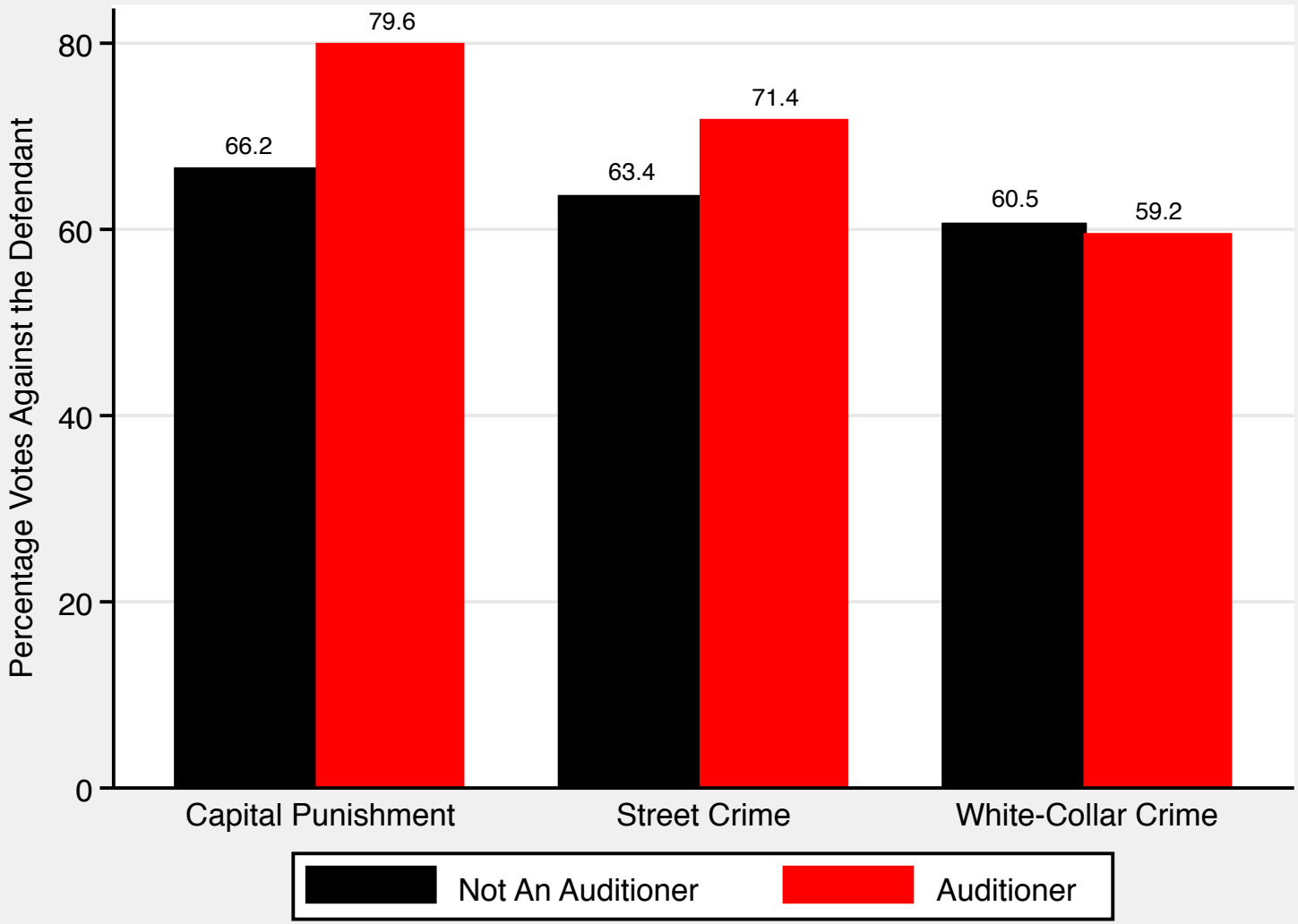

WashULaw

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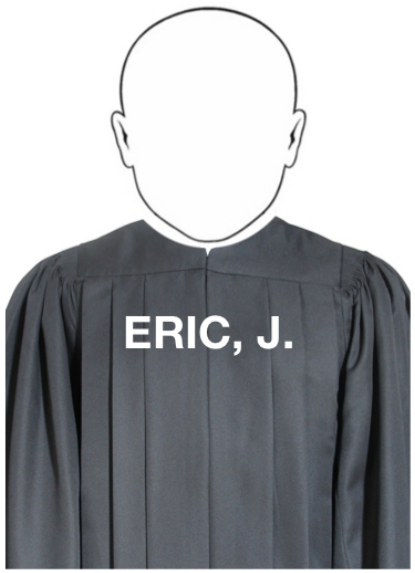
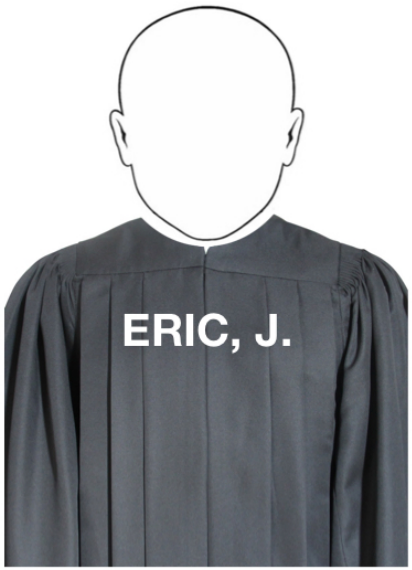
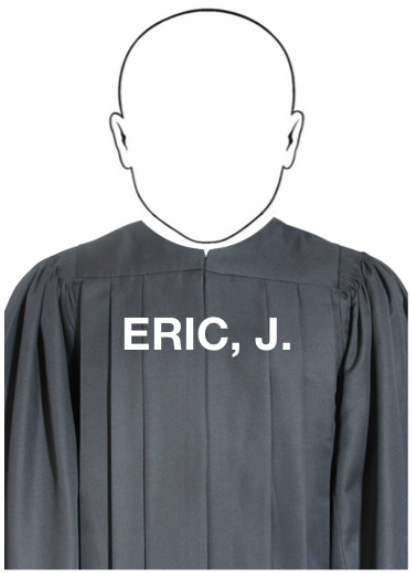
Gender Effects


ERIC, J.

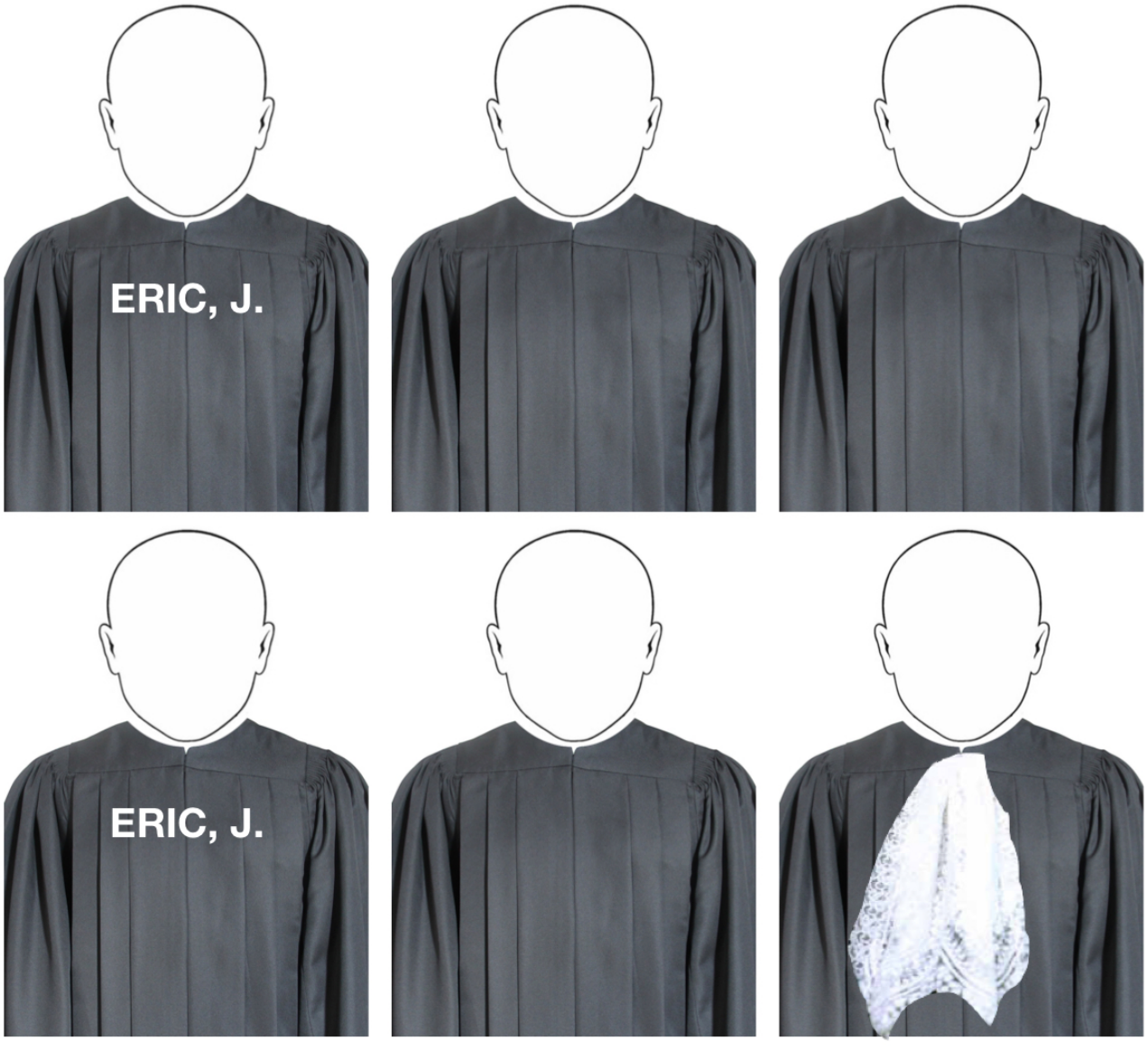
ERIC, J.

Gender Effects





Gender Effects



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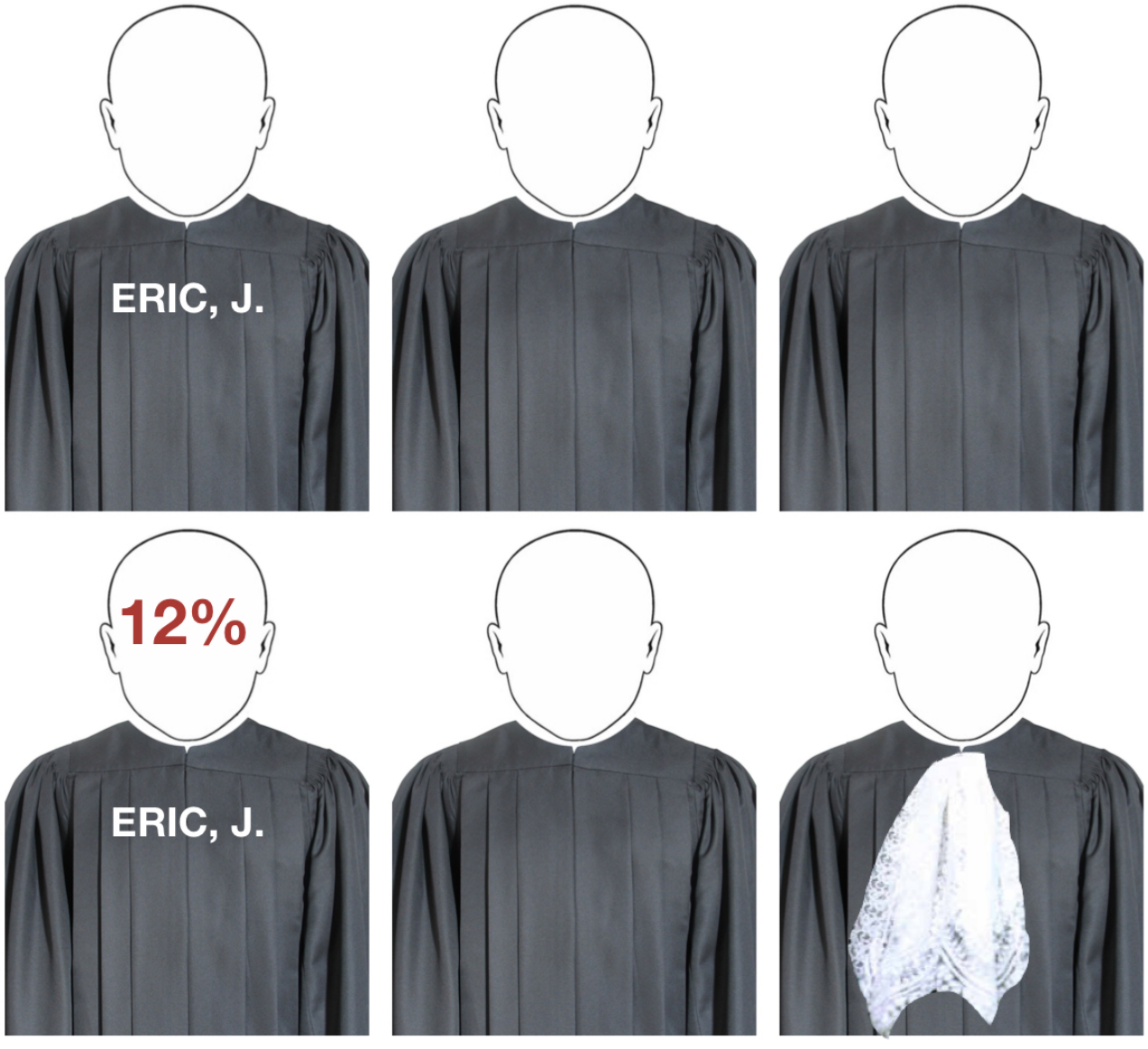
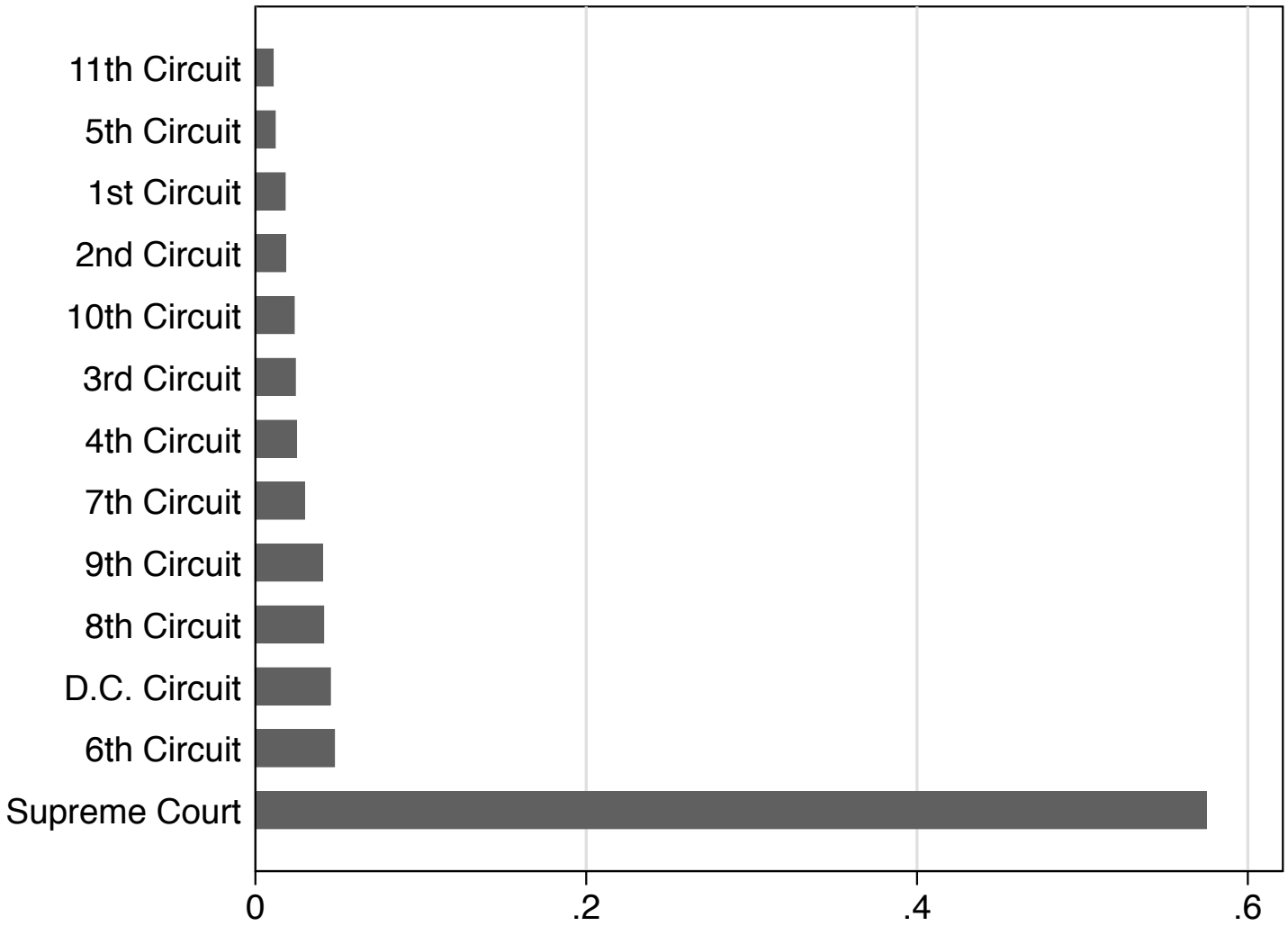


Fraction of Cases with Dissent

Fraction of Cases with Dissent



"Dissent Aversion"

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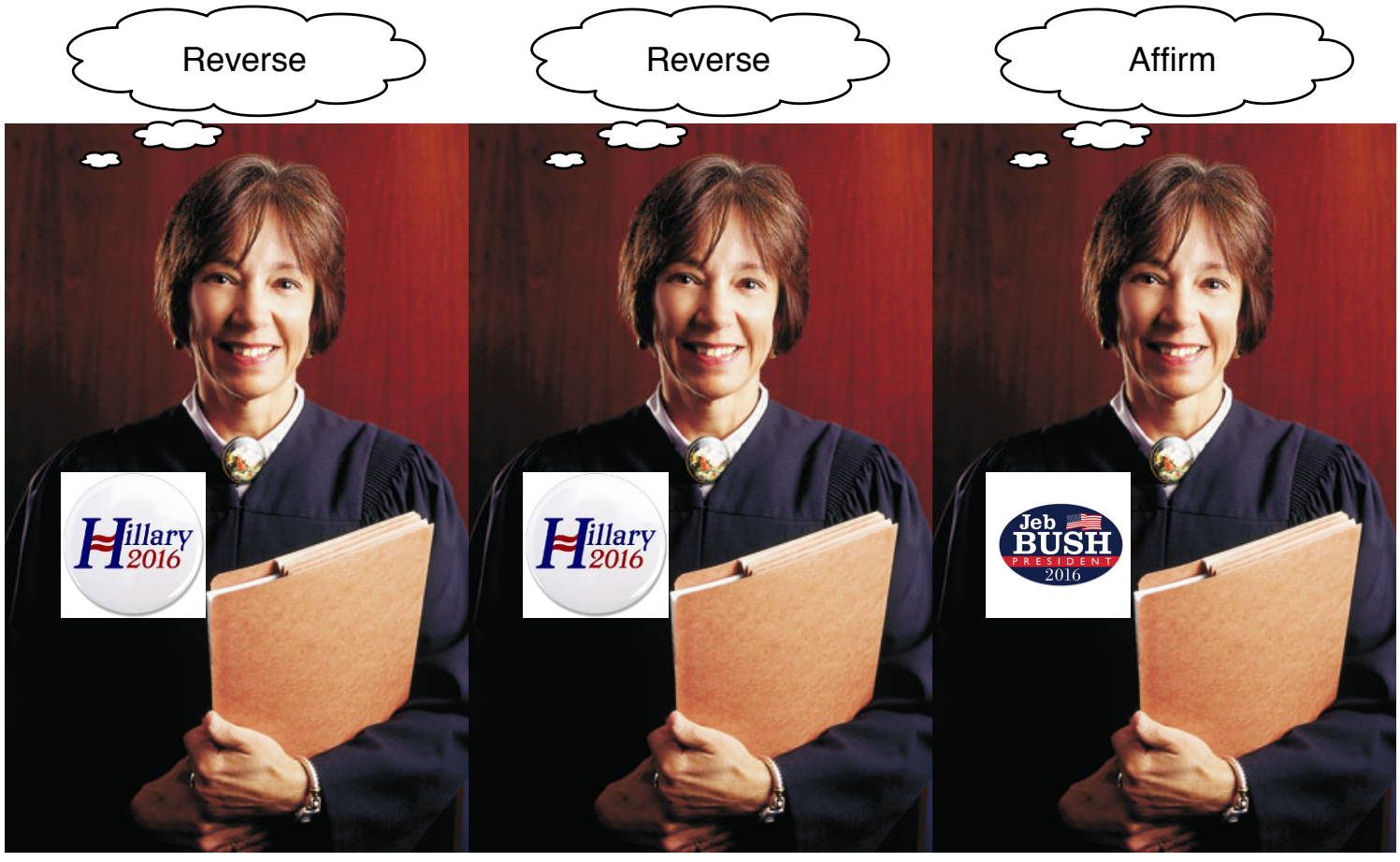

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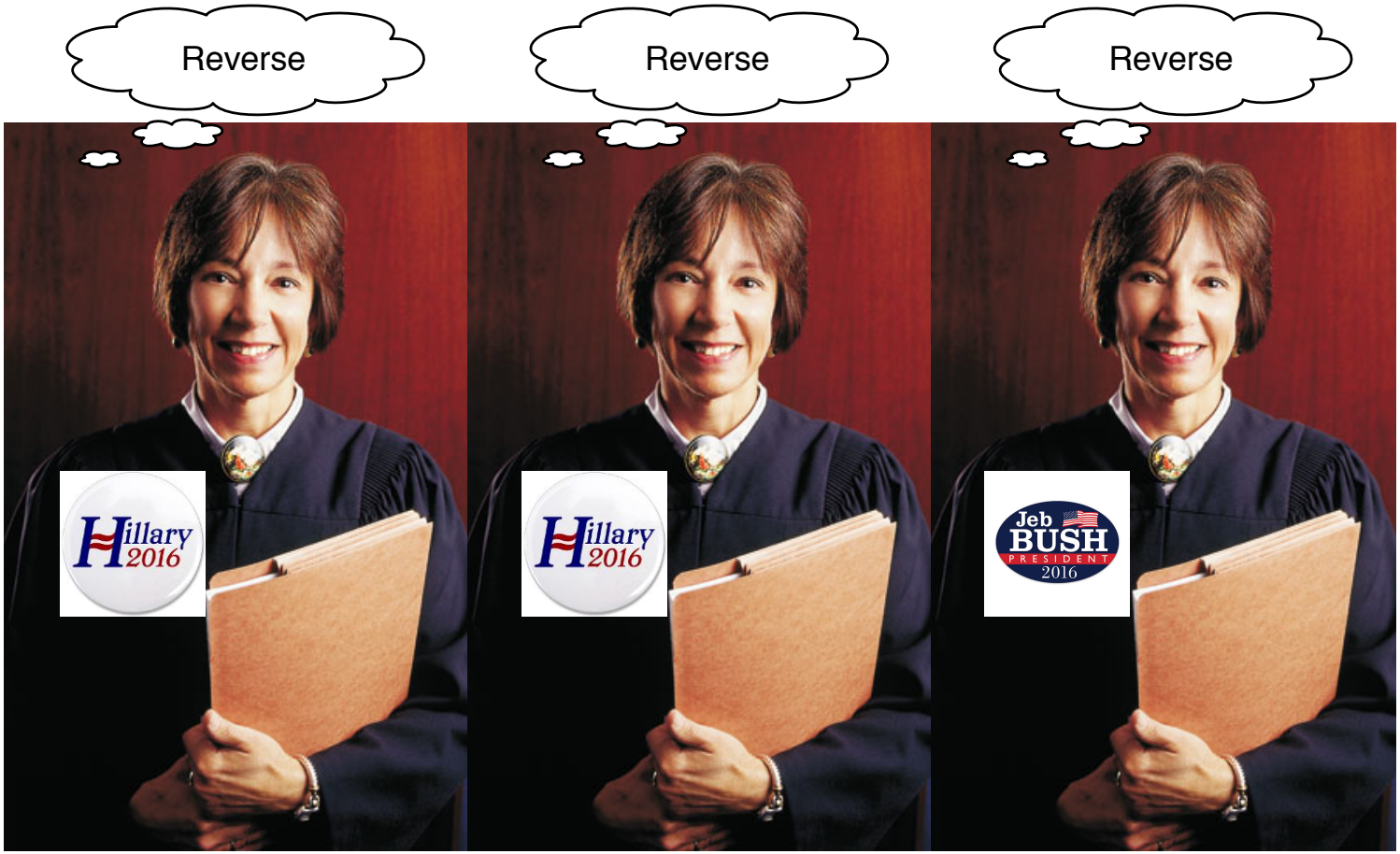
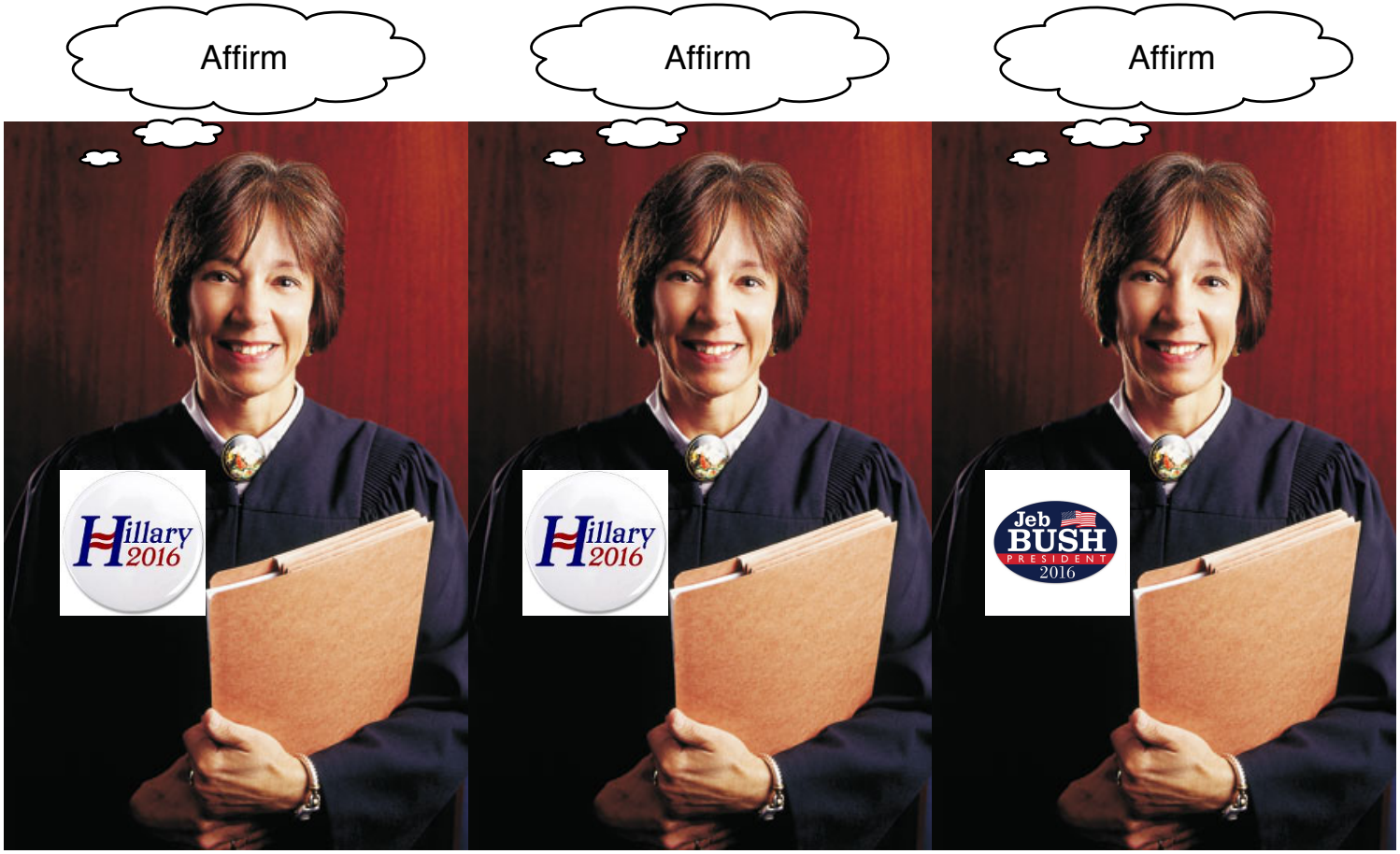


"Dissent Aversion"



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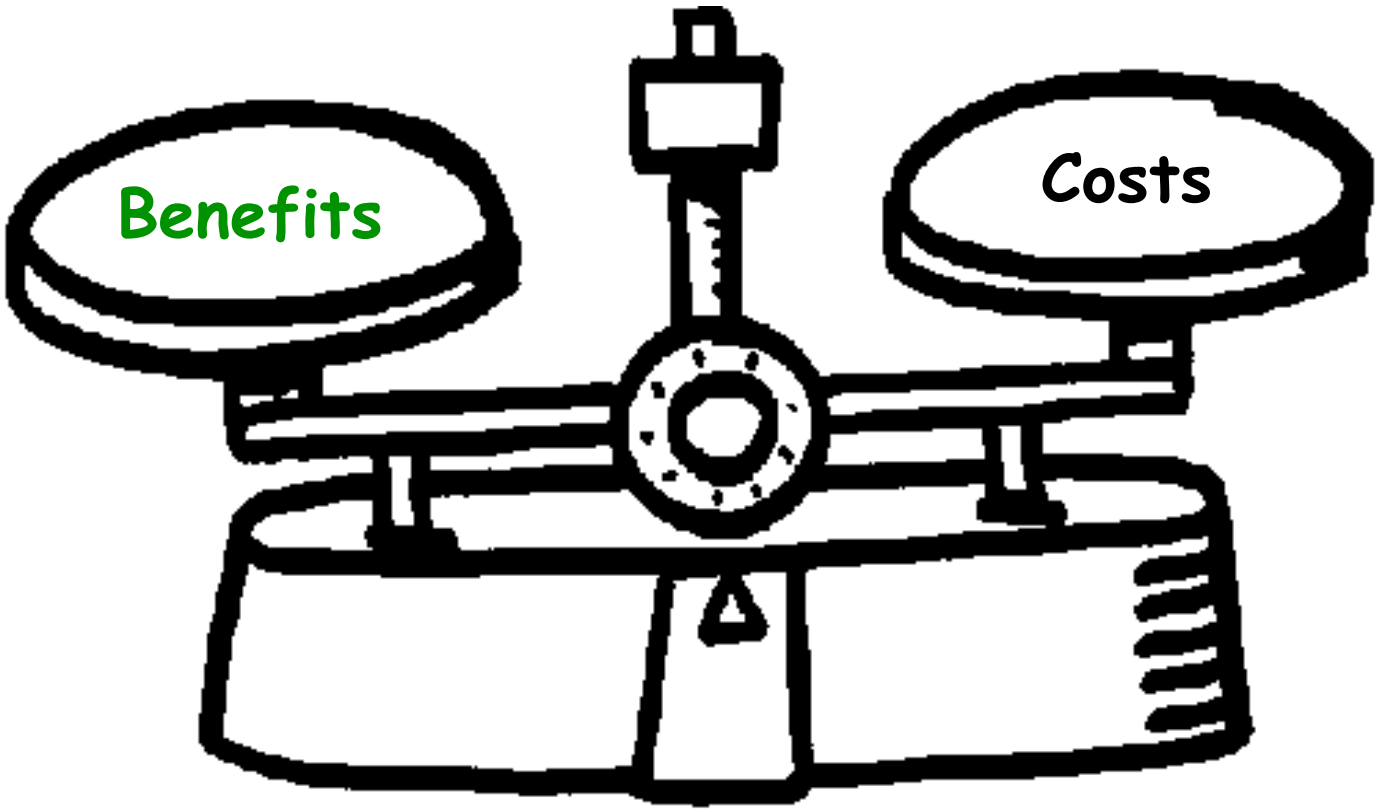
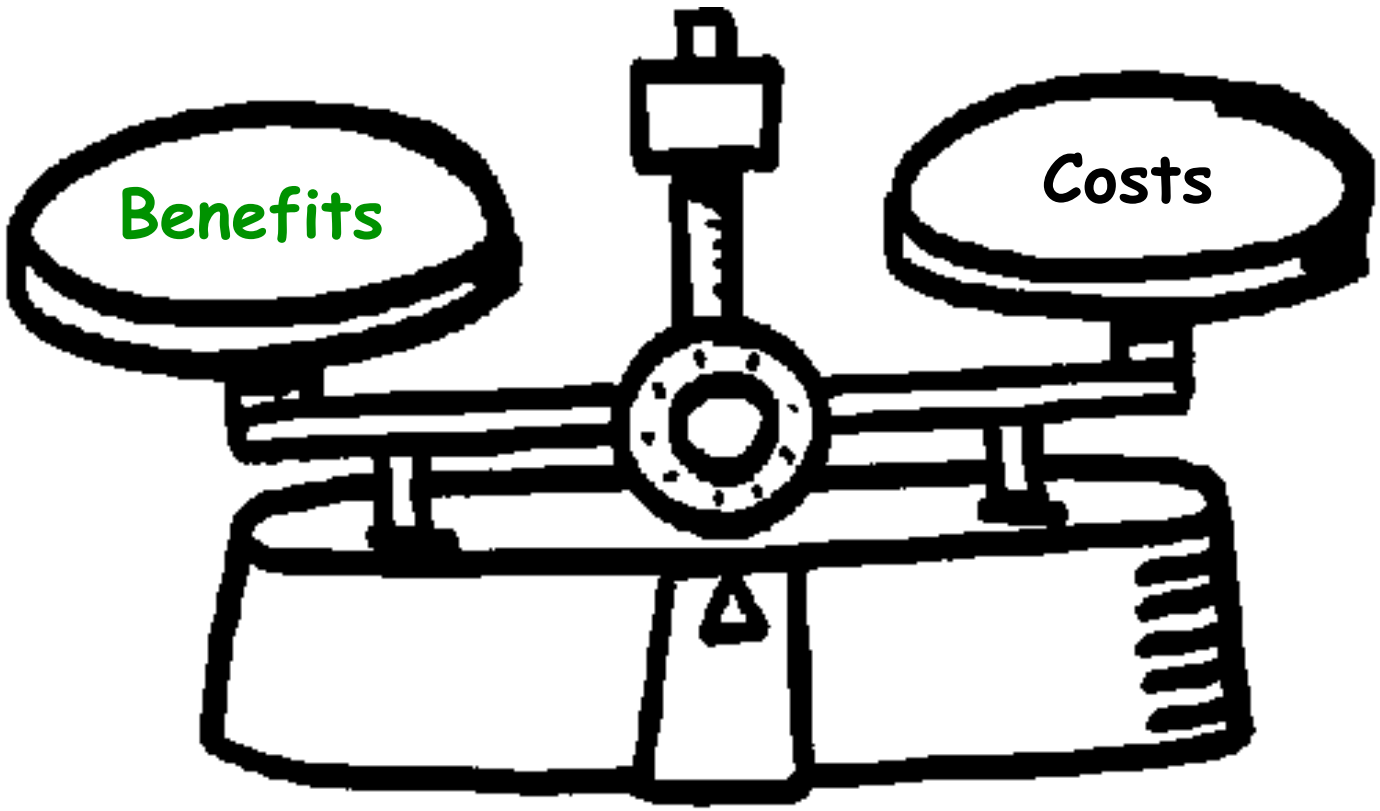


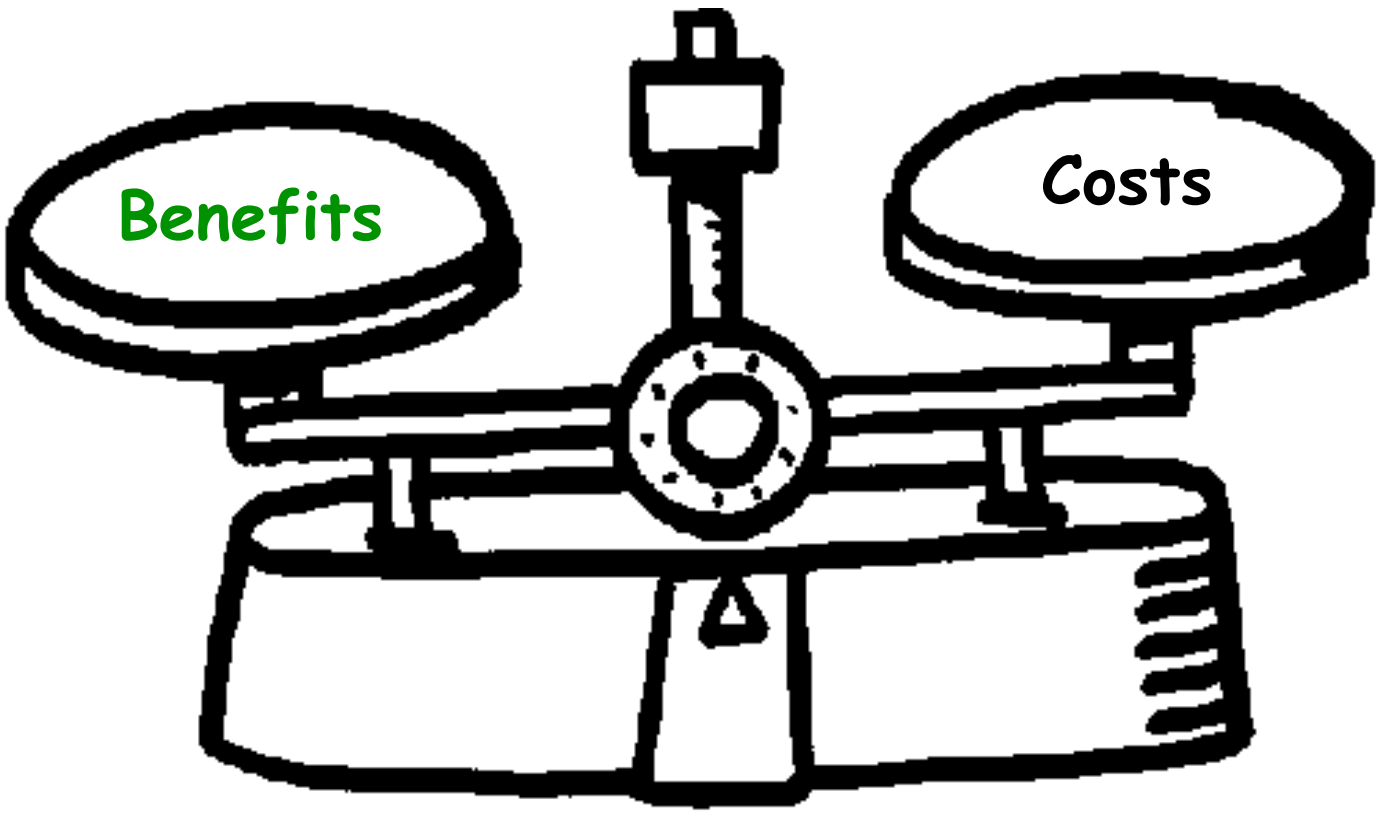
- Reputation
- Influence



"Dissent Aversion"

- Reputation
- Influence

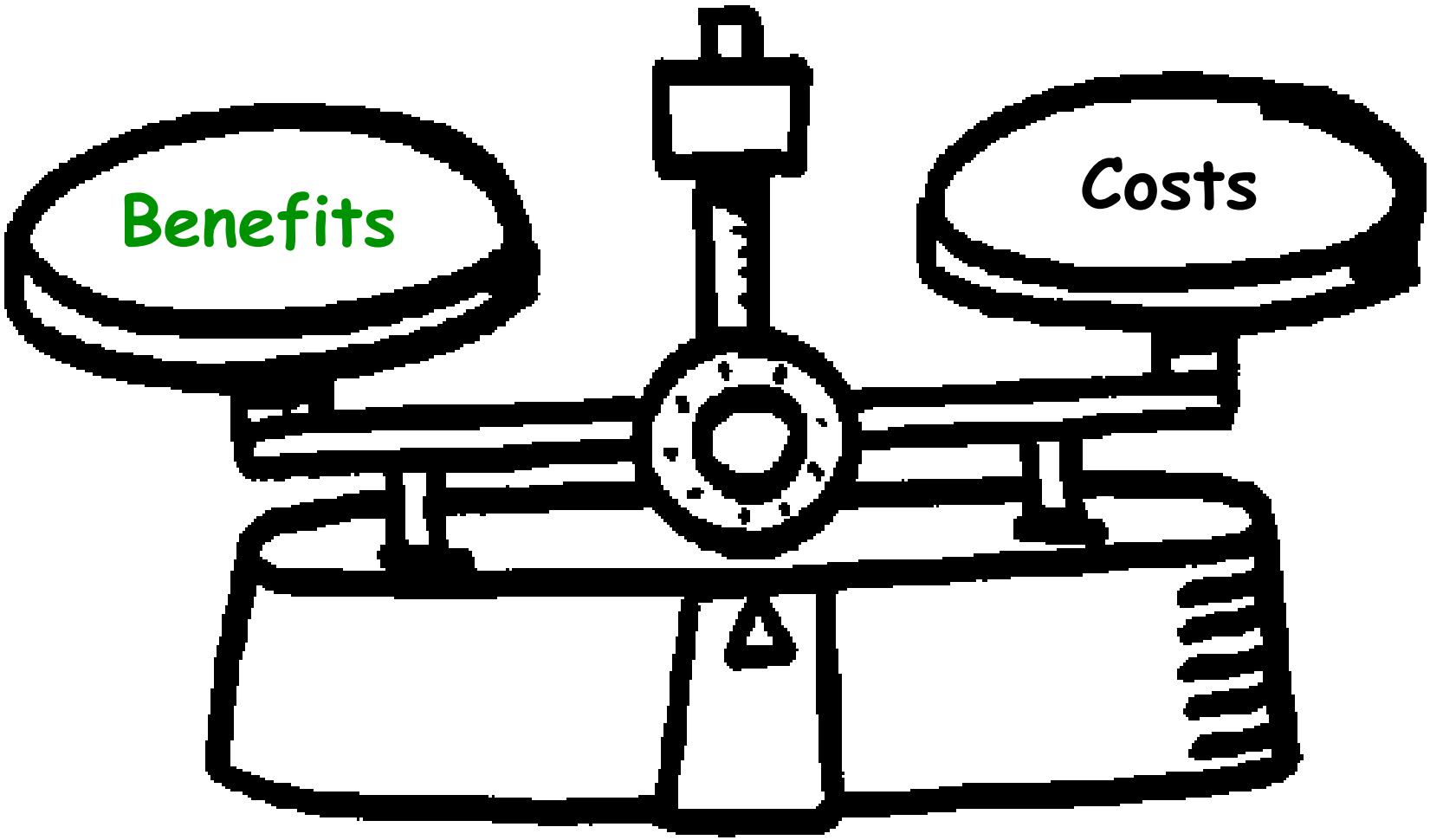
- Collegiality
- Effort



The Costs Outweigh the Benefits

- Reputation
- Influence

- Collegiality
- Effort



- ~~Reputation~~
- Influence

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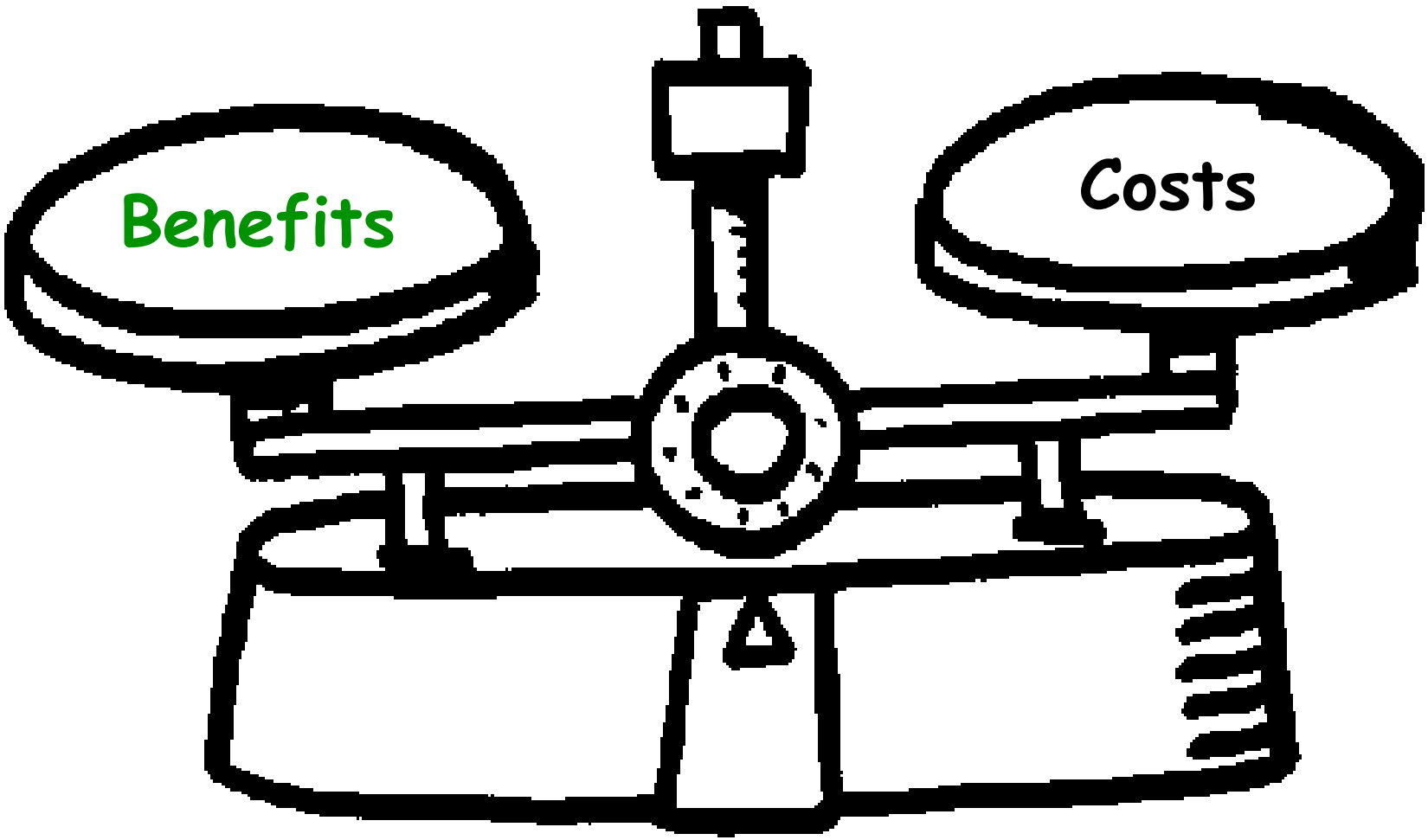
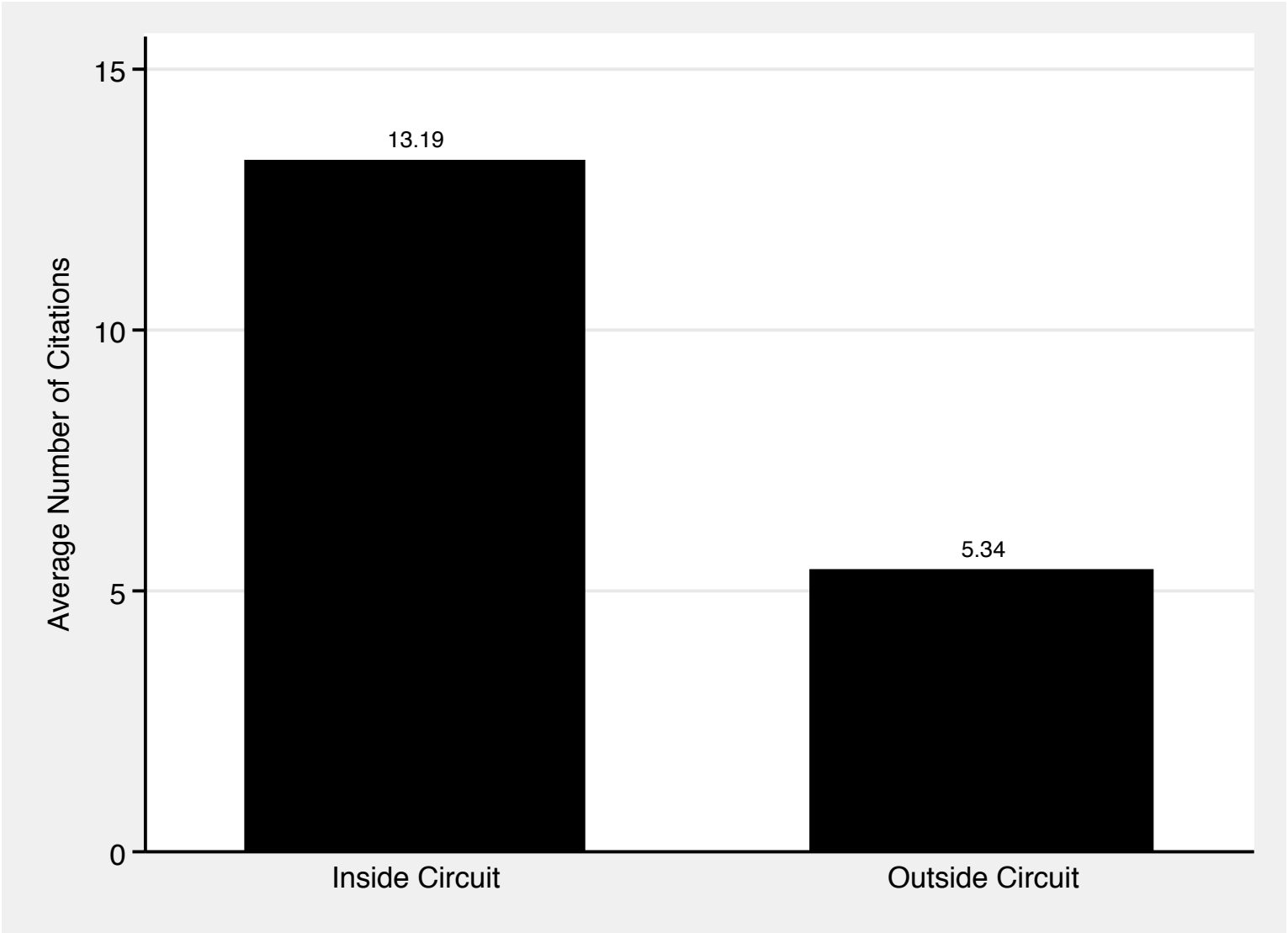


(Average) Citations to Court of Appeals Opinions



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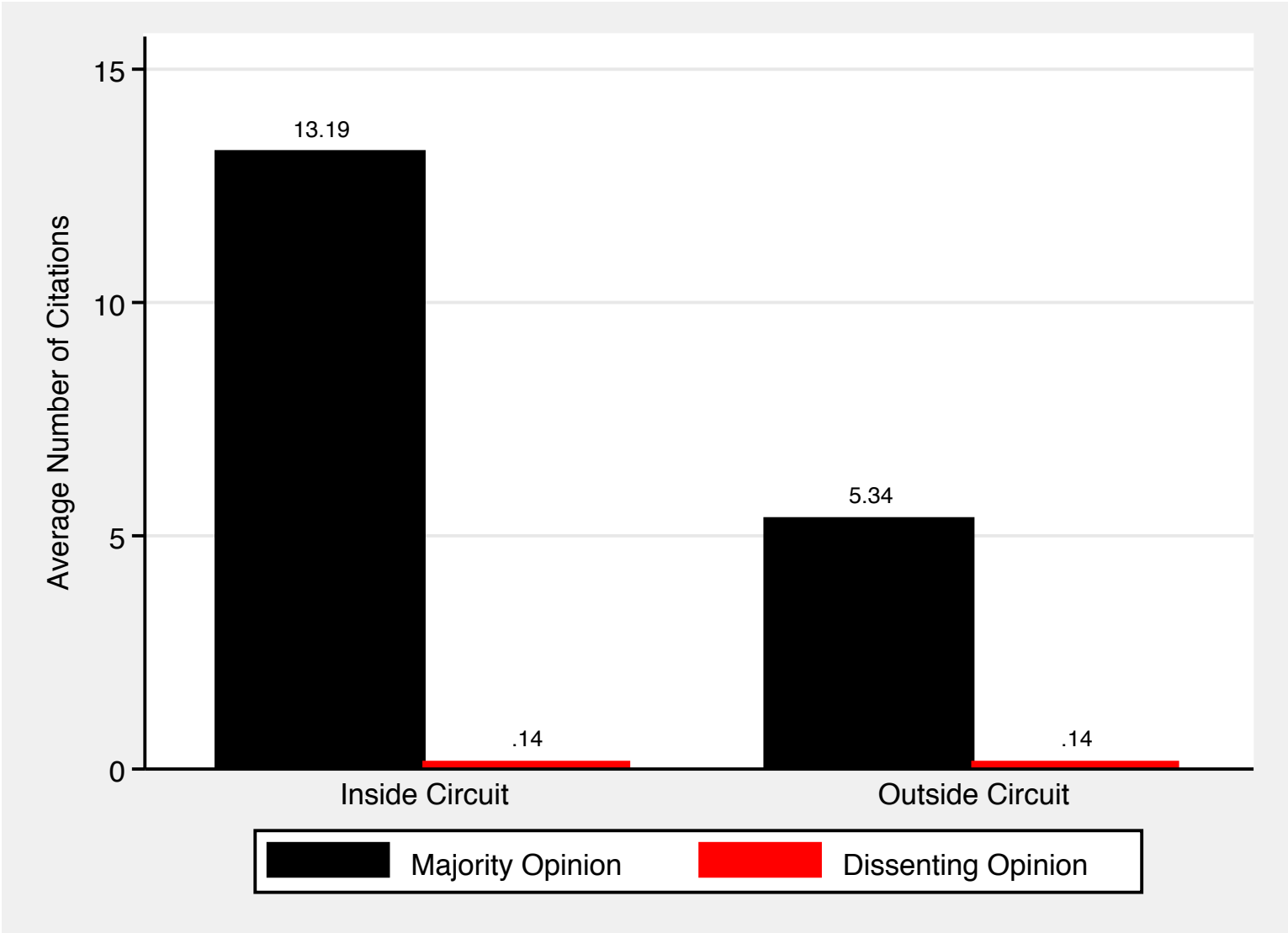

"Dissent Aversion"

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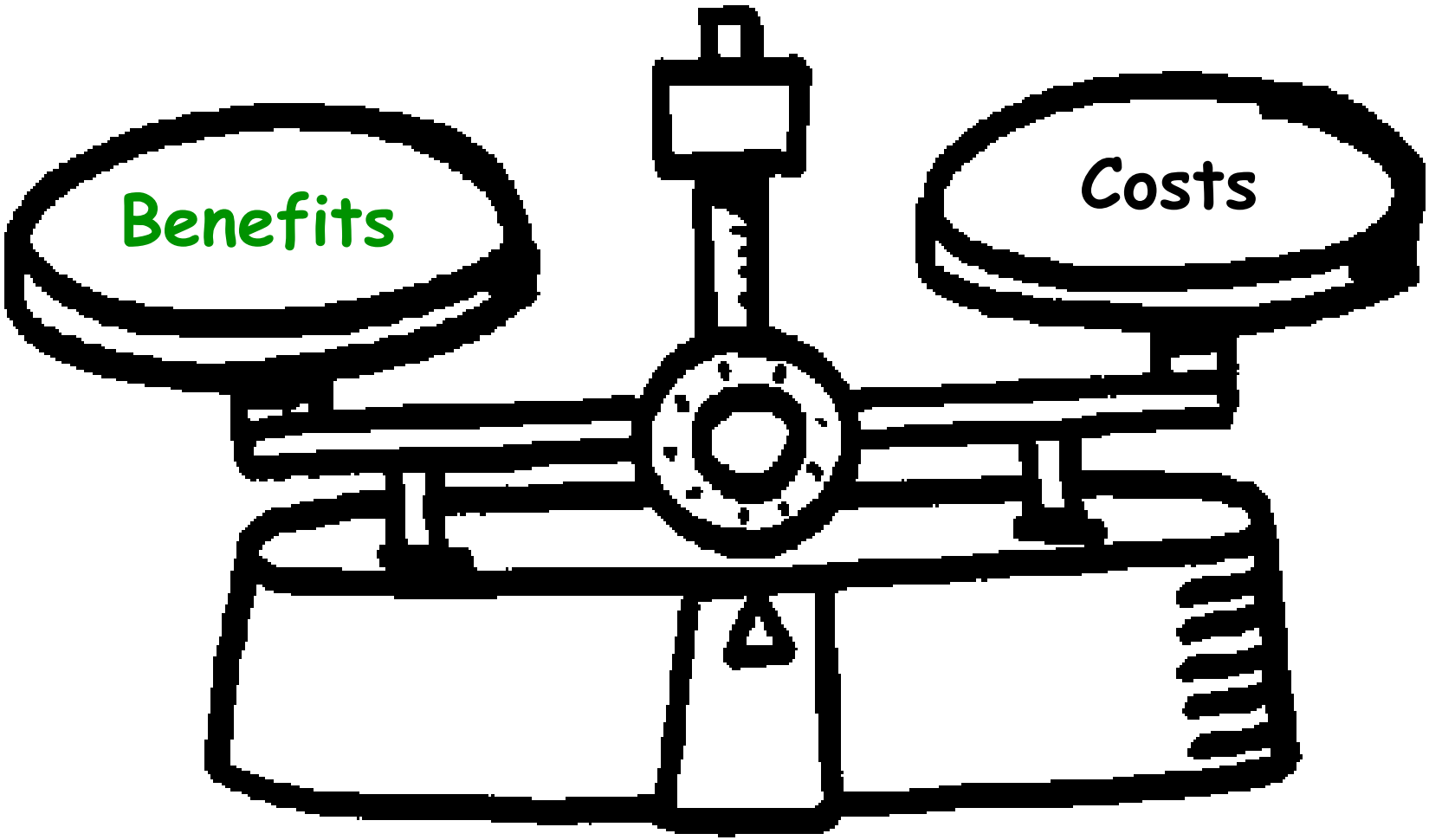

Expected N of Words in the Majority Opinion

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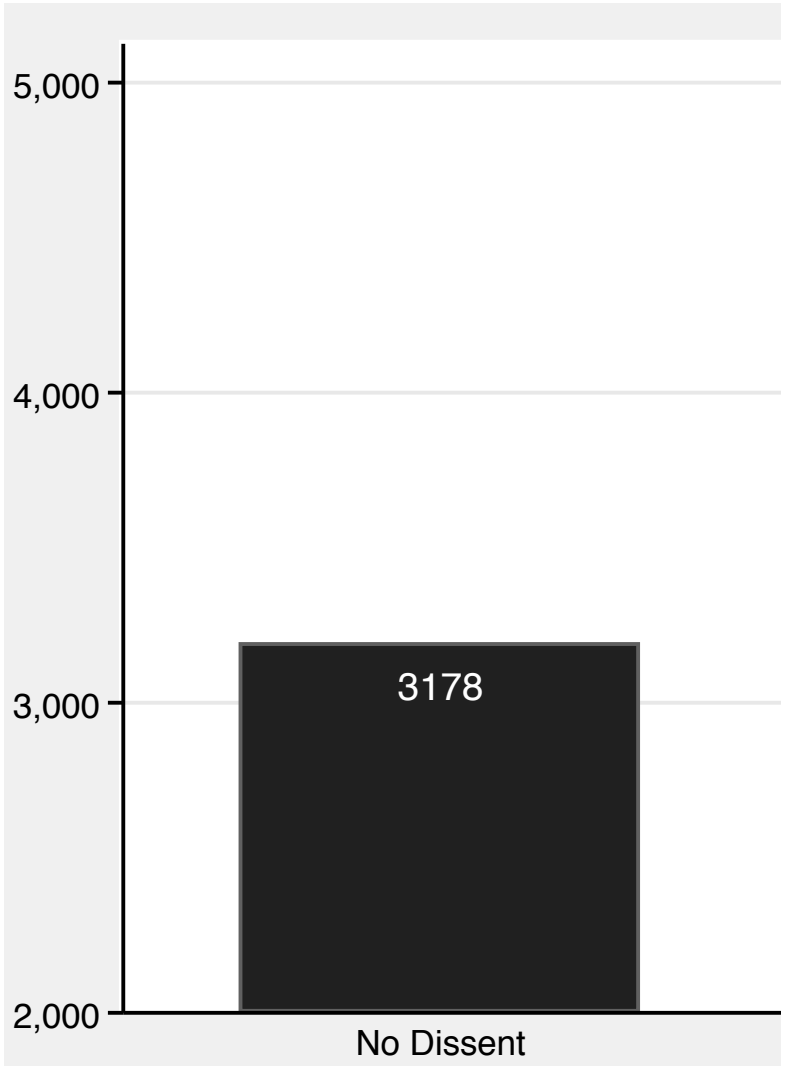

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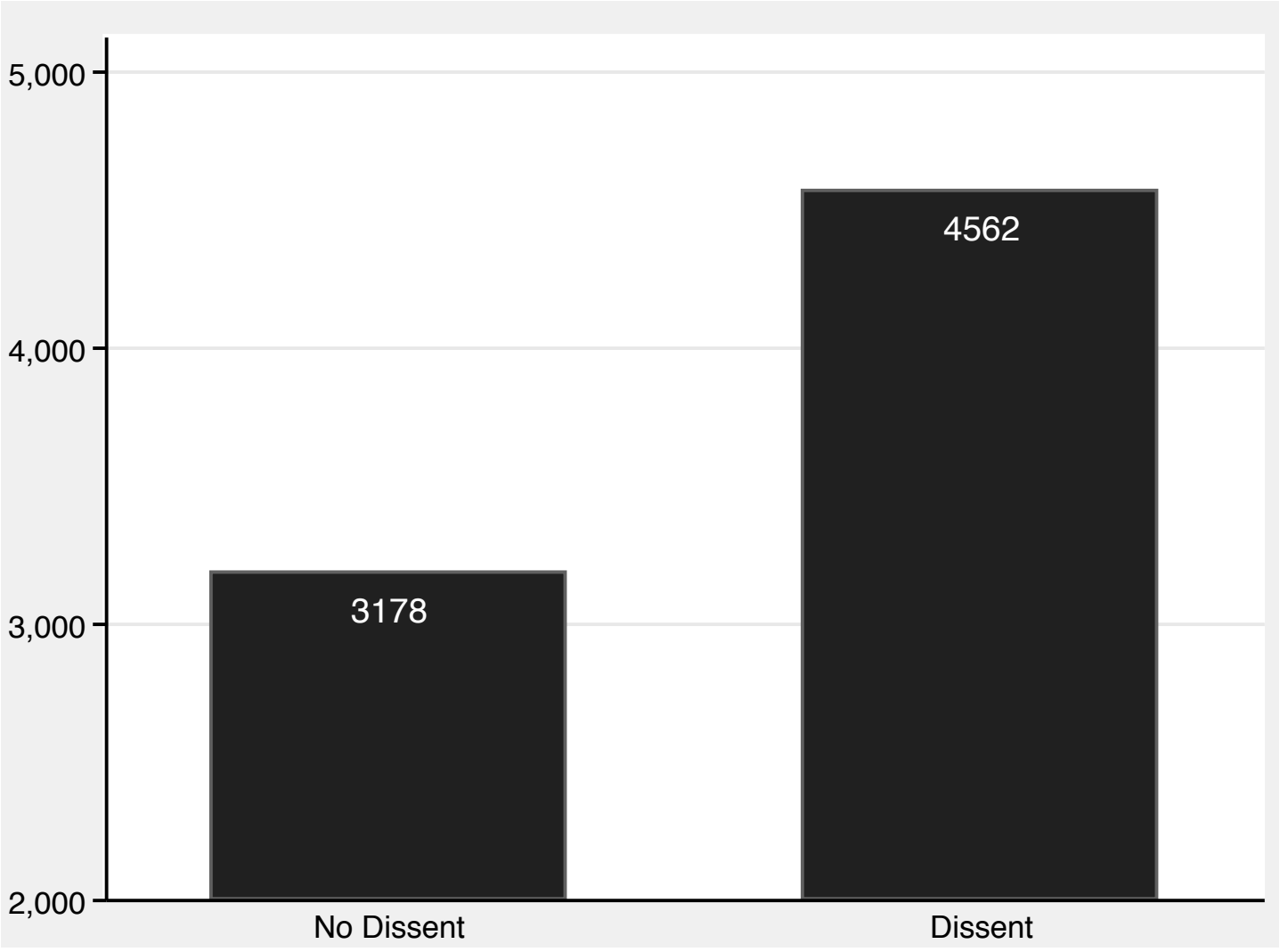

- The Individual Judge
- The Collegial Court
- Judicial Selection & Retention
- Courts and the Elected Branches
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Long List of Retention Institutions

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- Life Tenure with No Mandatory Retirement
- Life Tenure with Mandatory Retirement
- Non-Renewable Terms without Possibility of Retention (6-12 years)
- Non-Renewable Terms with Possibility of Retention (6-12 years)
- Renewable Terms (5-12 years)
- Retention Elections
- Non-Partisan Elections
- Partisan Elections

The Assumption

Greater Independence
(Low Opportunity Costs)

Greater Accountability
(High Opportunity Costs)

Life Tenure

Periodic Electoral or Legislative Checks

Some Findings

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Criminal. An analysis of 22,000 trial court sentences in assault, rape and robbery convictions finds that sentences are significantly longer as the judge's reelection moves closer (Huber & Gordon).

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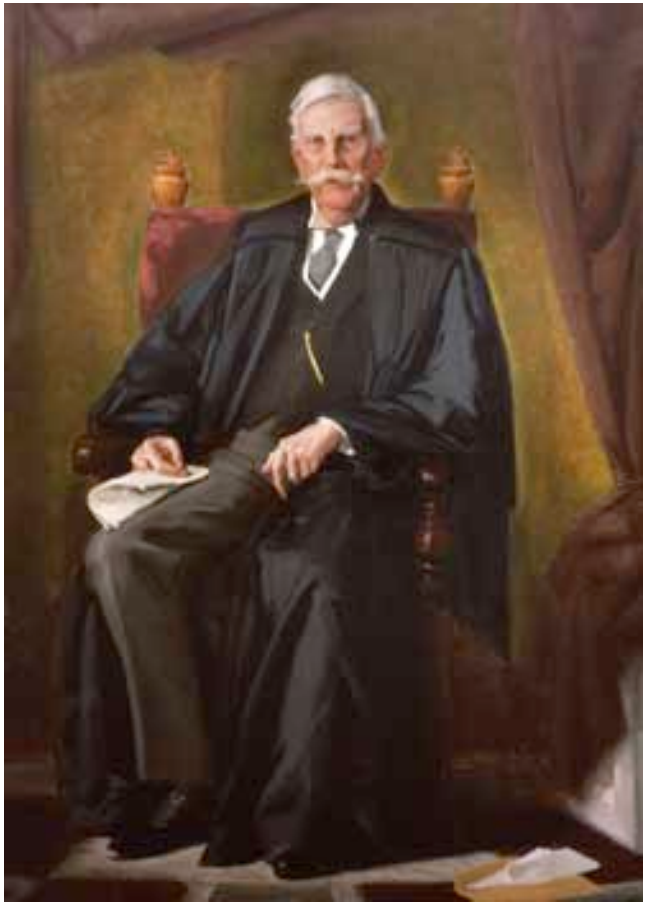
Civil. An examination of 7,000 cases across 48 states found tort awards against out-of-state firms were about $140,000 higher in states with elected judiciaries. Authors suggest that "redistributing wealth from out-of-state defendants to in-state plaintiffs is a judge's way of providing constituency service" (Tabarrock & Helland).

Life Tenured Judges

Some Disappointments . . .

Some Disappointments . . .



"I could carve out of a banana a judge with more backbone than Oliver Wendell Holmes"

Some Disappointments . . .

"The biggest damn fool mistake I ever made."

But Many Successes

But Many Successes

But Many Successes

Life Tenured Judges

Life Tenured Judges

Life Tenured Judges

= 39.6%

Life Tenured Judges

= 39.6%
37.3%

Life Tenured Judges

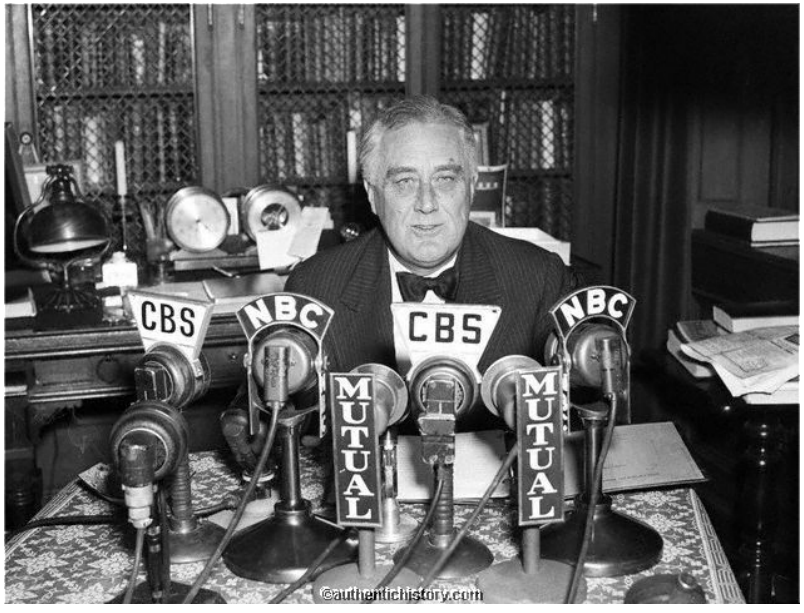
$$= \begin{array}{r} 39.6\% \\ 37.3\% \\ \hline 2.3\% \end{array}$$

Life Tenured Judges

Justice	President's Ideology	Predicted Fraction Conservative	Justice's Fraction Conservative	Error
Alito	0.724	63.20	63.67	0.47
Breyer	-0.472	36.68	41.42	4.74
Ginsburg	-0.472	36.68	37.60	0.92
Kagan	-0.329	39.85	36.36	3.49
Kennedy	0.693	62.51	57.82	4.69
Roberts	0.724	63.20	59.54	3.66
Scalia	0.693	62.51	64.49	1.98
Sotomayor	-0.329	39.85	35.91	3.94
Thomas	0.573	59.85	67.53	7.68

Life Tenured Judges

Life Tenured Judges



(Mean Length of Service= 14 years)

Life Tenured Judges

"This plan will save our national Constitution from hardening of the judicial arteries."

(Mean Length of Service= 14 years)

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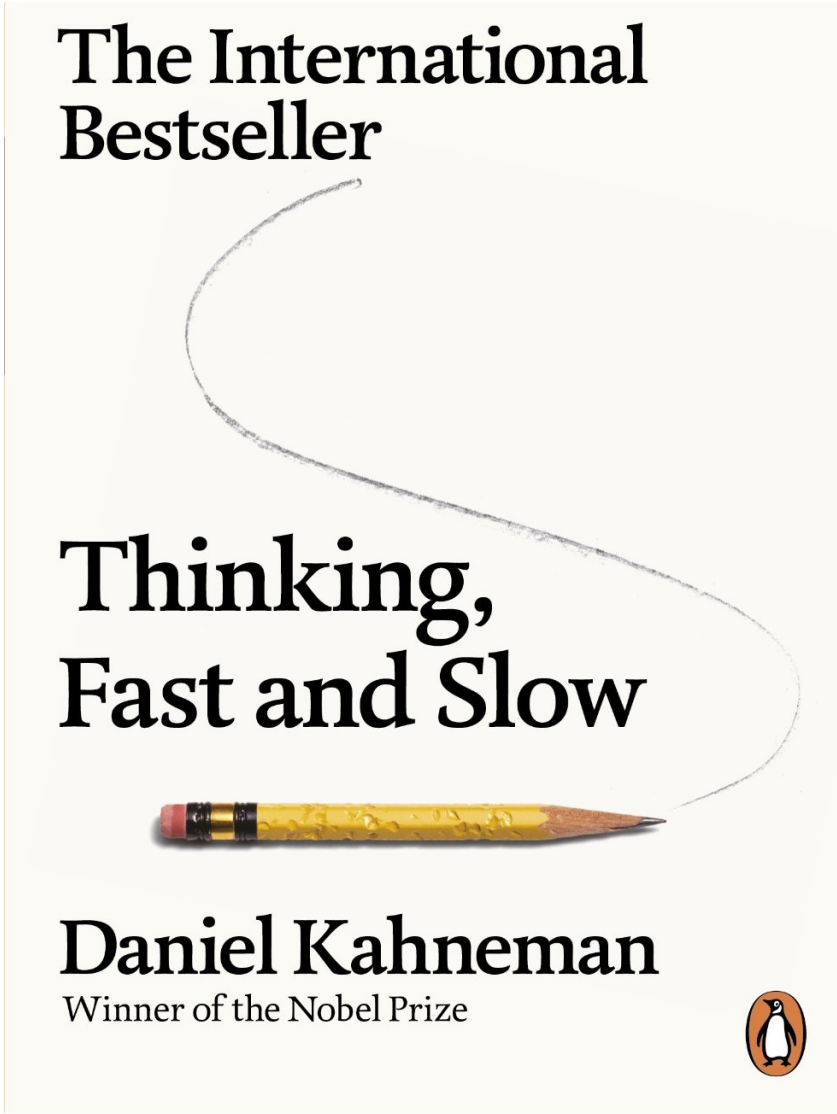
Suggestions

Suggestions

- Move beyond the US!

Suggestions

- Move beyond the US!
- Recognize the limits of the rationality assumption


The International Bestseller
Thinking, Fast and Slow
Daniel Kahneman
Winner of the Nobel Prize

The Experiments

The Experiments

- Rachlinski, Johnson, Wistrich & Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?," 84 *Notre Dame Law Review* 1195 (2009)
- Rachlinski, Guthrie, & Wistrich, "Heuristics and Biases in Bankruptcy Judges," 163 *Journal of Institutional and Theoretical Economics* 167 (2007)
- Guthrie, Rachlinski, & Wistrich, "Blinking on the Bench: How Judges Decide Cases, 93 *Cornell Law Review* 1 (2007)
- Rachlinski, Wistrich, & Guthrie, "Probability, Probable Cause, and the Hindsight Bias," 8 *Journal of Empirical Legal Studies* 72 (2011)
- Rachlinski, Wistrich, & Guthrie, "Altering Attention in Adjudication," 60 *UCLA Law Review* 1586 (2013)
- Rachlinski, Guthrie, & Wistrich, "Consilience in the Courtroom," 98 *Cornell Law Review* 1189 (2013).

The Experiment: Affect Heuristic

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Kahneman (2011)

- People often base decisions on feelings instead of reasoning
- They substitute an easy question ("Do I like it?") for a more difficult question ("Is this a wise choice?")

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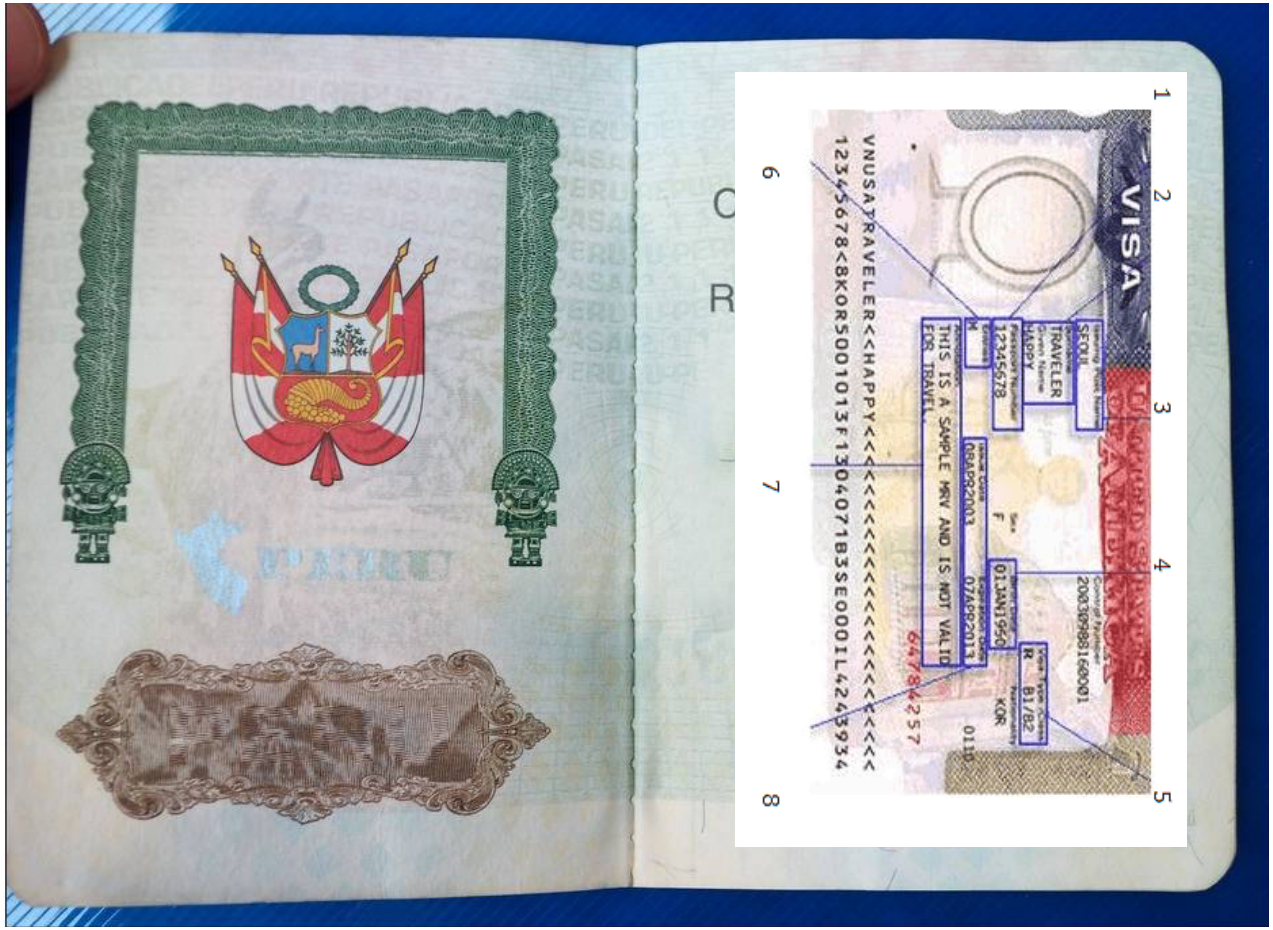
The Study

Do judges have affective responses to litigants? Do their feelings toward litigants affect their decisions?

The Experiment: Affect Heuristic

The Experiment: Affect Heuristic

The Experiment: Affect Heuristic



The Experiment: Affect Heuristic

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Tries to enter US to get a job to earn money to pay for critically ill daughter's liver transplant

The Experiment: Affect Heuristic

Tries to enter US to get a job to earn money to pay for critically ill daughter's liver transplant

OR

Tries to enter the US to track down rogue member of a drug cartel who had stolen due proceeds from cartel

The Experiment: Affect Heuristic

Tries to enter US to get a job to earn money to pay for critically ill daughter's liver transplant (FATHER)

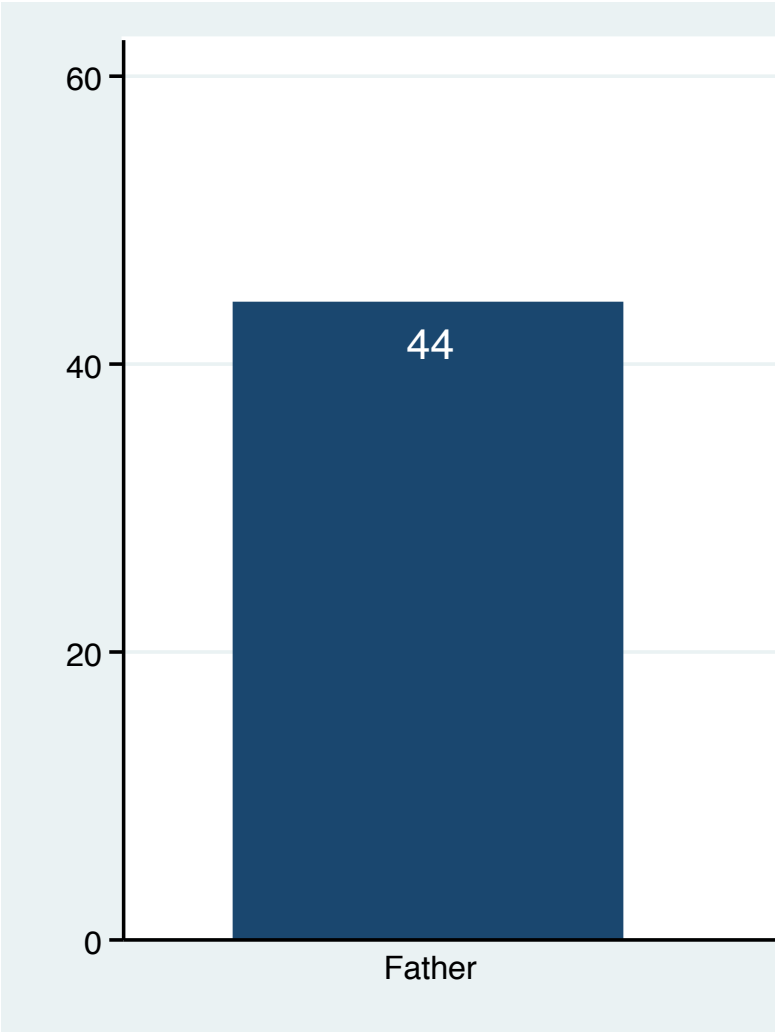
OR

Tries to enter the US to track down rogue member of a drug cartel who had stolen due proceeds from cartel (KILLER)

WashULaw

The Experiment: Affect Heuristic

The Experiment: Affect Heuristic



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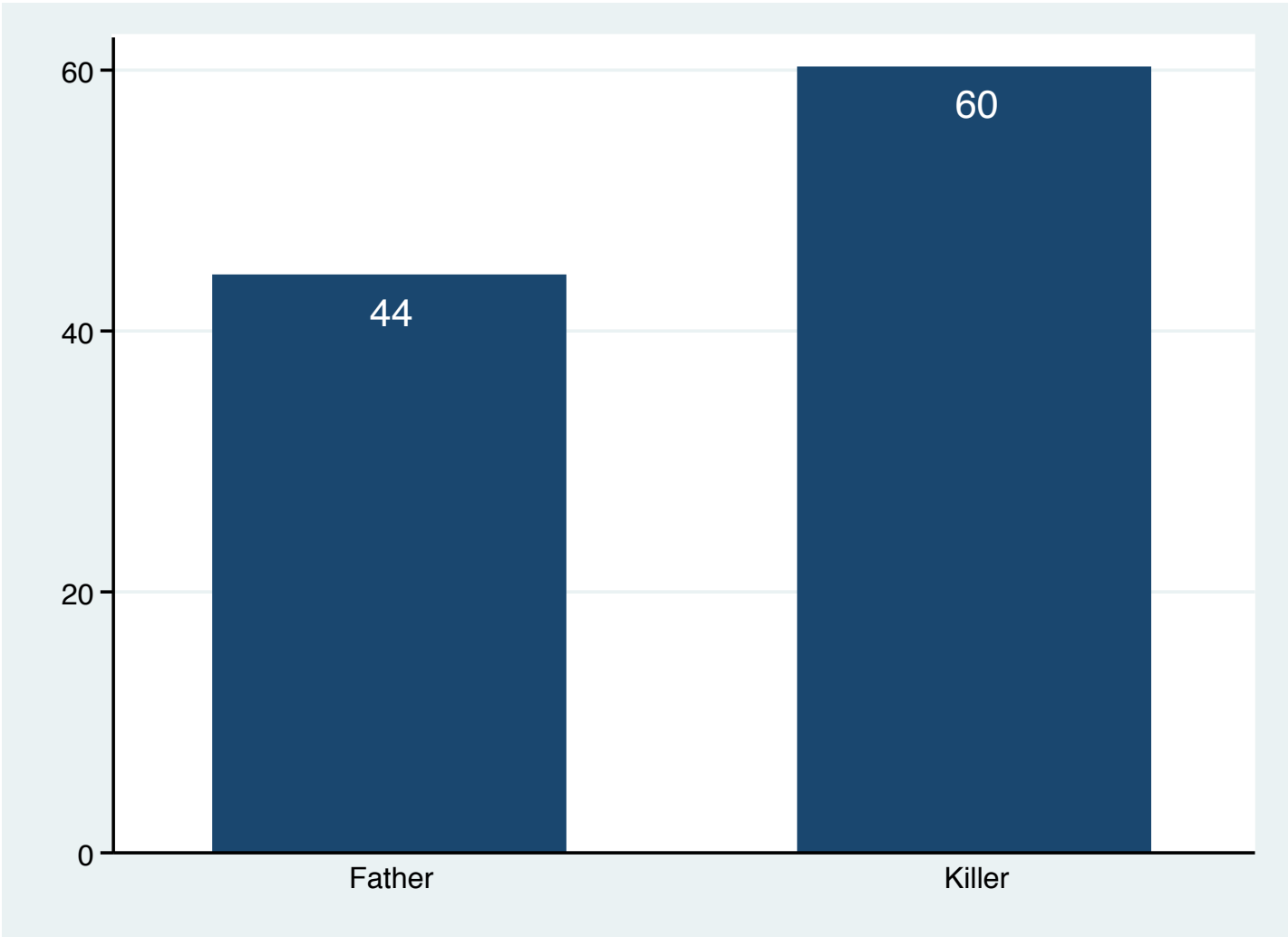

Rachlinski, et al. Conclusion

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Judges' affective responses to litigants are inevitable. Judges are not computers. By design, the justice system is a human process, and, like jurors, judges are influenced by their emotions to some degree, even when we would prefer that they were not, and however sincerely they may try to resist it. This is simply reality. Get over it.

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Suggestions

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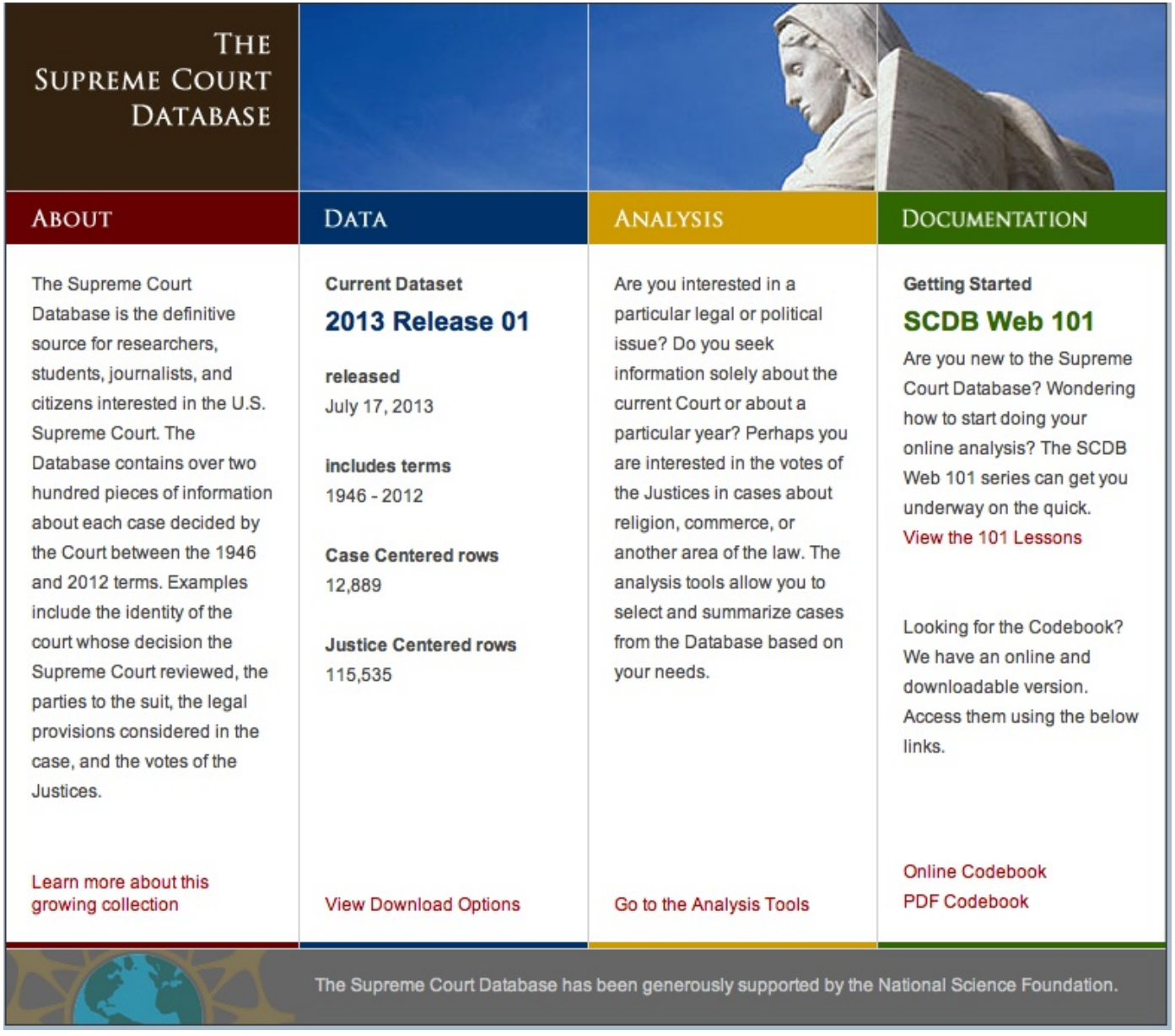
- Recognize the limits of the rationality assumption

Suggestions

- Move beyond the US!
- Recognize the limits of the rationality assumption
- Make use of text

Texts as Data



BROWN ET AL.
v.
BOARD OF EDUCATION OF TOPEKA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.
No. 1.[*]

Argued December 9, 1952. Reargued December 8, 1953.
Decided May 17, 1954.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

1 These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1] [347 U.S. 487]

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WashULaw

Transcript:

ORAL ARGUMENT OF THOMAS G. HUNGAR ON BEHALF OF THE PETITIONER

Chief Justice John G. Roberts: We'll hear argument first this morning in case 12-696, the Town of Greece v. Galloway.

Mr. Hungar.

Thomas G. Hungar: Thank you, Mr. Chief Justice, and may it please the Court:

The court of appeals correctly held that the legislative prayers at issue in this case were not offensive in the way identified as problematic in Marsh, but the court then committed legal error by engrafting the endorsement test onto Marsh as a new barrier to the practice of legislative prayer.

Justice Elena Kagan: Mr. Hungar, I'm wondering what you would think of the following: Suppose that as we began this session of the Court, the Chief Justice had called a minister up to the front of the courtroom, facing the lawyers, maybe the parties, maybe the spectators.

And the minister had asked everyone to stand and to bow their heads in prayer and the minister said the following: He said, we acknowledge the saving sacrifice of Jesus Christ on the cross.

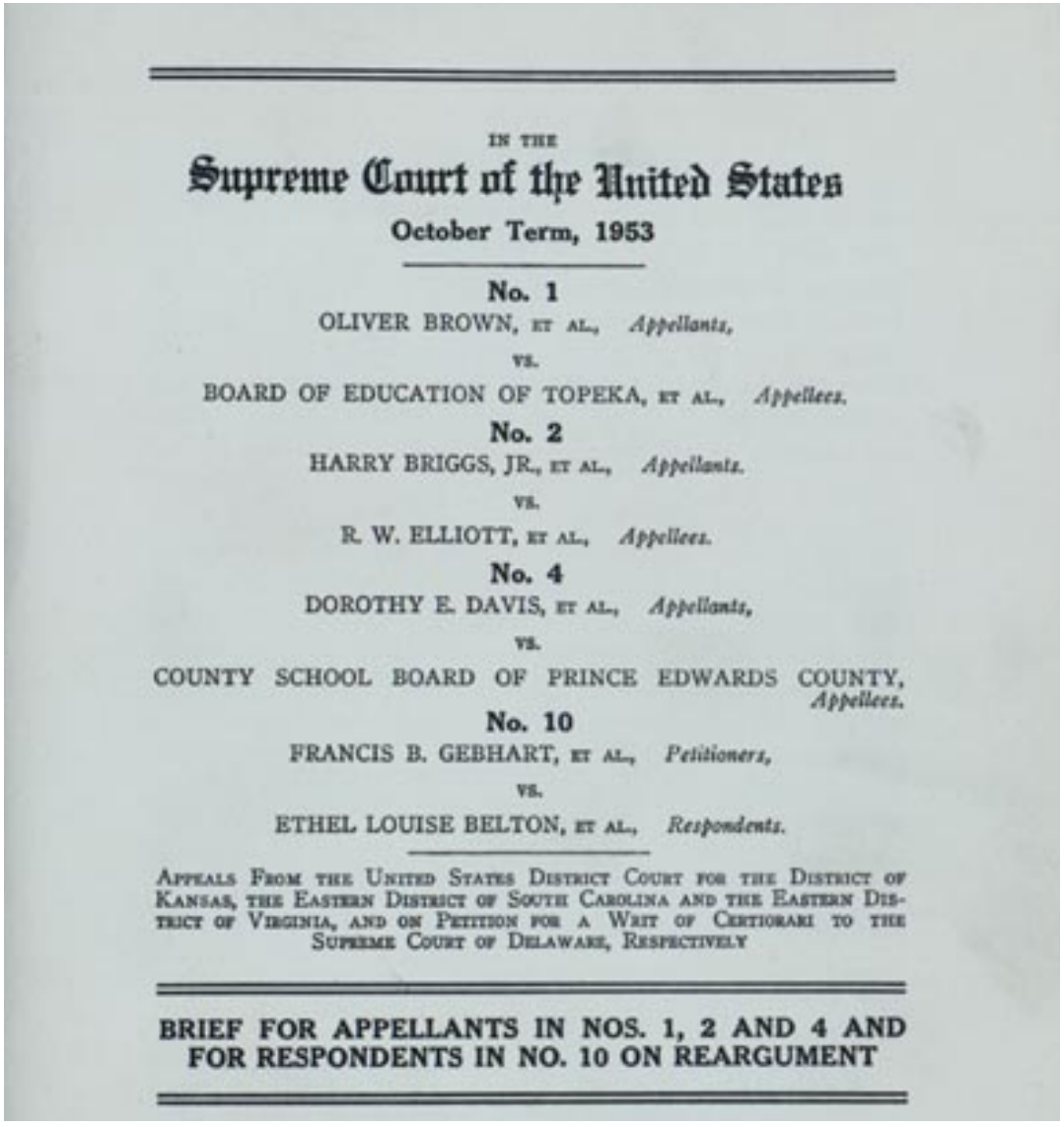
We draw strength from His resurrection.

Blessed are you who has raised up the Lord Jesus.

You who will raise us in our turn and put us by His side.

The members of the Court who had stood responded amen, made the sign of the cross, and the Chief Justice then called your case.

Would that be permissible?



IN THE

Supreme Court of the United States

October Term, 1953

No. 1

OLIVER BROWN, ET AL., *Appellants,*

VS.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants.*

VS.

R. W. ELLIOTT, ET AL., *Appellees.*

No. 4

DOROTHY E. DAVIS, ET AL., *Appellants,*

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY, *Appellees.*

No. 10

FRANCIS B. GEBHART, ET AL., *Petitioners,*

VS.

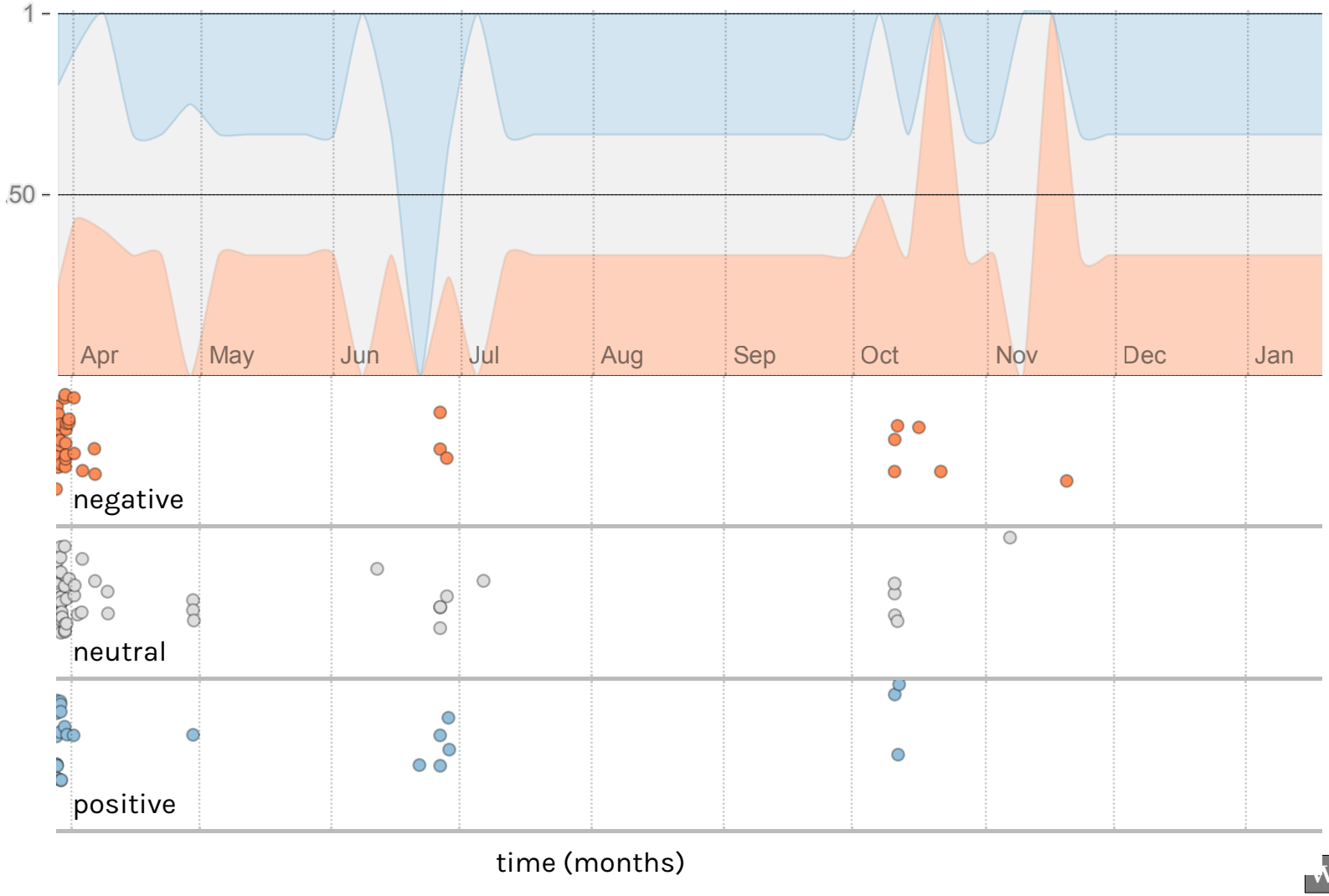
ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

WashULaw

Dataset: Twitter Feed: Antonin Scalia
Classifier: Twitter Sentiment



C. Herman Pritchett

THANKS! MERCI! GRAZIE!