

# **International Judicial Dissent: Causes and Consequences**

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## Introduction

The past two decades have witnessed an unprecedented increase in international adjudication. The increased judicialization of global politics, in turn, has sparked a flurry of research into the politics of judicial appointments, the independence of international tribunals, and the effectiveness and legitimacy of international courts. While this literature has made great strides, it has almost entirely ignored a feature critical to understanding the role and purpose of any court, namely the use, or non-use, of separate dissenting or concurring opinions by individual judges. It is a striking feature of international courts that some allow and make extensive use of dissents (e.g., the International Court of Justice (ICJ), the International Tribunal of the Law of the Sea (ITLOS), and the European Court of Human Rights (ECtHR)), while others issue rulings as a court with no, or very few, concurring or dissenting opinions (e.g., the European Court of Justice (ECJ) and the Appellate Body of the World Trade Organization (WTO)). Yet we know very little about why courts adopt different approaches to this central question, or about the effects of dissent on the independence of international judges and the legitimacy of their courts. Thus far, political scientists have largely ignored these questions, while legal scholars have pursued primarily normative analyses of individual courts and tribunals.

If one begins with the most extensive body of literature, on the ECJ, one encounters a court that has, from the beginning, opted to deliberate and vote in strict secrecy, issue collective decisions on behalf of the court, and suppress individual dissenting or concurring opinions. Scholars of the ECJ have been nearly unanimous in their interpretation of this behavior, attributing it to the judges' desire to protect their independence vis-à-vis nominating states that might otherwise pressure judges to toe the national line to secure renomination at the end of their renewable six-year terms. In addition, the issuing of collective decisions is often seen as a strategy designed to increase the legitimacy of the judgments of a court whose initial position was quite precarious.<sup>1</sup>

We should, however, beware of overgeneralizing from a single case. For, at the other end of the spectrum, we find the ICJ, whose members have for over half a century engaged in the practice of issuing frequent, lengthy and signed dissents and concurring opinions. We find this

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<sup>1</sup> See e.g. Julia Laffranque, *Dissenting Opinion in the European Court of Justice*, IX JURIDICA INTERNATIONAL 14, 16-17 (2004); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177 (1998); and DANIEL TERRIS, CESARE P.R. ROMANO, AND LYNN SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 125 (2007).

practice widely defended on principled grounds, moreover, by UN member governments, by legal commentators, and by the judges themselves, who often argue that dissenting and concurring opinions can serve to limit nationally biased behavior on the part of judges (who must provide public reasoning for their dissenting votes), to improve the quality of majority decisions (which are forced to engage publicly with the reasoning of dissenters), and to make the law and legal questions more intelligible to present and future analysts of the Court.<sup>2</sup>

The case for dissents is further strengthened by the practice of another European court, the ECtHR, whose extensive use of concurring and dissenting opinions is widely seen as consistent with both judicial independence and a high level of legitimacy – although here it is striking that the member states of the ECtHR reformed the court in 2004 to provide for a nine-year, non-renewable terms of office for ECtHR judges, who had previously served renewable six-year terms like their ECJ counterparts.<sup>3</sup>

An intermediate case is the WTO, where the Dispute Settlement Understanding neither expressly prohibits nor authorizes dissents, but where both panelists and Appellate Body (AB) judges have in almost all cases resisted issuing dissenting or concurring opinions, which are also discouraged under the AB's rules of procedure. Available evidence suggests that WTO jurists have been guided by a logic similar to ECJ judges, believing that consensus decision-making increases both the independence of judges and the legitimacy of the fledgling AB.<sup>4</sup> This view is increasingly contested, however, by scholars who claim that increased use of dissenting views would improve WTO jurisprudence without compromising judicial independence.<sup>5</sup>

Our central point here should be clear: The question of judicial dissent is an unavoidable one that has arisen with respect to these four, and indeed all, international courts, and yet, because of the lack of comparative analysis, we have at best a partial understanding of why some

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<sup>2</sup> The classical statement of this position can be found in R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L. Q. 788 (1965).

<sup>3</sup> Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

<sup>4</sup> Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895, 903-16(2006). A similar debate has taken place in the realm of international commercial arbitration; see e.g. Di Pietro, Domenico (2011). "The Controversial Role of Dissenting Opinions In International Arbitral Awards," *Transnational Notes*, <http://blogs.law.nyu.edu/transnational/2011/10/the-controversial-role-of-dissenting-opinions-in-international-arbitral-awards>.

<sup>5</sup> Lewis, *supra* note 4, at 916-931; see also Manfred Elsig and Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, EUR. J. INT'L REL., forthcoming 2012.

courts engage in vigorous and regular dissent, while in other cases the jurists themselves choose to refrain from dissent.<sup>6</sup> More precisely, when and why have states, in creating international courts, established rules governing the use, or prohibition, of judicial dissent as a design choice? Why have judges from different courts, all of whom have enjoyed at least some degree of leeway on the question of dissent within the broad confines of their respective statutes, made such different choices and engaged in such different practices? And what difference has that choice, to dissent or not to dissent, made to the development of international law and legal doctrine, the independence of individual judges, or the collegiality, effectiveness and legitimacy of international courts and tribunals?

To date, the academy has contributed little to our understanding of these questions. International law (IL) scholars interested in dissent have pursued primarily normative analyses of individual international courts and tribunals or particular doctrinal areas, but have not sought to explain the puzzling pattern of use and non-use of dissent across tribunals. Among political scientists, international relations (IR) scholars have increasingly turned their attention to the design and behavior of international courts, but none has sought systematically to address the specific question of international judicial dissent and its use and non-use across international courts.

This paper seeks to fill this gap in the literature by offering a framework for a more robust, theoretically informed empirical research program into the causes and consequences of international judicial dissent. To do so, the paper proceeds in three parts. First, we argue that, in the absence of clear IL and IR scholarship on this topic, the most promising starting point for our analysis is the sizable and increasingly sophisticated literature on dissent in American and other domestic courts.<sup>7</sup> We review this literature for the insights and hypotheses it generates, while

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<sup>6</sup> Hence, EU scholars generally take it as a given that the lack of dissents increases judicial independence (but see Laffranque, *supra* note 1), while ICJ scholars argue vehemently that dissent improves the quality of judicial decisions as well as judicial independence, see Anand, *supra* note 2, but with little empirical evidence for either set of claims and with little evidence of engagement between the two camps. Lewis engages in an exceptional, if brief, comparative analysis, comparing the WTO to three other courts (ICJ, ITLOS, and NAFTA Chapter 19 and 20 arbitrations) and concluding that the WTO is an outlier in rejecting dissents, but this analysis engages in clear selection bias as it leaves out the primary counter-example of the ECJ. Lewis, *supra* note 4, at 901-902.

<sup>7</sup> In this regard, our approach has strong affinities with the claims of Jeffrey K. Staton and Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 *INT'L ORG.* 553 (2011), as well as Elsig and Pollack's (2012) application of domestic judicial appointment models to the appointment of international judges. Like those authors, we suggest that previous scholarship has overstated the difference between domestic and international courts – both of which stand as wielders of law facing wielders of power, and both of which face similar questions of legal interpretation, judicial independence, and judicial dissent.

also noting the limitations of the domestic analogy and the need to adapt its insights to the specific features of the international arena. Second, we offer a tentative theoretical framework for understanding both the *causes* of international judicial dissent – why member states when establishing a court, or the judges they appoint, might opt either to promote or suppress dissent – and the *consequences* of such dissent for the development of law, the independence of judges, and the collegiality, effectiveness and sociological legitimacy of international courts. In the third section, we offer a brief overview of the phenomenon of judicial dissent across a preliminary sample of six international courts and tribunals, as a prelude to a planned, in-depth comparative study of dissent in four international tribunals (in progress).

As will become clear, our efforts at this stage are tentative at best, and we cannot and do not claim to conduct any systematic test of the hypotheses we put forward here. Instead, this paper should be understood as a first step into largely uncharted waters, featuring some extremely preliminary ideas about how best to navigate their currents. Criticisms of these preliminary ideas, and further (and better) ideas, are most welcome.

## **I. Dissent in Domestic Courts: Lessons and Limits of the Domestic Literature**

If international law and IR scholarship has been largely silent on the question of dissent at international tribunals, the opposite is true of scholarship on American law and courts, which has witnessed a centuries-long debate on the pros and cons of judicial dissent and competing analyses of the crooked trajectory of dissent practices in federal courts since the beginning of the Republic. Although this legal literature typically does not specify dependent and independent variables or attempt to offer a causal explanation of the origins or the consequences of dissent, it does offer some fundamental insights and arguments that will inform our study of international judicial dissent.

In terms of the specification of our dependent variable, for example, Kevin Stack makes an important distinction between what he calls “second-order” and “first-order” decisions about dissent.<sup>8</sup> In this view, a second-order decision refers to the arguments for and against the practice of dissent as a whole, and the decision to prohibit, allow, or encourage dissent. This second-order decision may be taken by the political actors who draw up the court’s statute, or it may, as in the US federal system, be left to the judges themselves, who may draw up formal

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<sup>8</sup> Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L. J. 2235 (1996).

rules on dissent or alternatively adopt more or less stable informal norms to govern the practice. By contrast, Stack uses the term “first-order” to refer to the reasons that inform an individual judge’s decision to dissent or not to dissent in a given case, presumably within the constraints of the formal or informal second-order rules governing the conduct of the court as a whole.

In practice, the American legal literature is concerned with both types of decisions. In terms of second-order decisions, much of the literature is given over to debates over the advantages and disadvantages of dissent as a general practice, and much historical analysis has focused on the rise and fall of various norms of dissent within the Supreme Court over time. In the US system, however, such second-order questions cannot be completely divorced from the first-order questions facing individual judges, whose actions can serve to buttress or undermine what are, in the federal court system, only informal norms on dissent. Indeed, the most detailed social-scientific study of dissent in federal courts identifies as its dependent variable the first-order decisions by individual judges to dissent within a more or less stable set of late 20<sup>th</sup>-century norms.<sup>9</sup> For the purposes of exposition, we will focus here first on the second-order questions of the advantages of disadvantages of dissent as a practice, then on the changing second-order norms that have governed the behavior of the Supreme Court over two centuries, before finally coming back to the first-order question of how individual judges decide whether to dissent or join the majority in a given judicial decision.

#### **A. The Advantages and Disadvantages of Dissent [To be completed]**

For over two centuries, participants in and observers of American federal courts have engaged in an ongoing and as-yet unresolved debate about the advantages and disadvantages of judicial dissent. Champions of dissent, such as Justice William Brennan, have identified a number of distinct advantages that allegedly arise from the practice, and drawing from Brennan and other scholars we can catalogue at least a few of these:

- **Correcting a perceived error in the majority decision:** “In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority’s legal

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<sup>9</sup> Lee Epstein, William M. Landes, and Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEG. ANALYSIS 101 (2011)

analysis. It is offered as a corrective – in the hope that the Court will mend the error of its ways in a later case....”<sup>10</sup>

- **“Riding herd” on the majority, and improving the quality of the court’s jurisprudence:** “But the dissent is more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision. Karl Llewellyn [referred to it as] ‘rid[ing] herd on the majority.’ At the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side.”<sup>11</sup>
- **Limiting the scope of the court’s decision:** “The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly – a sort of ‘damage control’ mechanism.”<sup>12</sup>
- **Promoting deliberation:** “In this sense, this function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court – both the majority and dissent – were the product of a judicial town meeting.”<sup>13</sup> This argument suggests that one way that collegial courts in democratic societies gain legitimacy is by operating in a way that is consistent with fundamental democratic values. Published dissents vividly demonstrate that the judges have openly deliberated with each other to reach a considered opinion, and hence enhance a court’s authority.<sup>14</sup>
- **Guidance to lower courts and litigants:** “Along the same lines, a dissent sometimes is designed to furnish litigants and lower courts with practical guidance—such as ways of

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<sup>10</sup> Brennan xxxx.

<sup>11</sup> Brennan xxxx.

<sup>12</sup> Brennan xxxx.

<sup>13</sup> Brennan xxxx.

<sup>14</sup> For a defense of this view, see Peter Bozzo, Shimmy Edwards, and April A. Christine, *Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court*, 36 J. SUP.CT. HIST. 193 (2011).

distinguishing subsequent cases. It may also hint that the litigant might more fruitfully seek relief in a different forum – such as the state courts.”<sup>15</sup>

- **Appeal to future generations:** “The most enduring dissents, however, are the ones in which the authors speak, as the writer Alan Barth expressed it, as ‘Prophets with Honor.’ These are the dissents that often reveal the perceived congruence between the Constitution and the ‘evolving standards of decency that mark the progress of a maturing society,’ and that seek to sow seeds for future harvest.”<sup>16</sup> Echoing this idea, Chief Justice Charles Evans Hughes famously characterized dissents as “appeal[s] to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>17</sup>

Against this catalogue of advantages, various authors offer a list of disadvantages of dissent, or conversely of the advantages of judicial unity and *per curiam* rulings. In this view, the practice of dissent, as opposed to issuing a single, unanimous judgment of the court *en banc*, brings with it an impressive list of disadvantages:

- Damage to unity and legitimacy of the court and its decisions, particularly early in a court’s history, before it has created a legacy.
- Damage to collegiality
- Damage to quality of court jurisprudence
- Lack of transparency
- Lack of accountability of judges
- Costs to individual judges

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<sup>15</sup> Brennan xxxx.

<sup>16</sup> Brennan xxxx.

<sup>17</sup> CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES—ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 68 (1928).



## **B. Historical Accounts: The Practice of Dissent in the US Supreme Court [To be completed]**

Much of the literature on dissent in American federal courts consists of historical accounts of changing norms, and changing practice, of dissent among Supreme Court Justices. As is now well established, the early Court followed the British tradition of seriatim judgments, in which each judge wrote a separate opinion, and a majority position emerged from these many distinct positions. A major change in both the norms and the practice of dissent, however, took place with the appointment of John Marshall as Chief Justice.

- Marshall and the debate with Jefferson.
- Various periodizations of Supreme Court history, characterized by shifting informal norms about dissent.
- The current period, in which dissent has emerged as the norm, as bridge to Epstein et al. study.

## **C. First-Order Decisions to Dissent: The Positive Political Science Approach [To be completed]**

- The Epstein et al. piece is a **positive political science complement** to the legal-normative literature, focusing on how ideological diversity, case load, and other factors influence judicial decisions to dissent. See below.

## **D. Comparative Judicial Dissent: Legal Systems and Judicial Appointment**

The American literature on dissent in US federal courts, then, offers us a broad set of insights into the advantages and disadvantages of dissent, and the second- and first-order choices of courts and individual judges to encourage, allow, discourage or forbid the practice. Despite these strengths, this American literature, because it is limited to US federal courts, holds constant and effectively ignores several variables that are almost certain to be relevant to the question of dissent at international tribunals. First, the American literature holds constant the broad outlines of the US common-law tradition, without considering the practice of dissent in other legal traditions, in particular the civil law tradition common to most of Europe and Latin America.

Second, the literature on US federal courts is based on the assumption that judges serve lifetime appointments, and are therefore not subject to the threat of removal or the prospect of reappointment, as are judges in most other legal systems. Third, the literature on the US federal courts takes as a given the silence of the Constitution and federal statutes on the question of dissent, and therefore attributes variation in the norms and practice of dissent entirely to judicial choices; in other political systems, however, judicial choices are often constrained by constitutional rules or statutes formulated by the political branches of government, which specify rules on dissent and therefore limit and structure judicial incentives. Let us consider each of these briefly in turn.

With respect to comparative judicial practice of dissent, Ruth Bader Ginsberg identifies three ideal types, each linked to a broader legal tradition: the British tradition of seriatim opinions by each member of the bench, the civil-law tradition of a single anonymous judgment of the court with no public dissent, and the US system as a middle way featuring an opinion of the court from which individual judges may dissociate themselves through concurring and dissenting opinions.<sup>18</sup> Although the British tradition of seriatim opinions was influential in the early history of the US Supreme Court, the Court soon abandoned this practice,<sup>19</sup> and most comparative law scholars therefore focus on the stark contrast between the common law American model described above, and a very different civil law tradition of issuing single, anonymous, *per curiam* decisions in which public dissent is stifled. Ginsburg, for example, summarizes the civil law approach – typified by French judicial practice – as follows:

Under the French practice, still followed in large measure in most civil law systems, judicial decisions typically portray the result demanded by the law as inexorable. There is a right answer. It is expressed in a unanimous judgment, written up in a formal, impersonal, concise, stylized manner. The author of the judgment is neither named nor otherwise identifiable.<sup>20</sup>

Although written from a different perspective, Merryman’s survey of the civil law tradition provides a nearly identical account:

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<sup>18</sup> Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990).

<sup>19</sup> Peter Bozzo, Shimmy Edwards, and April A. Christine, *Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court*, 36 J. SUPREME CT. HIST. 193 (2011)

<sup>20</sup> Ginsburg, *supra* note 12, at 134.

In general, there are no separate concurring or dissenting opinions, even at the appellate level, in civil law jurisdictions. Although exceptions do exist, the general rule is one of unanimity and anonymity. Even dissenting votes are not noted, and it is considered unethical for judges to indicate that they have taken a position at variance with that announced in the decision of the court. A recent tendency toward noting dissents and separate concurrences, and even toward the publication of separate opinions, has developed in the constitutional courts of some civil law jurisdictions. But the standard attitude is that the law is certain and should appear so, and that this certainty would be impaired by noting dissents and by publishing separate opinions.<sup>21</sup>

As Merryman notes, the practice of dissent has made some inroads into some civil law systems, most notably in the constitutional courts of Germany and Italy, but the traditional civil law insistence on stifling dissent in order to promote legal certainty as well as judicial legitimacy remains a general rule, reminiscent of Marshall's aims, but in stark contrast to contemporary US practice.<sup>22</sup>

Ginsburg speculates on some of the reasons for this contrast between civil law and common law systems. In addition to the different conceptions of law, she suggests, the embrace of anonymous, *per curiam* decisions and the suppression of dissent also fits in with the very different career and recruitment patterns of civil law judges. By contrast with US appellate judges, who are typically recruited "from among practicing advocates at the height of their reputation,"<sup>23</sup> and used to speaking in a distinctive legal voice, the career path of a judge is through the civil service, serving among large numbers of other career civil-service judges. Furthermore, the absence of any formal system of precedent removes part of the incentive that common law judges have to ensure that their views become part of the legal record, recoverable by a future majority. Whatever the reasons for the correlation, it is clear that the tradition of vigorous and open judicial dissent in the United States is indeed foreign to most civil law

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<sup>21</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 122 (3d ed., 2007).

<sup>22</sup> Possibly add a note here from Lasser, noting the suspicion with which French practice is viewed by American comparative legal scholars.

<sup>23</sup> R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 129 (2d ed. 1978) at 127, quoted in Ginsburg, *supra* note 12, at 136. A significant literature examines the changing backgrounds of federal judicial appointments. See, e.g., Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely causes and possible implications*, 93 *JUDICATURE* 140 (2010); Monique Renee Fournet, et al., *Evolution of judicial careers in the federal courts, 1789-2008*, 92 *JUDICATURE* 62 (2009).

systems, and that the question of dissenting votes and opinions may be institutionally nested within broader legal traditions that are resistant to change.

In addition to the issue of broad legal tradition, the US literature also holds constant, and hence largely ignores, the interrelated questions of judicial terms, appointment, and (in some cases) reappointment, on the assumption that the US federal judges at the heart of the literature enjoy lifetime appointments contingent only upon good behavior. For such judges, issuing individually signed, public and sometimes unpopular decisions – whether majority, concurring, or dissenting – is unlikely to pose any significant threat to judicial independence, since the judge is safe from retaliation or reward by the political branches. By contrast, Ginsburg notes, individually signed public opinions, including but not limited to dissents, “may sweep away judges who lack the cushion of life tenure.”<sup>24</sup> She gives the example of California Supreme Court judges who were voted out of office in 1986 following an unpopular opinion, and quotes a commentator in that case:

Good judges reaching well-reasoned and even precedentially-restrained results in one particularly controversial case are seriously at risk if a majority of the electorate feels strongly enough about the one issue. Justices who lack principle so that they bend to the pressure of popular opinion will be retained. This places too much external pressure upon the justices.<sup>25</sup>

“There is security in anonymity,” Ginsburg concludes, “as these illustrations attest.”<sup>26</sup>

The relationship between issuing separate opinions, on the one hand, and the nature and structure of judicial terms and appointment procedures, on the other, may arise in similarly stark terms in other legal systems. For example, a similar fear of retribution against judges casting individual opinions also informed the decision by the political branches in Germany to alter the judicial appointment of judges to the German Constitutional Court. In 1970, as part of a reform

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<sup>24</sup> Ginsburg, *supra* note 12, at 140. Look for other work on dissent in state courts.

<sup>25</sup> Quoted in Ginsburg, *supra* note 12, at 140. A more recent illustration of the same phenomenon came in 2010, when Iowa voters failed to re-elect three justices of the Iowa Supreme Court who had voted to strike down a law defining marriage as between a man and a woman. Under Iowa law, the judges simply needed a simple majority of votes in an unopposed election to secure reelection, yet a conservative campaign against the judges helped to secure a majority “no” vote against all three judges, who were removed from office. See A. G. Sulzberger, “In Iowa, Voters Oust Judges Over Marriage Issue,” *The New York Times*, 3 November 2010, <http://www.nytimes.com/2010/11/03/us/politics/03judges.html?scp=1&sq=iowa%20supreme%20court%20same-sex%20marriage&st=cse>.

<sup>26</sup> Ginsburg 1990: 140.

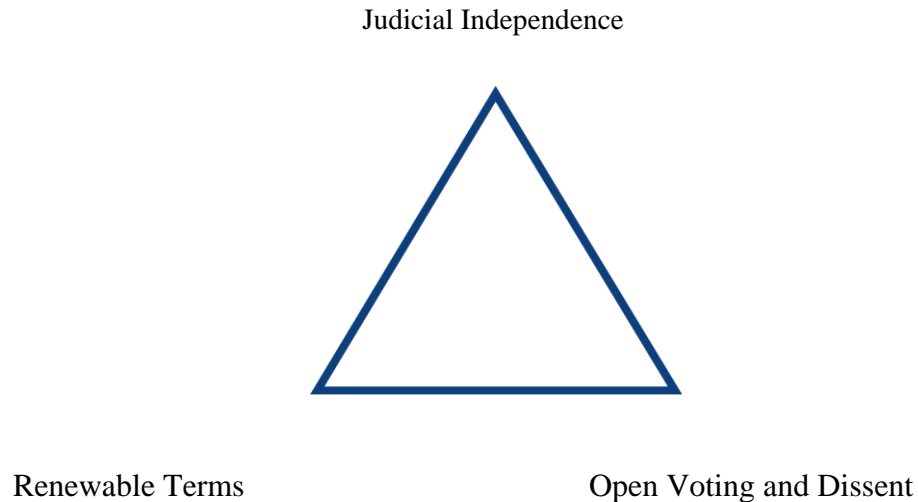
that allowed the Court to publish concurring and dissenting opinions, the political branches in Germany, “[r]esponding to the concern that reappointment considerations might influence a judge’s votes,”<sup>27</sup> altered the appointment process for those judges, moving from a system of short, renewable terms to a new system of non-renewable, 12-year terms.<sup>28</sup> Extrapolating from these cases, we may theorize more generally about the interrelationship between judicial appointment, judicial independence, and dissent. More specifically, we may hypothesize that with respect to three design features – renewable terms, open voting and dissent, and judicial independence – judicial systems face potential trade-offs, such that any given court can maximize two, but not all three, of these features<sup>29</sup> (see Figure 1).

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<sup>27</sup> Ginsburg, *supra* note 12, at 146.

<sup>28</sup> As we shall see, one international court, the European Court of Human Rights, took a parallel decision to move from short, renewable terms to longer, non-renewable terms, in part out of concern for the independence of judges who regularly engage in public judicial dissents, and similar proposals have been advanced at the WTO.

<sup>29</sup> All three of these variables, we would add, can be measured along a continuum, rather than dichotomously. A given court, for instance, may practice “dissent”, but rates can range from “low” (e.g. WTO, 11% of all judgments featuring a dissent) to “high” (ICJ 90%). While the renewability of terms is a dichotomous variable, the impact of such renewal is likely to depend on the length of the term, with longer terms considered to generate greater independence than short terms. Judicial independence, finally, which has been defined by Voeten (2013: 422) as “to the set of institutional and other factors that, to a lesser or greater extent, allows judges autonomy from the preferences of other political actors when these judges issue legal opinions,” can also vary from a perfectly responsive agent entirely dependent on its political principals to an entirely independent “trustee” (Stone Sweet and Brunell 2012). See Erik Voeten, *International Judicial Independence*, in *INTERDISCIPLINARY INSIGHTS INTO INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 421* (Jeffrey L. Dunoff & Mark A. Pollack, eds. 2013). Add Stone Sweet and Brunell 2012 reference.



**Figure 1: The Judicial Trilemma: “Pick two, any two”**

If the judicial trilemma accurately captures the strategic choices states face, then we are left with three possible combinations:

- (i) a court can have open voting and frequent dissent and keep high levels of judicial independence, as in the US, the German Constitutional Court (and, as we shall see, the post-2010 ECtHR), but only if terms are not renewable;
- (ii) a court can have renewable terms and high levels of judicial independence, as in many civil law systems, the ECJ and WTO AB, but only by suppressing dissent; or
- (iii) a court may combine renewable appointments and open voting and dissent, as in many US state courts and international courts, but only at the risk of compromising judicial independence.

To be sure, there may be strategies that can solve, or at least mitigate, the judicial trilemma. Interestingly, Dumbauld, writing in 1942, suggested that, “It might be possible... to obtain most of the advantages of dissenting opinions by publishing them without indicating the

names of their authors.”<sup>30</sup> While Dumbauld appears to have been referring to the internal circulation of dissenting opinions among the judges in a given case, it might in principle be possible for courts to overcome the judicial trilemma by allowing for the public circulation of *unsigned* or *anonymous* dissents, mitigating the trade-off between renewable terms and judicial independence by making individual judges’ votes and opinions more difficult (but not impossible) to identify and sanction.<sup>31</sup> This is, indeed, the model that has been chosen for the World Trade Organization’s Appellate Body, discussed below.

A third and final dimension that serves as an omitted variable in the US literature is the possibility that, rather than leave the question of dissent entirely to the discretion of judges, some legal systems specify rules on dissenting votes and/or separate opinions in constitutional law or in the statutes of the courts in question. In the German and Italian cases, for example, it was not judges but the political branches of government that opted to change the rules governing judicial dissent (and, in the German case, appointments), leaving judges to respond to a changing set of constitutional or statutory constraints. Similar conditions obtain on all international courts, as all of the relevant treaties we have reviewed address the form and content of judicial opinions. In these circumstances, the choice “to dissent or not to dissent” belongs not solely to the judges, acting singly or collectively, but is typically a “design element” of the court and its mandate, designed by the political branches to produce certain outcomes in terms of judicial independence, the progressive development of law, or some other such desiderata. It is to this question of *international* judicial dissent that we now turn.

## **II. Theorizing International Judicial Dissent: Causes and Consequences**

Although the specific features of international courts and tribunals are in many ways distinct from those of the national courts that are the focus of the literature reviewed so far in this paper, we believe that a research agenda on international judicial independence can and should benefit from the core insights of the domestic literature regarding the advantages and disadvantages of dissent, the factors and considerations that might influence the choices of either political branches fashioning the statutes of courts or judges themselves in making decisions to

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<sup>30</sup> Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 940 (1942).

<sup>31</sup> To be sure, anonymous separate opinions may raise problems of their own, as they may “spur a judge to vote invariably in support of the cause of his own State, without incurring the odium of partisanship.” R.P. Anand, *The Role of Individual and Dissent Opinions in International Adjudication*, 14 INT’L & COMP. L. Q. 788, 792 (1965).

dissent or not to dissent, and the likely consequences of dissent for the quality of law, the independence of judges, and the collegiality, effectiveness and legitimacy of courts. In this section of the paper, we move tentatively towards a research agenda and a theoretical framework for the study of international judicial dissent, in two stages. We start with a focus on judicial dissent as a dependent variable, seeking to understand the causes of dissent, whether set down by states in courts' governing statutes or by international judges themselves in their internal rules of procedure and their judicial practice. We then reconsider international judicial dissent as an independent variable, asking about the consequences of either unified, *per curiam* rulings or dissenting opinions for a variety of other outcomes of interest to lawyers and political scientists. We emphasize that our hypotheses here are tentative, and we welcome comments and suggestions for sharpening or further development.

### **A. Causes of Dissent**

The existing literature on domestic judicial dissent reviewed briefly above identifies a number of different dimensions of the dependent variable that might potentially be the focus of our analysis of international judicial dissent. First, and most obviously, we might focus on *the state-mandated statutes* of a given court as a design choice, which might require or prohibit members of the court from publicly voting, or from issuing separate dissenting or concurring opinions. Indeed, as we shall see, most international court statutes do indeed set out at least general rules on the form of judicial rulings, including the secrecy of deliberations and the possibility of separate concurring or dissenting opinions. Second, within the broad rules established by international court statutes, we can ask about the development and evolution of *second-order rules or norms on judicial dissent, established by judges themselves*. Third and finally, we could follow Epstein et al. and others by identifying our dependent variable as the *first-order decision by individual judges* to issuing publicly dissenting votes or separate dissenting or concurrent opinions.<sup>32</sup> One could, for example, examine the absolute frequency of dissenting opinions, or more tellingly the ratio of opinions of the court to dissenting *votes* or to separate dissenting and concurring *opinions*. We might, moreover, ask what types of judges within a given court are most likely to act as “team players” or as “Great Dissenters,” and whether such behavior correlates with other variables such career backgrounds, nationality, and

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<sup>32</sup> See e.g. Epstein et al., *supra* note 9; others.



so on.<sup>33</sup> For our purposes in this preliminary study, which seeks to explain broad patterns of dissent across international courts, we focus primarily on understanding broad second-order decisions about dissent, including both state design of international court statutes and judicial decisions to promote or discourage dissenting and concurring opinions in courts' internal rules of procedure and informal norms. We leave first-order decisions about dissent largely as a subject for future research, although as we shall see a handful of scholars have begun to undertake systematic studies of such decisions for individual courts.

At the international level, the primary rules and norms governing dissent are typically found in the treaties or statutes that create a tribunal. These general norms are then frequently elaborated in the more detailed rules of procedure that the judges themselves craft, sometimes with input or approval of states, but often on their own authority. And these formal norms are often supplemented by informal norms, to which we have access via statements of judges, other court officials such as registrars, and through secondary literature.<sup>34</sup> Finally, these norms both guide, and are shaped in part by, the actual practice of judges in dissenting, or failing to dissent, in individual judgments. In the paragraphs that follow, we theorize and develop some plausible hypotheses about the causes of dissent, in two stages. First, we consider treaty-and statute-based rules about dissent as a design choice by states, after which we turn to judicial choices about dissent, including formal judge-made rules, informal norms, and judicial behavior.

## **1. Rules of Dissent as a Member-State Design Choice**

On the international plane, as domestically, courts are established via constitutional provisions or legislative enactments. At both levels, the political “principals” that create courts often include in the constitutive instruments at least some rules regarding the form and content of judicial opinions, as well as other related issues such as appointment, terms of office, reappointment, and so on.<sup>35</sup> In this sense, the American federal judiciary is a partial exception,

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<sup>33</sup> Alternatively, we could follow some legal scholars and examine *forms of dissent as a speech act*, noting the different rhetorical forms of dissent (apologetic, respectful, assertive, etc.), either for their own interest or as a sign of changing norms of dissent within a given court. See Note, *From Consensus to Collegiality: The Origins of the “Respectful Dissent,”* 124 HARV. L. REV. 1305 (2011).

<sup>34</sup> One striking example, discussed below, is the apparent decision by members of the WTO AB who decided, among themselves, not to issue dissents, notwithstanding language in the relevant treaty and rules of court that authorized them to do so.

<sup>35</sup> Here, we are employing the general language of principal-agent analysis to understand the relationship between a group of states as a collective principal, and a group of judges as their collective agent. See e.g. Mark A. Pollack,

as neither the U.S. Constitution nor federal statute govern the form of judicial opinions in general, or the practice of dissent in particular, by federal judges, leaving that choice entirely to the discretion of the judges themselves. When we move from the American system to comparative analysis, by contrast, the literature foregrounds the influence of legal tradition on dissent practices in domestic courts, with common-law countries generally opting for open dissent and civil law countries suppressing dissent in favor of unanimous, anonymous, *per curiam* decisions.

Moving in turn from the domestic to the international level, the primary theoretical framework used to address such questions is the rational design research program, which seeks to explain a multitude of institutional design choices (in the original formulation, membership, scope, centralization, control and flexibility) with reference to a set of environmental variables (distribution problems, enforcement problems, number, and various types of uncertainty).<sup>36</sup> Recently, Barbara Koremenos has extended the rational design agenda to make and test predictions about the conditions under which states might design international agreements with or without dispute settlement mechanisms, with particular attention to decisions to use formal and/or informal dispute settlement mechanisms.<sup>37</sup> It is less clear, however, whether the rational choice approach generates specific predictions about a precise feature of international court design such as the choice to require, encourage, allow, discourage or forbid dissenting opinions – at least without a series of supplementary assumptions that go beyond identification of the broad environmental features, such as uncertainty, that usually inform rational design inquiries.<sup>38</sup>

An alternative IR approach would be to draw from liberal IR theory, hypothesizing that states' preferences about judicial dissent, as about other features of international courts and tribunals, are likely to vary state-by-state as a function of domestic state-society relations with

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*The Engines of European Integration: Delegation, Agency and Agenda Setting in the European Union* (New York: Oxford University Press, 2003). Other scholars reject the language of agency, suggesting that all international courts (Karen J. Alter, "Agents or Trustees? International Courts in their Political Context," *European Journal of International Relations*, Vol. 14, No. 1, pp. 33-63) or at least some courts (Alec Stone Sweet and Thomas L. Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO," unpublished paper, 2012) serve as trustees of the legal order. We are agnostic on the use of these terms, which are without prejudice to the basic fact that the member states of a court adopt and can in principle ratify its statute, as well as playing a collective role in the appointment and potential reappointment of its judges.

<sup>36</sup> Koremenos et al. 2001.

<sup>37</sup> Koremenos 2007, Barbara Koremenos & Timm Betz, *The Design of Dispute Settlement Procedures in International Agreements*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 371* (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2013).

<sup>38</sup> We do not, however, rule out the possibility of constructing a theory linking broad features of the international environment from the rational design program to the question of dissent, and we welcome suggestions on this score.

respect to the issue-area governed by the court's jurisdiction. Some states, for example, might be characterized by a strong societal preference for free trade, and these groups might, *ceteris paribus*, favor robust multilateral enforcement of international trade law, and hence a strong, independent court within the international trade regime. There are limits, however, to this approach as well, in that it remains indeterminate regarding a preference for dissent without intermediating assumptions about the influence of dissent on the independence or effectiveness of international courts and tribunals, and the preferences of domestic actors toward these characteristics. As in the case of rational design, therefore, one could in principle derive specific hypotheses linking domestic state-society relations to national preferences over judicial dissent, but to do so would require a set of assumptions about the *consequences* of dissent for domestic actors which we would not, at this stage, want to prejudge.

Barring clear predictions from the existing IR theories, we might nevertheless derive from the domestic and international law literatures three other hypotheses about the determinants of states' choice to impose rules on dissent on the courts they create.

The first, **functionalist** hypothesis derives in large part from the existing legal literature, noting that different international courts serve different functions for their members.<sup>39</sup> In this view, we might expect that, to the extent that states design courts whose primary purpose is dispute resolution *simpliciter* among contending parties, they would be less likely to authorize or encourage dissenting opinions, both because dissents could potentially undermine the authoritativeness and finality of the court's decision, and because such a system places little or no significance on the law-making power of international court. By contrast, courts that are understood to serve other functions, such as the elaboration and progressive development of legal doctrine over time, might encourage or even require a system of judicial dissent. A related functionalist hypothesis might focus on the issue-area of a court's jurisdiction, on the grounds that dissents can be more or less valuable depending on the particular characteristics of the issue-area within the court's jurisdiction. Ginsburg, for example, notes that British courts forbid

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<sup>39</sup> The locus classicus remains SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958). For a recent overview and critique of the legal literature, see Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, available on SSRN. In the IR literature, Karen Alter has identified four such functions, which she labels dispute resolution, enforcement, administrative review, and constitutional review. See Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Resolution, Constitutional and Administrative Review*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 345* (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2013).

dissents and publish *per curiam* decisions in criminal proceedings, raising the prospect that criminal or other types of jurisdiction may be more or less compatible with the practice of dissent. Generalizing this hypothesis would lead us to expect states to adopt different rules about dissent for courts with jurisdiction over different types of disputes. In the legal literature on international tribunals, Flett offers an example of this type of argument, suggesting that international economic law is “more susceptible to objective assessment” than the issue-areas that come before a court of general jurisdiction like the ICJ, and hence that the utility of dissent in trade tribunals is extremely limited.<sup>40</sup>

A second, **sociological institutionalist** hypothesis emphasizes the tendency for actors – both states and judges – to fall back on legitimate templates when designing international courts and their rules of procedure. Sociological institutionalists like Powell and DiMaggio note that actors, when designing institutions, typically do not start from scratch, but engage in “institutional isomorphism,” following existing templates that may possess normative legitimacy (hence, normative institutional isomorphism) or simply limit the transaction costs of design by providing an easily copied model (hence, mimetic institutional isomorphism).<sup>41</sup> Applied to international courts and tribunals, this hypothesis suggests that states and judges, when designing international courts and their rules of procedure, may draw on existing templates, either from existing international courts, or from their own domestic political traditions. This, in turn, generates two variants of sociological institutionalist hypotheses.

The **international variant** of the hypothesis suggests that states (and judges) when designing international courts and their rules, will tend to copy provisions from other, existing international courts, particularly where these enjoy a high degree of normative legitimacy. By contrast with the rationalist, functionalist hypothesis, which predicts that states will tailor institutional rules carefully to the functions of specific courts, the sociological institutionalist approach predicts copying and hence uniformity across international courts regardless of function. As we shall see, there is at least *prima facie* support for this view across a cross-section of courts, with the International Court of Justice copying almost verbatim the statute and

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<sup>40</sup> James Flett, *Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence*, 13 J. INT’L ECON. L. 287, 315 (2010).

<sup>41</sup> Paul J. DiMaggio and Walter W. Powell, “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields,” in Powell and DiMaggio, eds., *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press), pp. 63-82.

the rules of court from the previous Permanent Court of International Justice, and with subsequent courts frequently drawing inspiration from the design features of the ICJ. As we shall also see, however, a simple version of this hypothesis overpredicts institutional copying and isomorphism, insofar as both states and judges frequently depart – sometimes modestly, at other times dramatically – from the templates provided by the PCIJ and ICJ, and hence we shall, in our planned case studies, look for evidence both of institutional copying *and* for deliberate departures from existing templates.

A second, **domestic variant** of the sociological institutionalist hypothesis might emphasize the tendency of states (and judges) to copy existing and legitimate templates, not from international courts but from their own domestic courts, and more broadly from their respective countries' broad legal traditions. We have already noted that dissent is most commonly associated with common law states, whereas practice of judicial dissent is typically not found in states with civil law traditions, and we might hypothesize that states might simply “upload” their own domestic legal tradition on the question of judicial dissent to the international courts they create.<sup>42</sup> This would yield a straightforward expectation that common-law states will favor creating courts that allow dissent, while civil law states will prefer international courts that issue unanimous and anonymous *per curiam* decisions. Ginsburg offers a variant on this hypothesis, suggesting that where civil-law countries cooperate entirely among themselves, as in the original ECJ, the resulting international courts adopt *per curiam* decisions, vote in secret, and rule out dissents; but where common law countries cooperate among themselves or with civil law countries, as in the PCIJ, ICJ, ECtHR, and ITLOS, the resulting courts tend to adopt the common law approach, with decisions of the court adopted according to an open vote and with the possibility of dissent.<sup>43</sup>

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<sup>42</sup> Mitchell and Powell offer a similar argument, suggesting that states' positions towards international law are shaped by their domestic legal tradition, although they strikingly omit any reference to dissent from their analysis. See SARA McLAUGHLIN MITCHELL AND EMILIA JUSTYNA POWELL, *DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS* (New York: Cambridge University Press, 2011).

<sup>43</sup> Ginsburg, *supra* note 12, at 14-15. Note that if this hypothesis is supported, it would be a striking victory for sociological institutionalist theories over rationalist ones: basically, it would suggest that, when national diplomats sit down to negotiate the statute of a new court (or when judges lay out their own rules of procedure), their own legal tradition or “professional field” trump other considerations. Note also that this would raise an interesting question, of why a mixed group of states opts for dissents, i.e., why do the practices associated with common-law jurisdictions tend to dominate. See, e.g., Joost Pauwelyn, *The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. DIS. RES. 121 (2003) (analyzing the extent to which WTO dispute settlement has been “Americanized”).

Testing these competing hypotheses about the determinants of institutional choice will require both broad comparative analysis of multiple courts, to look for patterns across cases, as well as qualitative historical research to recreate the motives and intentions of both state designers of international courts and their statutes.

## **2. Rules, Norms and Practice of Dissent as a Judicial Choice**

In the previous section, we focused on rules about dissent as a deliberate design choice for *states* writing the treaties or statutes governing the courts they create, and indeed as we shall see most such treaties and statutes do lay out at least broad rules about dissent and related issues for judges. In most cases, however, these rules are quite broad and often quite vague, leaving considerable leeway for the judges themselves to draw up additional formal rules or informal norms to supplement or possibly even to undermine treaty rules about dissent. How do such judges decide whether, like Marshall, to encourage unity and discourage dissent, or, like Brennan, to encourage judges to publicly dissent from the decision of the majority and to spell out their reasons for doing so? As the examples of Marshall and Brennan suggest, the debate over the advantages of disadvantages of judicial dissent is centuries old, with no clear answer as to what practices of dissent are normatively preferable. Nevertheless, our survey of the existing literature does offer four plausible hypotheses about the conditions under which judges might reject or embrace dissent, and several of these hypotheses travel to the international level. The first three of these predict broad second-order differences across international courts, while the fourth predicts variation in first-order decisions about dissent among judges within a given court.

First, the historical trajectory of the US Supreme Court suggests one plausible, testable hypothesis, which we label the *life-cycle hypothesis*, namely that the imperative and the benefits of judicial unity, and its purported benefits in terms of legitimacy vis-à-vis the political branches and the general public, are greatest early in the life of any court, when the new institution is struggling to establish its place in the constitutional order and its legitimacy. By contrast, a more mature court, having established such a place and such legitimacy, might be more able to afford the public display of disunity occasioned by the use of dissent, and hence we might expect to see judges moving towards greater acceptance of dissent over the life of a given court.

Preliminary evidence on this question with respect to international courts is suggestive but hardly conclusive. There is some soft support for the life-cycle hypothesis in PCIJ Advisory

Opinion practice. Between 1922 and 1928, dissents from Advisory Opinions were relatively rare: 12 of 15 advisory opinions did not contain separate opinions. In contrast, between 1930-35, dissents were much more common; only 2 of 11 advisory opinions did not have separate opinions. However, this evidence is of limited utility. First, the Court had occasion to issue only a limited number of Advisory Opinions during its short existence. Second, when exercising jurisdiction over contentious cases, the court's work product shows no sharp difference between early and later cases with respect to the number of opinions accompanied by dissents. Similarly, the empirical discussion of the GATT/WTO case set forth below suggests that the early post-1995 norm against dissent in AB reports appears to have weakened over time, with some observers<sup>44</sup> suggesting that the WTO Appellate Body is now sufficiently "mature" to allow for dissent. By contrast, there has been no movement at all in the ECJ's rejection of dissenting opinions, although some scholars and judges have suggested that dissent might become a viable option for the court over time. We have not yet compiled data on potential shifts in the frequency of dissent in the ICJ or the ECtHR over time.

A second, judicial appointments hypothesis arises from our hypothesized judicial trilemma, which posits an interrelationship between public judicial dissent, renewable terms, and judicial independence. If we accept this logic – as both scholars and practitioners of the EU legal system appear to have done – then the combination of renewable terms (particularly short terms) and open judicial dissent threatens to undermine judicial independence, on the grounds that revealing individual judges' votes (whether in the majority or the minority) would expose those judges to retaliation from member states that might refuse to renominate them at the end of their term in office. If this logic holds, and if we assume that judges value their independence, we would hypothesize that judges with renewable terms will choose not to issue frequent dissents, and indeed adopt formal rules or informal norms to discourage or prohibit dissenting votes or opinions, particularly where those judges' terms were relatively short. By contrast, judges with longer renewable terms, or non-renewable terms, will be more likely to engage in, and adopt internal norms facilitating, judicial dissent.

This judicial choice, however, is not made in a vacuum, and is likely to be affected in systematic ways by the member states' design choices in creating a court and its statute. Hence, if a Court's statute and rules of procedure allows judges *to both deliberate and vote in secret* (as

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<sup>44</sup> Kolsky Lewis, *supra* note x.

in the Treaties of Paris and Rome creating the ECJ), then judges with concerns about renomination have little incentive to reveal their individual voting patterns through an open dissent or concurrence. To do so would, by the logic spelled out above, endanger their renomination and reappointment, and hence their independence. However, if an international court statute or rules of procedure requires the revelation of the judges participating in a given ruling *and their votes on that ruling* (as in the 1950 ECHR), the calculus for the judges changes: in effect, judges have already been “outed” as having voted in favor of, or in opposition to, their national government’s position. Under those circumstances, judges may have a rational incentive to write a separate concurring or dissenting opinion, explaining the *reasons* for their vote: in the case of a vote against their home state, they can at least explain the reasons for their vote to the government that controls their renomination, while in the case of a vote for their home state, they can explain their reasons to their fellow judges and to the broader “interpretive community,” in order to avoid charges of partisanship or bias. In either case, we would predict that judges of courts with mandatory open voting will accompany dissenting votes with separate opinions, even where (as in Article 51 of the original ECHR) the court’s governing statute allows a “bare statement of dissent.” If this hypothesis is correct, it suggests that the fundamentally important design choice for both states and judges is whether to require the publication of judicial *votes*, rather than separate *opinions*: once the Rubicon of open voting has been crossed, judges who might otherwise have kept their concerns private have a rational incentive to write separately to justify their votes to their home states and to the invisible college of international lawyers.

A third set of hypotheses arises from the American literature, and in particular from Epstein et al.’s empirical analysis of dissent among US appellate court judges. Specifically, Epstein et al. find evidence that individual judges’ choices to dissent are a function of several variables, including (a) caseload, (b) ideological diversity, and (c) circuit size.<sup>45</sup> Generalizing from their analysis, we can hypothesize about the effects of these variables on the likelihood or frequency of dissent in international courts and tribunals. With respect to the first, we might suggest that (a) judges are more likely to embrace dissenting and concurring opinions where their caseloads are relatively small (on the assumption that a large caseload increases the opportunity cost of producing multiple opinions), which would predict greater dissent in courts, such as the

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<sup>45</sup> Epstein et al., *supra* note x.



ICJ, ITLOS, and the WTO Appellate Body, with light case loads, and fewer instances of dissent in the European courts with their much higher case-loads. With respect to the second variable of ideological diversity, this hypothesis might translate into the prediction (b) that, *ceteris paribus*, global courts, and possibly courts of general jurisdiction, such as the ICJ, are more likely to engage in dissents, reflecting the multiple and diverse legal traditions and interests of its members, while regional or other courts with limited membership (e.g., ECJ, ECtHR) and/or specialized, issue-specific courts (e.g., the early GATT, ITLOS) are likely to have less ideological diversity and hence less need for dissent. Third, following from the logic of the Epstein et al. argument, which hypothesizes greater collegiality costs of dissent in smaller circuits, we might predict higher rates of dissent in courts with larger numbers of judges, and/or in courts that rule en banc rather than in chambers. In this case, the collegiality costs of dissent would be lower, and the frequency of dissent higher, in larger chambers, all else being equal. Note that this hypotheses predicts variation both across courts, as a function of total size, and within courts, as a function of the size of chambers.

Fourth and finally, we can again draw on a sociological institutionalist hypothesis, in both its international and domestic variants. The international variant suggests that international judges, when designing both formal rules of court and informal norms about dissent, may draw on legitimate templates from existing courts, such as the PCIJ and the ICJ, and here again we can look for both judicial decisions to follow such templates, as well as deliberate decisions to depart from them. The domestic variant, finally, variations in the first-order dissent decisions of individual judges, as a function of those judges' domestic legal tradition, with common law judges likely to embrace the use of dissent, and civil law judges spurning dissent in favor of court unity and *per curiam* decisions.<sup>46</sup>

## **B. The Consequences of Dissent**

We shall return to these various hypotheses about judicial choices about dissent below, but first we offer a few, very tentative hypotheses about the potential *consequences* of dissent for other variables of interest to students of international courts. Put differently, our focus here is on dissent as an *independent* variable, and we are able to mine the domestic literature on the

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<sup>46</sup> For a comparison of dissent rates by judges from common law systems with dissent rates by judges from civil law systems at the PCIJ, see table x.

purported advantages and disadvantages of dissent for hypotheses about its effects. Briefly, we might hypothesize that the use, non-use, or relative frequency of judicial dissent in international courts might produce impacts on the following variables.

**1. Judicial collegiality.** One common concern about and purported disadvantage of dissent is that the publication of dissenting opinions, which inherently question and often undermine the decision of the majority in a given case, constitutes a blow to collegiality among the judges. As Justice Brandeis – celebrated for his dissents in *Olmstead* and other cases – once observed, “there is a limit to the frequency with which you can [dissent], without exasperating men.”<sup>47</sup> If these claims are correct, we should expect that, *ceteris paribus*, collegiality among judges to be higher in courts, like the ECJ, the EFTA Court, and to a lesser extent the WTO, where judicial decisions are issued *per curiam* with infrequent, anonymous dissents, and lower among the majority of courts that allow and practice dissent regularly.

**2. Nature and quality of jurisprudence.** As we have seen, it is a widespread belief in the American literature that the adoption and publication of dissenting and concurring opinions is likely to improve the quality of a court’s jurisprudence. Not only does the dissenting or concurring minority introduce new legal arguments that might in the fullness of time be accepted by future majorities, but even within a single case the presence of a dissenter has been shown to “ride herd” on the majority, whose decision may be longer and more nuanced as a result of being forced to engage with the publicly expressed arguments of the minority.<sup>48</sup> As Justice Ginsburg has noted, “My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial [opinion.]”<sup>49</sup> By contrast, it is often argued that civil law courts, by virtue of their practice of adopting a single, *per curiam* decision, tend to produce judicial decisions that paper over substantial differences among the judges, resulting in rulings that are more terse, less clearly or

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<sup>47</sup> MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 579 (2009). See also Collins J. Seitz, *Collegiality and the Court of Appeals: What Is Important to the Court as an Institution is the Quality of the Working Relationship among Its Members*, 75 JUDICATURE 26 (1991) (article by former Chief Judge of Third Circuit Court of Appeals).

<sup>48</sup> Brennan xx on riding herd. Epstein et al. on longer majority decisions in cases featuring public dissent.

<sup>49</sup> Ruth Bader Ginsburg, *Dissent is an ‘Appeal’ for the Future*, ALASKA B. RAG, Apr.-June 2008, at 1, 6.

richly argued, and hence less clear and helpful to the parties to present and future disputes. If this is the case, then international courts that practice dissent should, *ceteris paribus*, feature longer and more detailed majority opinions than international courts without dissent; and, for any given court, cases marked by one or more concurring or dissenting opinions may be longer and more carefully argued than cases adopted unanimously.<sup>50</sup>

**3. Judicial legitimacy:** Chief Justice Marshall, in common with the founders of the European Court of Justice, believed fervently that the social legitimacy of a court among the political branches as well as among public opinion is likely to be strongly influenced by the presence or absence of judicial dissent.<sup>51</sup> Many argue that the landmark Supreme Court opinions that helped define the US constitutional order, such as *Marbury* and *McCulloch*, are all the more powerful because they came from a united Court, and Chief Justice Warren's efforts in fashioning a unanimous opinion in *Brown*, on the theory that anything less than unanimity would undermine the moral force of the decision, particularly in segregated areas of the country, are well known and widely celebrated.<sup>52</sup> Are international courts and their rulings seen to be more legitimate when they offer a unanimous, *per curiam* opinion, or when they offer an opinion of the court with dissents demonstrating a full and deliberative consideration of all the arguments?

**4. Judicial independence.** In the literature on US domestic courts, open voting and public dissent is often seen as increasing judicial accountability without, however, endangering judicial independence, which is protected by judges' life tenure. In other systems with renewable appointments or even elections (as in some US states), however, recorded votes and dissents may pose a fundamental threat to judicial independence, leading judges to rule in favor of the preferences of their political masters in the hopes of securing reappointment and reelection. If this analysis is correct, then the use of dissent by international judges

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<sup>50</sup> See, e.g., Epstein, *supra* note x, at 120 (statistical analysis showing that "a Supreme Court majority opinion tends to be longer if there is one dissenting opinion and even longer if there is more than one")

<sup>51</sup> See, e.g., Donald G. Morgan, *The Origin of Supreme Court Dissent*, 10 WM & MARY Q. 353 (1953).

<sup>52</sup> See, e.g., Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 23 J. SUPREME CT. HIST. 112 (1998). Chief Justice William Howard Taft, as well, devoted substantial efforts to securing unanimous opinions during his time on the Court. See, e.g., Sandra Day O'Connor, *William Howard Taft and the Importance of Unanimity*, 28 J. SUP. CT. HIST. 157 (2003).

should serve in practice to reduce the independence of those judges, at least in the majority of international courts whose judges are subject to reappointment; relatively short terms should magnify this effect.<sup>53</sup>

We have laid out a series of hypotheses here about the consequences of dissent, and in the previous sections about the causes of dissent both with respect to member-state treaty and statute provisions as well as judicial rules, norms, and behavior. Most of these hypotheses are tentative, and none have yet been operationalized for empirical testing. In the next section, we take an equally tentative step in that direction, by collecting some descriptive statistics for a small number of important courts, and by probing more deeply into a single international legal system, that of the GATT/WTO.

### **III. From Theory to Empirics: A First Look at Dissent Practices in International Courts**

To test and further refine the hypotheses set out above, we have begun to undertake a detailed analysis of dissent practices at six of the most prominent and important international courts: the Permanent Court of International Justice (PCIJ); the International Court of Justice (ICJ); the European Court of Justice (ECJ); the European Court of Human Rights (ECtHR); the (first level) panels and Appellate Body (AB) of the World Trade Organization (WTO); and the International Tribunal of the Law of the Sea (ITLOS). This constellation of tribunals provides a rich cross-section of the international judiciary, including two global courts with general jurisdiction (PCIJ and ICJ) that operated during different time frames; two global courts with specialized jurisdiction (ITLOS and WTO) that were created roughly contemporaneously but that have very different caseloads, number of judges, and dissent practices; and two regional courts that were created roughly contemporaneously, one with general jurisdiction (ECJ) and one with specialized jurisdiction (ECtHR), and with very different dissent practices. [Possibility of adding ICC, as a global court with specialized jurisdiction in a very different area, international criminal law, and with a jurisdiction over cases with a different party structure, namely, individuals as defendants. Possibility of adding Andean Court of Justice, as a regional court

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<sup>53</sup> Perhaps for this reason, we have seen that both domestic and international political principals concerned about judicial independence of their courts (e.g. the German Constitutional Court and the ECtHR, respectively) have moved from relatively short renewable terms to longer, non-renewable terms, or allowed dissent on the condition that such dissents be issued anonymously (e.g., the WTO).

outside of Europe and a nice comparison to ECJ. Ultimately, our hope is to collect summary data on dissent rules and practices for the entire universe of active international courts and tribunals.]

For those not familiar with these tribunals, a thumbnail description might be useful.

The **Permanent Court of International Justice** was created as part of the institutional framework that arose in the aftermath of World War I. At its second session early in 1920, the Council of the League of Nations appointed an Advisory Committee of Jurists to submit a report on the establishment of the PCIJ. In December 1920, after extensive study and debate, the Assembly unanimously adopted the Statute of the PCIJ. Although there was a close association between the Court and the League, which found expression *inter alia* in the fact that the League Council and Assembly periodically elected the Members of the Court and that both Council and Assembly were entitled to seek advisory opinions from the Court, as a formal matter the Court never formed an integral part of the League, just as the Statute never formed part of the Covenant.

The PCIJ was the first permanent international court with general jurisdiction. Its inaugural sitting was in 1922, and between that date and 1940 it considered 29 contentious cases between States and delivered 27 advisory opinions. However, the outbreak of World War II inevitably had a significant impact on the Court. After its last public sitting in December 1939, the Court conducted no further judicial business. It met for the last time in October 1945, when it was decided to take all appropriate measures to ensure the transfer of its archives and effects to the new International Court of Justice, discussed below. The PCIJ judges all resigned in January 1946, and in April 1946 the Court was formally dissolved.

As states began to consider the shape of the post-World War II order, the U.S. and the UK declared themselves in favor of the establishment or re-establishment of an international court after the war's conclusion. The Dumbarton Oaks proposals calling for creation of a new organization contemplated a new international court of justice, and a draft Statute for the future Court was submitted to the San Francisco Conference which drew up the UN Charter. The Charter provided that a new **International Court of Justice** would serve as the principal judicial organ of the United Nations, with a Statute creating the Court to be annexed to and forming part of the Charter. The ICJ Statute is based upon the PCIJ Statute, and incorporates many articles verbatim. In February 1946, at the first session of the United Nations General Assembly and Security Council, the first judges of the ICJ were elected.

The Court exercises two primary forms of jurisdiction: it hears legal disputes submitted to it by States (contentious cases) and it is authorized to issue advisory opinions (advisory proceedings) on legal questions referred to it by duly authorized UN organs and specialized agencies. The first case was submitted to the Court in May 1947. As of October 12, 2012, some 152 disputes had been submitted to the Court.

The **European Court of Justice** (now, formally called the Court of Justice of the European Union) is the judicial organ of the European Union.<sup>54</sup> Its primary task is to examine the legality of European Union measures and to ensure the uniform interpretation and application of EU law. The Court consists of 28 Judges, or one from each EU Member State. It is assisted by nine Advocates General, who are tasked with presenting the Court an impartial and independent “opinion” in the cases assigned to them.

The Court has jurisdiction over several types of proceedings. First, domestic courts in EU Member states may, and sometimes must, refer cases to the ECJ and seek clarification of EU law (references for preliminary rulings). In addition, the Commission or any member state may bring an action to determine whether a Member State is fulfilling its obligations under EU law. In addition, applicants can seek the annulment of a measure adopted by an EU body, or the lawfulness of the failure of an EU body to act. Since 1952, the ECJ has issued approximately 16,600 judgments and orders.

The **European Court of Human Rights** hears cases alleging violations of the European Convention on Human Rights, a treaty whereby the (now) 47 member States of the Council of Europe are obliged to uphold fundamental civil and political rights of individuals under their jurisdiction. Complaints may be filed by individuals or by member States; in addition the Court is authorized to issue advisory opinions.

New accessions following the end of the Cold War and a wider appreciation of the Court’s role prompted a dramatic increase in Court’s workload. As a result, in May 2004 the Council of Europe Committee of Ministers adopted Protocol no. 14 to the European Convention. Its aim was to improve the Court’s efficiency, in part by strengthening the Court’s ability to quickly dispose of applications that are clearly inadmissible. The Protocol also amended the rules governing judicial terms. In place of six-year, renewable terms, the protocol provides for

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<sup>54</sup> As a formal matter, it is the judicial institution of the EU and the European Atomic Energy Community, and is made up of three courts: the Court of Justice, the General Court, and the Civil Service Tribunal. For current purposes, our focus is on the Court of Justice.

one nonrenewable term of nine years. Since its establishment in 1959, the Court has issued more than 15,000 judgments.

The international trade regime started as the General Agreement on Tariffs and Trade (GATT), which was intended to be a temporary body and therefore had only the most rudimentary dispute settlement provisions. Over time a practice of using “panels” of trade experts who issued reports on the facts and law relevant to disputes emerged. On January 1, 1995, the GATT was replaced by the **World Trade Organization**. Disputes between WTO members are considered, in the first instance, by “panels” that are similar to GATT panels. The WTO also has a standing **Appellate Body**, which is limited to consideration of points of law. Jurisdiction is limited to disputes where one WTO member alleges that another member has violated WTO law. Neither panels nor the AB has jurisdiction over claims of private parties, or over claims that a WTO body or institution has failed to follow WTO law. The WTO dispute system has been widely utilized; as of October 12, 2012, parties had brought some 450 disputes to WTO dispute settlement.

The **International Tribunal for the Law of the Sea** was established by the UN Convention on the Law of the Sea. It has jurisdiction over disputes arising out of the interpretation and application of the Convention, as well as over other matters specifically provided for in any other agreement which confers jurisdiction upon the tribunal. It is open to states that are party to the Convention and, in some circumstances, to states not party to the Convention and private parties. It also has jurisdiction to issue advisory opinions. The Tribunal’s first judges were sworn in on October 18, 1996 and the first case was submitted in November 1997. As of October 12, 2012, nineteen cases have been submitted to the Tribunal.

A synoptic overview of treaty provisions governing dissent and related issues such as judicial appointment and terms of office, as well as judicial rules governing dissent, for these key courts can be found in table 1, below:

**TABLE 1: SELECTED DESIGN ELEMENTS OF INTERNATIONAL TRIBUNALS**

	<b>PCIJ</b>	<b>ICJ</b>	<b>ECJ</b>	<b>ECtHR</b>	<b>WTO</b>	<b>ITLOS</b>	<b>ICC</b>
<b>Year Created:</b>	<b>1922</b>	<b>1945</b>	<b>1952</b>	<b>1959</b>	<b>1994</b>	<b>1996</b>	<b>2002</b>
Does Treaty or Statute creating the Court address form of opinion and judgment (voting, dissent, etc)?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Does Treaty/Statute require or permit publication of votes?	Yes	Yes	Not addressed.	Not addressed	Yes	Not addressed	Yes
If yes, are votes anonymous?	Not Addressed	Not Addressed		Not addressed	Anonymous	Not addressed	Not addressed
Does the Treaty/Statute permit separate opinions?	Yes	Yes	Not addressed	Yes	Yes	Yes	Yes
If yes, are dissents anonymous?	Not addressed	Not addressed	Not addressed	Not addressed	Anonymous	Not addressed	Not addressed
Has Court promulgated rules on form of opinion or judgment?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
If so, what rules?	Judgments and Advisory opinions "shall contain" "the number of judges constituting the majority"  Judges may issue separate (dissenting or concurring) opinions	Judgments and advisory opinions "shall contain" "number and names of judges constituting the majority"  Judges may issue separate opinions	Judgment shall list names of judges taking part. No mention of listing names of judges in majority.  No mention of separate opinions.	Judgments and advisory opinions "shall contain" "the number of judges constituting the majority"  Judges may issue separate opinions.	Article 3(2): AB " to make every effort to take their decisions by consensus," when not possible, majority vote prevails.	Judgments shall record "the number and names of the judges constituting the majority and those constituting the minority, on each operative provision"  Judges may issue separate opinions.	Incorporate by reference art 84 of treaty
How are judges selected?	Election by majority of League of Nations Assembly and Council	Election by United Nations General Assembly and Security Council	Appointed by common accord of the governments of the Member States..."	Elected by the Parliamentary Assembly	Director-General names panelists, with input from parties; AB members elected by WTO membership	election by secret ballot by State Parties	"election by secret ballot at a meeting of the Assembly of States Parties convened for that purpose"; need a 2/3 majority for election
How long are judicial terms?	9 years	9 years	6 years	9 years	4 years [AB] Ad hoc [panels]	9 years	9 years
Are terms renewable?	Yes. No limit on terms	Yes. No limit on terms	Yes. No limit on terms	No	AB: Yes. Limit of two terms.	Yes. No limit on terms	No



Treaty Provide for Judicial Independence?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Are disputants entitled to a national judge?	Yes	Yes	No	Yes	No	Yes	No
Is jurisdiction compulsory?	No	No	Yes	Initially, no. Since Protocol 11 (1998), yes.	Yes	No	Yes

These data are obviously too few and too preliminary to constitute a clear test of any of our hypotheses, but some patterns emerge even from this small survey, with at least preliminary implications for the hypotheses about the causes (but not the consequences) of dissent spelled out above.

#### **A. State Design of Dissent Rules in International Court Charters and Statutes**

The design of international courts' charters and statutes demonstrates both common features and striking variation. For example, all of the treaties creating these tribunals address the form of judicial opinions and/or judgments. Several of the treaties and statutes provide explicitly for the publication of the names of the judges in the minority (and hence also in the majority), and none explicitly forbids it. With just one exception – the ECJ – each of the treaties explicitly allows for the publication of judges' separate concurring or dissenting opinions. With one exception – the WTO – the treaties do not specify whether dissents are signed or anonymous. Clearly, therefore, among the leading international tribunals, member states have generally, with the notable exception of the ECJ, designed courts that allow for public dissenting votes and separate (concurring or dissenting) opinions.

This pattern seems to argue against our **functionalist hypothesis**, since courts with a wide variety of functions, geographic ranges, and subject matter jurisdictions are allowed by statute to engage in dissent, while the ECJ's functions alone do not seem so unique as to explain its outlier status as a court that does not allow dissent.

**Sociological institutionalist hypotheses**, by contrast, receive some *prima facie* support. The **international variant** is partially supported, insofar as the rules on separate opinions for several of the courts (ECtHR, ITLOS) closely follow the PCIJ/ICJ model, although both the ECJ and the WTO depart from this model by failing to mention dissent (ECJ) or allowing only anonymous dissents (WTO). The domestic variant, best exemplified by Ginsburg's legal-traditions hypothesis, also receives some *prima facie* support, in that the ECJ is the only one of the courts surveyed whose initial members were entirely composed of civil law systems, and suppressed dissent, while the other courts, which allow and to some extent practice dissent, are mixed civil and common law systems. However, we are reluctant to attribute such variation as we observe to legal traditions

without further empirical analysis of the individual courts and the negotiations of their charters and statutes. Furthermore, neither theory seems able to explain a peculiar feature of the WTO, namely the requirement – at odds with practices at the PCIJ, ICJ, ECHR, and ITLOS – that all separate opinions be issued anonymously, a practice that breaks with both common-law tradition and the design of previous international courts.

## **B. Judicial Rules, Norms and Practices**

Looking beyond state-mandated treaties and statutes to judicially established rules and norms about dissent, we see that in each case judges on all of the various courts have on their own authority supplemented the often terse treaty text about dissent with rules on the form of opinions or judgments. On several courts, the judges have supplemented treaty text by providing, for example, that opinions identify the number, and sometimes the names, of the judges in the majority. By necessary implication, these opinions will also identify the judges in the minority. In most cases, the judge-made rules of court echo the state-drafted charters for each court, with four courts (PCIJ, ICJ, ITLOS, and ECtHR) providing explicitly for the publication of separate opinions), while one court's (the ECJ's) rules of procedure echo the silence of the silence of its statute, while informal norms clearly suppress any public dissent. The WTO's Appellate Body is exceptional in that, while the court's governing Dispute Settlement Understanding explicitly anticipates the possibility of (anonymous) dissent, the judges themselves have promulgated a rule and informal norms that explicitly disfavor dissent.

Moving from judge-made rules and norms to the broad patterns of judicial behavior, the actual frequency of dissent across these tribunals varies enormously. Virtually all of the decisions issued by the PCIJ, ICJ and ITLOS have been accompanied by at least one – and frequently many – separate opinions. Somewhere between 60 and 80% of ECtHR judgments have been accompanied by one or more separate opinions. However, dissents are much less common in trade disputes: less than 10% of GATT, WTO panel and WTO AB reports have been accompanied by one or more separate opinions. The ECJ – alone among the leading international tribunals examined here – has never issued an opinion with a dissent. By and large, therefore, judges' practice of dissent on the various

international courts corresponds fairly well to the formal and informal norms of dissent adopted by the judges and (with the exception of the WTO AB) the member states.

Here again, the initial pattern of judicial rules, norms, and behavior poses some initial support, but also significant puzzles, for our hypotheses.

First, while the ECJ and WTO Appellate Body cases appear to support the **life-cycle hypothesis** that judges on young courts adopt internal rules and norms aimed at suppressing dissent in pursuit of social legitimacy, it is clear that the first cohorts of judges on PCIJ, ICJ, ECHR and ITLOS adopted no such rules during those courts' founding years. Whether those courts sought to limit the number and frequency of actual dissents in the early years as a matter of practice is as yet unclear, although available data do suggest that PCIJ judges did indeed issue fewer dissents early in the history of the court, only to move toward writing more frequent dissents in later years; we have yet to determine whether this pattern is replicated in other international courts. Again with respect to the life-cycle hypothesis, we find some evidence that the informal norm against dissent in the WTO AB weakened following its first decade, yet it remains robust in the ECJ more than six decades on.

The **judicial appointments hypothesis** receives little or no *prima facie* support from these cases. Treaties creating courts exhibit substantial diversity on the related issues of judicial appointment and reappointment. The PCIJ, ICJ and ITLOS all elect judges for nine-year, renewable terms, making the reappointment process a potentially significant check on judicial behavior. Other courts have shorter, renewable terms, suggesting still greater curbs on judicial independence. ECJ judges, for example, are elected for renewable, six-year terms, and WTO AB members are elected for four-year terms, renewable once. Prior to 2010, ECtHR judges were elected to six-year, renewable terms, but since then they instead serve nine-year, nonrenewable terms. The stated reason for the change was “to increase [judicial] independence and impartiality.”<sup>55</sup> This shift in the ECtHR tends to support our view about the potential tensions between renewable terms, judicial dissent, and judicial independence, as do the efforts of ECJ and WTO AB judges to suppress dissent in light of their relatively short, renewable terms.

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<sup>55</sup> Council of Europe, Factsheet – Protocol 14: The reform of the European Court of Human Rights, available at <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>

By contrast with these courts, however, judges on the ICJ and ITLOS have adopted rules that explicitly identify the judges that did, and did not, not join in the majority's resolution of the dispute. The data suggest that this rule provides a powerful incentive to these judges to issue public dissents, as nearly 100% of the cases decided by these courts include one or more separate opinions.<sup>56</sup> We conjecture that once a judge is publicly identified as not joining a majority, a written dissent serves as a pre-emptive strike against charges that a judge's vote was motivated by politics, rather than law. In this context, dissents serve, in the words of the distinguished ICJ Judge Sir Hersch Lauterpacht, to preclude "any charge of reliance on mere alignment of voting," and act "as a safeguard of the individual responsibility of the judges as well as of the integrity of the Court as an institution."<sup>57</sup> If supported by subsequent research into the history of the PCIJ, ICJ and other courts, this insight might help to explain why judges of these courts, whose dissenting *votes* are regularly made public, might believe sincerely what ECJ judges (whose dissenting votes are kept secret) reject, namely that dissenting *opinions* can serve as a sign and a safeguard of judicial independence. It also suggests that, as a matter of design, one highly significant decision is to require the publication of dissenting *votes*; once that Rubicon is crossed, judges in a minority have a strong incentive to issue dissenting opinions explaining their reasoning and thereby rebuffing those who might attribute that vote to national or other types of bias. In this sense, a critical design feature of the WTO may be the treaty-based requirement that all votes, including dissents, be issued anonymously, so that judges do not have the same individual incentive to offer dissenting opinions to explain the reasons behind their votes.

In any event, the extremely high dissent rates at the PCIJ, ICJ, ITLOS, and the pre-Protocol 14 ECtHR, notwithstanding renewable judicial terms, suggests in turn either that our judicial trilemma incompletely captures the tensions between renewable terms, dissents, and judicial independence, that there are alternative ways of protecting judicial independence, or that these courts have embraced dissent at a long-term cost to their own

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<sup>56</sup> In ITLOS, every judgment to date contains multiple separate opinions. See Appendix, table x. (Check to see if every dissenting judge has issued an opinion in every case). Calculate percentage of dissenting judges who issue opinions in ICJ cases.

<sup>57</sup> SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 68-69 (1958).

independence and legitimacy. Alternatively, it may be that judges on these courts are behaving rationally from an individual perspective, explaining and justifying their public votes, while the collective, initial decision of the courts to publicize votes (and hence encourage dissenting opinions) represents a key, if widely underappreciated, strategic choice, with large implications for the collegiality, independence and legitimacy of the courts in question. Exploring these compelling questions is high on our agenda as we undertake our qualitative empirical analysis of these courts.

Third, the trio of hypotheses derived from Epstein et al. receive at best support at this stage, although we would and will need more data on the behavior of individual judges to test them systematically. As we have seen, Epstein et al. predict that dissent should vary directly with ideological diversity, size of court/chamber, inversely with case-load.

The **ideological diversity** hypothesis – namely that the more diverse a court, the more likely its judges are to dissent – receives mixed support. The ECJ arguably has the least diverse membership, and rejects dissent, while the global PCIJ, ICJ and ITLOS are all extremely diverse in terms of membership, and all engage in dissent. These contrasts would seem to support the ideological diversity argument. Yet the ECtHR, which through most of its life had an overlapping membership with the ECJ, engages in regular dissent, while the WTO has managed to repress public dissent to an impressive extent despite its diverse global membership.<sup>58</sup> A potential future test of the ideological diversity hypothesis might be to examine rates of dissent at the ECtHR and the WTO before and after their dramatic enlargements in the 1990s, although in both cases the impact of enlargement (and hence increasing ideological diversity among the judges) may be impossible to isolate from contemporaneous changes to judicial rules as well as case-loads.

With respect to **circuit size**, the prediction is that judges in larger courts or chambers will dissent with greater frequency than judges in smaller courts or chambers. There is significant variation in the number of judges on the courts in our sample. At one end of the spectrum, the ECtHR consists of 47 judges, one for each state party to the

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<sup>58</sup> With respect to the WTO, however, there is reason to believe that ideological diversity may be relatively low despite its global coverage, insofar as the WTO (and the GATT before it) is not a universal membership organization or a court of general jurisdiction like the ICJ, but a body of states that have accepted the core free-trade principles of the organization. Furthermore, the dominance of trade specialists within WTO panels and, increasingly, the AB may also promote ideological homogeneity, and make unanimous agreement easier to achieve than in courts with a broader mandate.

European Convention. However, cases are heard either by a single judge; by a three judge Committee; by a seven-judge Chamber, and, exceptionally, by a Grand Chamber of 17 judges. The ECJ was made up of only 6 judges at the time of its founding, although since then it has grown to 27 judges, one from each EU member State. Cases are usually heard before chambers of three to five judges, with full plenary sessions being held on rare occasions. ITLOS consists of 21 judges, and the ICJ consists of 15 judges. Judges on both of these courts typically hear cases *en banc*. The WTO AB consists of seven members. There is thus an apparent, if weak, support for the hypothesized correlation between court size and dissent, with the six- and seven-member (early) ECJ and AB seeking to limit dissent, while the larger PCIJ, ICJ, ITLOS and ECtHR all embrace dissent.

The **case-load hypothesis** receives little support: while the PCIJ, ICJ and ITLOS, with their small case-loads, do practice frequent dissent, so do the judges of the ECtHR, even in the face of large and growing case-loads. It is, of course, possible that larger case-loads may increase the costs and hence decrease the frequency of dissent – which would predict in particular a declining frequency of dissent at the ECtHR over time as a function of its exploding case-load – but the initial evidence provides at best weak support for the case-load argument.

Fourth and finally, the pattern of outcomes also poses a puzzle for our **sociological institutionalism hypotheses**. With respect to the **international variant**, we do find judges in a number of cases adopting rules of procedure that appear to draw on previous (especially PCIJ/ICJ) templates, suggesting some normative or mimetic isomorphism. Yet we also find important variations, with the ECJ and the WTO departing dramatically from those precedents and adopting rules and norms that disfavor dissent. Nor can **domestic legal tradition** be used to explain judicial behavior with respect to dissent: while it is true that the mixed-tradition PCIJ, ICJ, ITLOS and ECHR judges all adopted rules of procedure explicitly allowing separate dissenting and concurring opinions, while the civil law ECJ judges of the 1950s disfavored dissent, it is also the case that the mixed WTO AB members followed the ECJ by attempting to suppress dissent. Within courts, moreover, even the preliminary data available to us from the PCIJ, ICY and ECtHR suggest that judges from civil-law countries do not eschew dissent, but have engaged in separate

concurring and dissenting opinions at rates that are broadly comparable to their common law counterparts.

Clearly, the broad-brush comparisons we have made here, across a very small sample of courts, are at best suggestive with respect to our various hypotheses about the causes of judicial dissent. Furthermore, they tell us little or nothing about the consequences of dissent for judicial collegiality, independence or legitimacy or for the quality of law. For this reason, we propose to undertake detailed case-study analyses of the history, the practice, and the consequences of dissent in each of these courts.

## **Conclusions**

In this paper, we have attempted to sketch out and begin to apply a tentative framework for understanding the causes and consequences of international judicial dissent. In terms of the causes, we have hypothesized that the use or non-use of dissent is a function both of the design of court statutes by states, and of the strategic decisions of judges on those courts. In terms of consequences, we have suggested that the use or non-use of dissent may, *ceteris paribus*, have implications for the judicial collegiality, independence, legitimacy, and the quality and development of law. All of these hypotheses are in need of further development, and our empirical survey of some basic data for six courts, together with a preliminary case study of a single case, the GATT/WTO, constitute at best a plausibility probe, rather than a definitive test, of those hypotheses. In lieu of a statement of our findings, therefore, we conclude with a brief discussion of the place and the potential contribution of our project to the broader and increasingly interdisciplinary study of international courts and tribunals. We offer just two points.

First, to the extent that our primary aim is to explain the diversity in international courts' practice of dissent, the current paper joins a large IR literature that explores the design features of various international institutions, including courts. These writings, particularly the rational design approach, have illuminated a number of important issues, including the motivations that prompt states to create international tribunals in the first place, as well as specific elements in the choice and design of particular tribunals. However, to our knowledge, ours is the first study in either the IR or the legal literature to focus upon *dissent* as a deliberate element in the institutional design of international



tribunals, and in that sense our approach here might be seen as an extension of the rational design approach.<sup>59</sup> However, our findings also problematize a critical, if underexplored, assumption of the rational design school. Specifically, both the legal and IR literature on the design and functioning of international tribunals typically focuses on *states* as the relevant decision-makers, and in particular on the decisions states make when they draft and adopt legal instruments creating new international courts. State decisions are of course critical to decisions about judicial dissent, enjoying a first-mover advantage and limiting judicial choices through provisions of international treaties and statutes, but our study highlights the underappreciated role played by another set of actors – the judges themselves. Judges at virtually all the major international tribunals have used their discretion to issue formal rules and informal norms that supplement the often terse language of treaty text. In some instances, such as at the WTO, judges have crafted internal rules that explicitly disfavor the publication of dissents, even when the relevant treaty language contains no such bias. Thus, our findings suggest that it is necessary to move beyond a focus upon states and the treaty texts they negotiate. As we have seen, states are important, but not the only (or even the primary) actors that drive the rules, norms, and practice of international judicial dissent. Instead, the frequency and form of judicial dissents is better understood as the outcome of a strategic interaction between states and the judiciary, as well as within any particular judicial body, than as inevitably following from decisions states reach when creating a tribunal.

Second, and more broadly, our approach to the question of international judicial dissent speaks clearly to a recent – and in our view salutary – breaking down of conceptual and methodological walls between international law and politics on the one hand, and domestic or comparative law and politics on the other. Like Staton and Moore, we believe that a strict divide between the international and the domestic disserves scholars on both sides of this line,<sup>60</sup> particularly with respect to the study of judicial politics where many of the fundamental questions about the workings of courts and their interactions with

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<sup>59</sup> Furthermore, our analysis complements rational design theory by considering the interrelationships and trade-offs among various design choices, including rules on dissent and rules on international judicial appointments.

<sup>60</sup> Jeffrey K. Staton and Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 INT'L ORG. 553(2011).

powerful interlocutors transcend the domestic/international boundary. In our case, we seek to explain the phenomenon of *international* judicial dissent, yet we have found that even the most promising institutionalist and liberal IR theories are underspecified and generate no clear testable hypotheses about the causes or consequences of dissent, while international legal studies have focused relatively narrowly on normative and doctrinal issues and avoided providing any explanation for variations in dissent across international courts. By contrast, scholars of American and comparative law and judicial politics have studied the causes and consequences of judicial dissent for decades, producing a wealth of testable hypotheses. To be sure, these domestic frameworks cannot simply be pulled off the shelf and applied uncritically to international courts and judges, and we have emphasized in particular the blindness of the American literature to factors that might be expected to matter a great deal in the international context. Nevertheless, it is clear that the many of the core hypotheses about domestic judicial dissent can indeed travel to the international level with relatively minor modifications, and therefore constitute our most promising starting point for studying a question about which the IL and IR literature have been almost entirely silent.