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THE MYSTERIOUS PERSISTENCE OF NON-CONSENSUAL NORMS ON THE U.S. SUPREME COURT

Aaron J. Ley, PhD,* Kathleen Searles, PhD,**
and Cornell W. Clayton ***

I. INTRODUCTION

In the popular imagination, the Supreme Court of the United States is often pictured as a “[m]arble [t]emple.”¹ The building’s neo-classical façade, sitting atop an imposing stairway of forty-four steps looking down on the Capitol building and Pennsylvania Avenue is intended to give the illusion of a solemn institution that sits above the fray of political life and the ordinary mortals who work within it.² But the Court is not a building.³ Nor is it a collection of nine black-robed judges.⁴ Rather, the Supreme Court is a collection of rules, norms, and ideas.⁵ Some of these are very complicated, such as the idea of judicial review or judicial impartiality.⁶ Some are more straightforward, such as the norm requiring secrecy about the Court’s deliberations, the principle of “majority rule [when] deciding cases,” or the idea of respecting seniority during conference discussions.⁷ Very few of these normative structures are formalized in laws or statutes.⁸ Most are simply customary habits of thought or traditions which, by their very nature, are al-

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1. David M. O’Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 91, 103 (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter O’Brien, *Institutional Norms*].

2. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 1* (2007).

3. See Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 65 (Cornell W. Clayton & Howard Gillman eds., 1999).

4. See *id.*

5. See *id.*

6. O’Brien, *Institutional Norms*, *supra* note 1, at 91.

7. *Id.*; see also Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 876 (1998).

8. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 71 (1996); and Caldeira & Zorn, *supra* note 7, at 876.

terable without any formal process that would mark a clear break from past practices.⁹

One important norm that has puzzled scholars over the years involves opinion-writing on the Court.¹⁰ Past empirical research demonstrates that norms governing consensus in opinion-writing on the Court have undergone important changes,¹¹ changes that are apparent in *National Federal of Independent Business v. Sebelius*,¹² the landmark decision which produced four total opinions reflecting severe disagreement among the Justices.¹³ According to the now familiar story, throughout the nineteenth century and up until the 1940s, the Court was able to decide roughly 80% to 90% of its cases by unanimous opinion.¹⁴ Since the 1940s, fewer than one-half, and in recent decades only about one-third of its decisions have been unanimous.¹⁵ This collapse in unanimity has been accompanied by a dramatic surge in separate opinions (both dissents and concurrences).¹⁶ Indeed, this fracturing of the Court's consensual decisions inspired one of the major political science innovations in the study of the Court—the so-called “attitudinal model” of Supreme Court decision-making.¹⁷ In their seminal article, Walker, Epstein, and Dixon argue that the collapse in consensual opinion-writing norms was the result of changes in leadership on the Court and the role of different Chief Justices.¹⁸ O'Brien, on the other hand, has argued that the collapse in consensual decisions was an artifact of jurisprudential dissensus on the Court, in particular the fissures within legal liberalism brought to the Court by Roosevelt appointees.¹⁹

If factors such as the leadership of Chief Justices or acute jurisprudential fissures explain the decline in consensual decisions, they do not explain why consensual opinion-writing norms have not returned since the 1980s. Since then, strong and influential Chief Justices (i.e., William Rehnquist and John Roberts) have made a return to consensual norms on the Court a priority.²⁰ Moreover, since 1994, the Court has been dominated by

9. *Id.*

10. See O'Brien, *Institutional Norms*, *supra* note 1; and Caldeira & Zorn, *supra* note 7; Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 384-88 (1988); Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 J. POL. 1158 (1992).

11. See, e.g., Caldeira & Zorn, *supra* note 7, at 899-901; Haynie, *supra* note 10, at 1166-68; Walker, Epstein & Dixon, *supra* note 10, at 384-86 (1988).

12. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

13. *Id.* at 2577, 2609, 2642, 2677.

14. O'Brien, *Institutional Norms*, *supra* note 1, at 93.

15. *Id.* at 95.

16. *Id.* at 109.

17. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (discussing the attitudinal model and how that model can be used to explain Supreme Court decision-making).

18. Walker, Epstein & Dixon, *supra* note 10, at 378-84; see also Haynie, *supra* note 10, at 1166 (confirming the conclusions of Walker, Epstein, and Dixon that different leadership on the Court is important to understanding changes in the issuance of consensus opinions). Cf. Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 364 (2001) (the article is not concerned with identifying a cause of the rise in individual opinions, such as changes in leadership, but instead focuses on whether a consensus norm actually existed).

19. O'Brien, *Institutional Norms*, *supra* note 1, at 100-02.

20. See William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 641, 648 (1976); See Cornell W. Clayton & Lucas K. McMillan, *The Roberts Court in an Era of Polarized Politics*, 10 FORUM J. APPLIED RES. CONTEMP. POL. 136 (2013).

GOP appointees who reject the legal liberalism that O'Brien argues accompanied the New Deal-Great Society political regime.²¹ In light of this inconsistency, why have non-consensual norms persisted despite new leadership and the appointment of justices who have rejected the legal liberalism of the Warren Court era?

In this paper, we argue that the persistence of non-consensual opinions is the product of two important factors. The first factor is the existence of fissures within conservative jurisprudence itself. Similar to fissures in legal liberalism, both divisions are the legacy of legal realism and the restructuring of legal thought that ties law more explicitly to political values.²² The neo-formalistic nature of conservative legal thought, especially the "originalism"²³ that explicitly rejects realism, should produce more consensus after the New Right's consolidation on the Court.²⁴ If non-consensual norms persist despite this consolidation, or if conservative appointees concur more often than Democratic appointees, then we are on firm empirical ground that fissures within conservative legal thought may be a factor contributing to the persistence of non-consensual norms. The second factor that influences opinion-writing has institutional foundations. We argue that the shift toward more consensual opinion-writing practices is adversely affected by institutional factors such as the Court's declining caseload, an increase in the number of clerks, and the embracing of computers and new legal research technology. We argue that each of these institutional factors has reduced the "costs" of writing separately and encouraged the persistence of non-consensual opinion-writing norms. Additionally, we find that a number of background characteristics also influence the decision to write separately.

II. SUPREME COURT COLLEGIALLY AND OPINION-WRITING PRACTICES HISTORICALLY

When the Supreme Court decides a case, each Justice has a decision to make: he or she may join the Court's opinion, he or she may dissent without writing or joining a separate opinion, he or she may write or join a separate dissent, or he or she may choose to write or join a separate concurring opinion.²⁵ Writing separately presents a cost: a Justice must expend resources and time that he or she might otherwise devote to activities on or off the Court.²⁶ It also distracts from the Court's institutional role in providing a clear and stable understanding of the law.²⁷ On the other hand, writing separately offers Justices the ability to express themselves as individuals.²⁸ These opinions are an opportunity to persuade other judges or judicial constituencies toward his or her view of the correct

21. O'Brien, *Institutional Norms*, *supra* note 1, at 101-02.

22. See Cornell W. Clayton, *Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 15, 16-17 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing a consequence of the legal realist movement that the law was "intimately connected" to political values).

23. See generally TOOBIN, *supra* note 2, at 15 (defining the term "originalism").

24. See Clayton, *supra* note 22, at 16-17 (explaining the realism movement).

25. O'Brien, *Institutional Norms*, *supra* note 1, at 91.

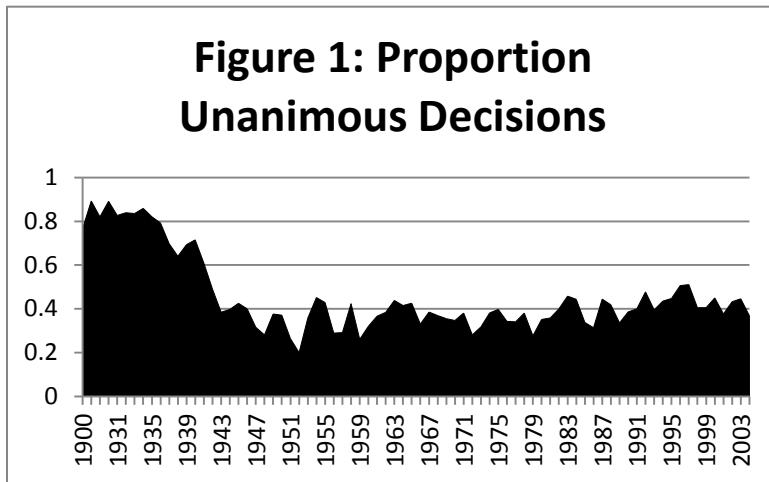
26. See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006) (discussing how it is important for Supreme Court Justices to maintain relationships with a variety of audiences both inside and outside of the Court).

27. See TOOBIN, *supra* note 2, at 45.

28. See O'Brien, *Institutional Norms*, *supra* note 1, at 104-05.

legal policy,²⁹ or to garner personal attention or notoriety for himself or herself.³⁰ In other words, the decision to write separately involves a balancing of institutional goals and interests against the personal costs and benefits of such opinions, and in this sense, that changing balance is at the heart of the Court's consensual opinion-writing practices.³¹

Figure 1 shows the proportion of cases decided each term by unanimous opinion.³² Throughout the nineteenth and early twentieth centuries, the Court decided the vast majority of its cases by unanimous opinion.³³



Roughly 80% to 90% of all its decisions during this period were unanimous.³⁴ This changed in the 1940s, when the consensual norms governing opinion-writing eroded sharply.³⁵ Indeed, by 1942, the proportion of cases decided by unanimous opinion for the first time fell below 50%; and since the 1970s, the Court has reached unanimity in only about one-third of its cases.³⁶ In addition, the number of separate opinions (dissents and concurrences) has grown sharply in recent decades, from less than one separate opinion per case in 1937, to nearly four separate opinions per case by 1985.³⁷

By any measure, this is a dramatic change and a fundamental transformation in the Court as a collegial institution. What explains the “mysterious demise” of the Court's consensual norms? One important factor identified by previous scholarship is changes in

29. Baum, *supra* note 26, at 51.

30. Gregory A. Caldeira, *In the Mirror of the Justices: Sources of Greatness on the Supreme Court*, 10 POL. BEHAV. 247, 255 (1988).

31. See BAUM, *supra* note 26, at 51; O'Brien, *Institutional Norms*, *supra* note 1, at 104-05; TOOBIN, *supra* note 2, at 45; Caldeira, *supra* note 30, at 255.

32. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS* 151-58 (4th ed. 2007).

33. O'Brien, *Institutional Norms*, *supra* note 1, at 93.

34. *Id.*

35. *Id.* at 97.

36. *Id.* at 95.

37. EPSTEIN ET AL., *supra* note 32, at 152-53, 157-58.

the leadership practices of Chief Justices.³⁸ As the first among equals,³⁹ the Chief Justice can assert leadership over the Court in several ways.⁴⁰ By tradition, the Chief presides over and directs conference sessions where the Justices discuss and vote on cases, and when voting with the majority, assigns who writes the opinion for the Court.⁴¹ In exercising these powers, Chief Justices can be good “task” leaders, good “social” leaders, or both.⁴² A good task leader directs and guides conference discussions with force and clarity, assigns and writes more opinions than his colleagues, and conducts the Court’s business with efficiency.⁴³ By contrast, social leadership involves easing tensions and disagreements between the Justices and facilitating interpersonal relations and collegial interactions on the Court.⁴⁴

The norm that the Court should strive to reach is a unanimous, institutional opinion, which the Court established during the leadership of John Marshall, who served as Chief Justice from 1801-1835.⁴⁵ Such opinions advance the institutional interests of the Court by allowing it to speak in a unified voice and to present a clear, stable view of the law.⁴⁶ These opinions also bolster the Court’s legitimacy⁴⁷ and reinforce a sense of judicial impartiality and objectivity.⁴⁸ Marshall transformed the early Court from the English model of *seriatim* opinion-writing, where individual Justices wrote separately in each case, to a model where separate opinions were discouraged and institutional opinions for the Court as a whole became the norm.⁴⁹ Those norms largely persisted throughout the remainder of the nineteenth century and well into the twentieth century.⁵⁰ It was under Chief Justice Harlan Fiske Stone that the opinion-writing norms of the Court took the most dramatic turn.⁵¹ The impact of Stone’s leadership on the opinion-writing practices of the Court is clearly seen in Figures 2 and 3, depicting the proportion of cases decided by the Court with either a dissenting or concurring opinion.⁵²

38. See, e.g., Caldeira & Zorn, *supra* note 7, at 900; Haynie, *supra* note 10, at 1166; Walker, Epstein & Dixon, *supra* note 10, at 361-64.

39. See Alpheus Thomas Mason, *The Chief Justice of the United States: Primus Inter Pares*, J. OF PUB. L. 17, 20-60 (1968) (discussing the concept of first among equals).

40. See Sue Davis, *The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST PERSPECTIVES 135, 137 (Cornell W. Clayton & Howard Gillman eds., 1999).

41. *Id.* at 136. Daniel Danelski, *The Influence of the Chief Justice in the Decisional Process*, in CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING, 237-38 (Joel B. Grossman & Richard S. Wells eds., 2d ed. 1980).

42. *Id.* at 238.

43. *Id.* at 237.

44. *Id.*

45. O’Brien, *Institutional Norms*, *supra* note 1, at 92.

46. See TOOBIN, *supra* note 2, at 45.

47. O’Brien, *Institutional Norms*, *supra* note 1, at 92.

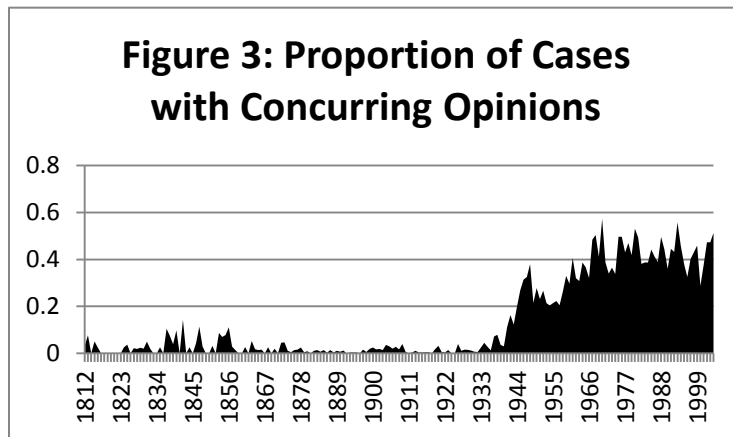
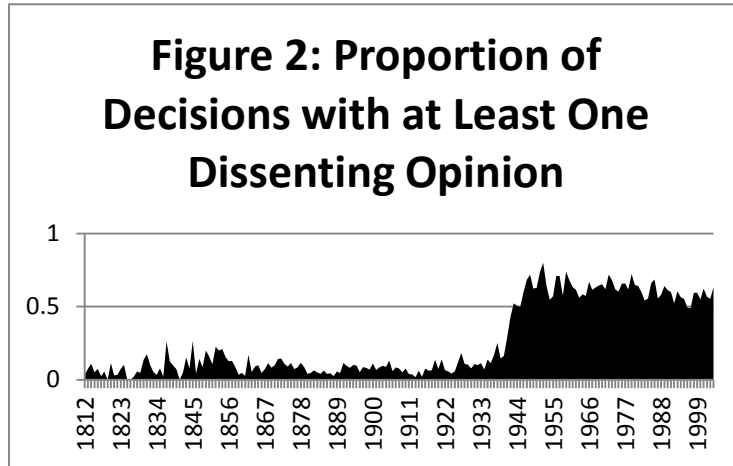
48. See *id.*

49. *Id.*

50. *Id.* at 93.

51. See *id.* at 97.

52. See EPSTEIN ET AL., *supra* note 32, at 152, 157.



In 1940, 16% of cases had a dissent⁵³ and 3% had concurring opinions.⁵⁴ By the time Stone left office in 1946, 56% included a dissent⁵⁵ and 21% had a concurring opinion.⁵⁶

A confluence of factors also catalyzed the changing norms governing the Court's opinion-writing during this period.⁵⁷ One factor was the rapid turnover of personnel.⁵⁸

53. *See id.* at 152.

54. *See id.* at 157.

55. *See id.* at 152.

56. *See id.* at 157.

57. *See generally* BAUM, *supra* note 26; EPSTEIN ET AL., *supra* note 32; O'Brien, *Institutional Norms*, *supra* note 1; DONALD GRIER STEPHENSON, JR., *CAMPAIGNS & THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS (1999)*.

58. *See* EPSTEIN ET AL., *supra* note 32, at 178.

On average, and throughout history, one new Supreme Court Justice will be appointed to the bench every two years.⁵⁹ Having made no appointments to the Court during his first term, however, Roosevelt made eight appointments to the Court in the six-year period between 1937 and 1943.⁶⁰ He elevated Stone, who was originally appointed by Calvin Coolidge, to the Chief Justiceship.⁶¹ By 1946, when Stone died, the entire Court had been appointed by Roosevelt.⁶² During Stone's Chief Justiceship, one new Justice was added to the Court nearly each year, leading to an influx of malleable newcomers on the Court.⁶³ As the longest serving member of a Court with little institutional memory, Stone's views about opinion-writing met with little resistance from other Justices who had not been socialized in the traditions of consensus.⁶⁴

Other changes also facilitated the rise of separate opinions.⁶⁵ For instance, throughout the nineteenth century, the author of a Court's opinion did not circulate a draft of his opinion but, instead, read them during conferences where other Justices could suggest changes.⁶⁶ During the 1920s, with the technological advancement of typewriters, the practice of reading opinions aloud during conferences so that other Justices could make suggestions changed.⁶⁷ Justices also began adding more personnel to the Court by hiring law clerks.⁶⁸ Horace Gray was the first Justice to hire a clerk, but the practice caught on among the other Justices.⁶⁹ By the time Stone assumed leadership of the Court in 1941, it was a well-established practice for each Justice to have a clerk, and Stone himself hired a second clerk.⁷⁰ With typewriters and clerks making court operations more efficient, the Justices began to circulate draft opinions prior to their conference discussions.⁷¹ This gave Justices more time to consider writing separate opinions.⁷² Moreover, with help from their clerks in researching and writing drafts, the cost associated with writing a separate opinion diminished.⁷³

It is also argued that one of the most important factors leading to the decline in consensual decision-making was declining consensus about the law itself.⁷⁴ As O'Brien has argued, Roosevelt's appointments to the Court all "embodied the intellectual forces of a generation of progressive liberals who had revolted against the legal formalism of

59. STEPHENSON, *supra* note 57, at 194.

60. EPSTEIN ET AL., *supra* note 32, at 178.

61. BAUM, *supra* note 26, at 83-84 n.21.

62. *See* EPSTEIN ET AL., *supra* note 32, at 178.

63. *See id.*

64. *See* O'Brien, *Institutional Norms*, *supra* note 1, at 98-99.

65. *See id.*

66. *Id.* at 102.

67. *Id.*

68. *Id.* at 103.

69. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 43 (2006).

70. O'Brien, *Institutional Norms*, *supra* note 1, at 103.

71. *Id.* at 102.

72. *See id.* at 103.

73. *See id.*

74. *Id.* at 101.

the old conservative order.”⁷⁵ The legal liberalism of these Justices, which dominated the Court’s jurisprudence from 1937 through the 1980s, grew out of the American Legal Realism movement, which highlighted the indeterminacy of the law and linked judicial decision-making explicitly to the political and social values of judges.⁷⁶ By emphasizing pragmatism and the balancing of competing values over fixed formulas, Realism made consensus on the Court more unlikely, and at the same time placed a new premium on how judges justified their decisions, thus, leading to the importance of separate opinions.⁷⁷

The impact of Realism in breaking down the doctrinal consensus of the old legal order was further exacerbated by the shortcomings of American legal liberalism itself. The legal liberals of the mid-twentieth century embraced diverse viewpoints and lacked a single coherent approach to constitutional interpretation or the role of the Court.⁷⁸ Disagreements about the role of the Court and the proper interpretive approach to the law required Justices to write more individual opinions to articulate and defend their views, even when they agreed on the outcome of a case.⁷⁹ Thus, the post-New Deal Justices were socialized into higher rates of individual expression than previous Justices, and according to O’Brien, “virtually all tended to increase their dissent and concurring behavior during their time on the bench.”⁸⁰

Thus, while Stone’s leadership on the Court may have contributed to the devaluation of consensual opinion-writing norms, other factors, especially changes in the very structures of American legal thought, played an equally important part in this process.⁸¹ Indeed, as data in Figures 1-3 illustrate, concurring opinions were on the rise, and the proportion of unanimous decisions were declining prior to Stone’s Chief Justiceship.⁸² Both trends continued for three decades after Stone’s departure.⁸³ In short, agreement on an institutional opinion for the Court used to be deemed “central to the Court’s prestige and legitimacy.”⁸⁴ The combination of changes in leadership and tensions inherent in legal liberalism brought to the Court by New Deal Justices transformed that norm into one of individual expression.⁸⁵ By the 1940s, less than a majority of cases was decided unanimously and by the 1960s less than one-third were decided unanimously.⁸⁶ Indeed, by the Court’s 1969 term, the number of separate opinions had skyrocketed and the decisions of the Court were, on average, accompanied by four separate opinions.⁸⁷

75. *Id.*

76. *Id.*

77. *Id.*

78. See KALMAN, *supra* note 8, at 71.

79. See THOMAS KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 65-66 (2004).

80. O’Brien, *Institutional Norms*, *supra* note 1, at 105.

81. See generally EPSTEIN ET AL., *supra* note 32; O’Brien, *Institutional Norms*, *supra* note 1.

82. See EPSTEIN ET AL., *supra* note 32, at 156-57.

83. See *id.* at 157-58.

84. O’Brien, *Institutional Norms*, *supra* note 1, at 111.

85. *Id.*

86. *Id.* at 93-95.

87. See EPSTEIN ET AL., *supra* note 32, at 152, 157.

III. LEADERSHIP AND JURISPRUDENCE ON THE REHNQUIST COURT – RESTORING CONSENSUAL NORMS?

If leadership and the tensions inherent in legal liberalism explain declining consensual norms in the Court's opinion-writing practices between the 1930s and 1960s, they cannot fully explain why there has not been a return to more consensual norms. This is especially true of the post-1980s period, during which time the Court had been remade by Republican presidents with Justices who rejected legal liberalism and who were committed to a New Right constitutional agenda.⁸⁸ The fact that the Court and constitutional law have been remade by the New Right Republican Party should be no surprise. Republican presidents since Richard Nixon have campaigned against the Court and railed against what they perceived as its liberal bias.⁸⁹ The legal liberalism of the Warren Court in particular, they argued, warped constitutional law with the invention of new rights (such as the right to privacy), and its embrace of judicial activism over Frankfurter's or Black's arguments for restraint.⁹⁰ Since 1968, Republican presidents have sought to appoint Justices who reject the legal liberalism and ensuing jurisprudential fissures associated with the Warren Court, while championing a new conservative activist jurisprudence.⁹¹ This is especially true since 1980, when Ronald Reagan brought new rigor and systematic attention to the judicial selection process.⁹²

Republicans have won seven of eleven presidential elections since 1968, and the vast majority of federal judges today are Republican appointees, including five of the nine Justices on the current Court (Roberts, Alito, Thomas, Kennedy, and Scalia).⁹³ Moreover, all Republican Justices have been appointed since 1980, when Ronald Reagan moved the Republican Party significantly to the right; the other two Justices, Ruth Bader Ginsburg and Stephen Breyer, were both appointed by Bill Clinton, a "New Democrat," who embraced many of the New Right's political positions in key areas of constitutional law (such as federalism and criminal justice).⁹⁴ If fragmented opinion-writing was the result of tensions inherent to legal liberalism alone, then those tensions should have disappeared by 1992, when seven of the nine Justices on the Court had been appointed by Republican presidents and judicial conservatives consolidated their control over the Court.

88. See STEPHENSON, *supra* note 57, at 194-95.

89. See *id.* at 200-02.

90. See *id.* at 196-202.

91. KECK, *supra* note 79, at 107-09. See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 108-10 (2003).

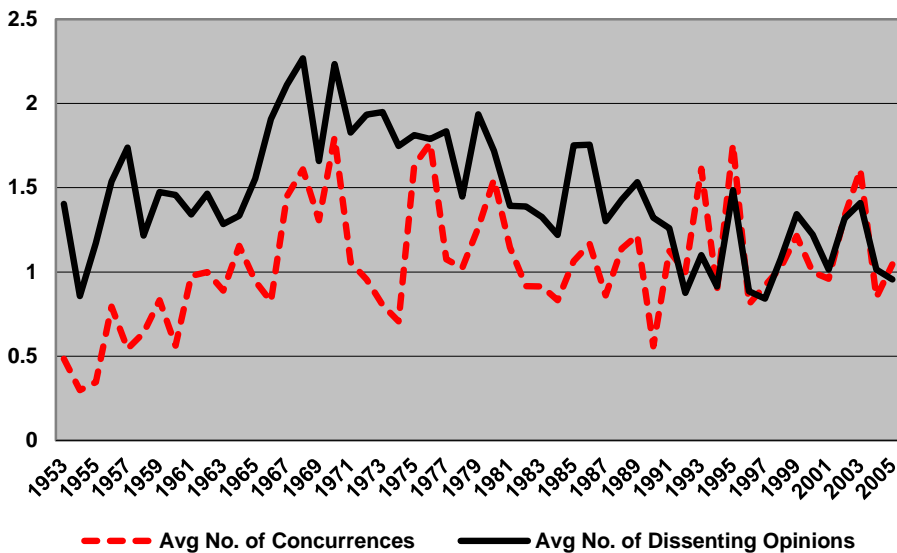
92. David M. O'Brien, *The Reagan Judges: His Most Enduring Legacy?*, in *THE REAGAN LEGACY: PROMISE AND PERFORMANCE* 62 (Charles O. Jones, ed. 1988) [hereinafter O'Brien, *The Reagan Judges*]; MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 111-23 (2007); DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 133-34 (1999).

93. See EPSTEIN ET AL., *supra* note 32, at 259.

94. See Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 *GEO L.J.* 1385, 1394 (2006) (discussing Clinton's acceptance of the New Right legal policy agenda in various policy areas).

Furthermore, Ronald Reagan elevated William H. Rehnquist to be Chief Justice in 1986.⁹⁵ Rehnquist's predecessor, Chief Justice Burger (1969-1986) had been an ineffectual leader, often ridiculed by his colleagues for misunderstanding basic legal principles.⁹⁶ Conference debates were rambling and confused, and Burger was unprepared and often angered his colleagues with his indecisiveness.⁹⁷ In addition, Burger had to grapple with a Court that not only contained the jurisprudential fault lines of legal liberalism, but was increasingly conflicted by new divisions between liberals and the new judicial conservatives being appointed by Republican presidents.⁹⁸ With the Justices increasingly divided over jurisprudential questions and without strong leadership to guide them in reaching consensus, the fragmented opinion-writing practices of the Court peaked during the Burger years as depicted in Figure 4, which shows the average number of separate opinions per case.⁹⁹

Figure 4: Concurring and Dissenting Opinions 1953-2005
(Average Number per Case)



95. O'Brien, *The Reagan Judges*, *supra* note 92, at 60.

96. See O'Brien, *Institutional Norms*, *supra* note 1, at 109-10.

97. *Id.*

98. See STEPHENSON, *supra* note 57, at 194-95.

99. See The Supreme Court Database, <http://scdb.wustl.edu/> (last visited June 9, 2013), from which cited data was compiled.

By contrast, Rehnquist was a highly effective leader by making decision-making more efficient, collegial, and consensual.¹⁰⁰ As Chief Justice, he discouraged lengthy discussions during conferences and he streamlined the process of managing the Court's caseload.¹⁰¹ Justice O'Connor characterized him as "concerned about efficiency. He didn't want to waste time . . . [his] push for efficiency was a pretty good thing—to get on with the task and get the work done."¹⁰² Indeed, even the most liberal Justices who served under Rehnquist respected his leadership; Thurgood Marshall called him "a great [C]hief [J]ustice," and William Brennan described him as the "most all-around successful" Chief he had served under—including Earl Warren.¹⁰³ Rehnquist put a lot of effort into fostering collegial interactions on the Court, as a former clerk noted:

He was very concerned about hurt feelings among the [J]ustices, and he was very careful and observant of the way that certain memos or interactions would make other [J]ustices react or feel. He always avoided invective in his own memos, and smoothed over hurt feelings when other [J]ustices used it.¹⁰⁴

Most importantly, Rehnquist was eager to reassert consensual opinion-writing norms on the Court.¹⁰⁵ Indeed, in an article about his predecessors in the Chief Justice's office, he was critical of Stone and admired both Marshall and Taft, because, unlike Stone, they had the skill to bring together colleagues of different minds.¹⁰⁶ Before being elevated to Chief Justice, Rehnquist was actually a frequent dissenter.¹⁰⁷ As the most conservative member of the Burger Court, Rehnquist wrote separate opinions in nearly 14% of the cases in which he participated, including so many solo dissents that he was given the nickname "Lone Ranger" and "Lone Dissenter."¹⁰⁸ After his elevation to the Chief's position in 1986, his views and opinion-writing practices changed.¹⁰⁹ As Chief Justice, Rehnquist wrote fewer separate opinions than any other member of the Court, writing dissents or concurrences in less than 4% of cases decided by the Court.¹¹⁰

By all counts, Rehnquist's successor as Chief Justice, John Roberts, is similarly respected as a leader of the Court and concerned about restoring consensual opinion-

100. *Contra* O'Brien, *Institutional Norms*, *supra* note 1, at 110-11.

101. *Id.* at 110.

102. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 15 (2007).

103. O'Brien, *Institutional Norms*, *supra* note 1, at 110; JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 194 (2007).

104. ROSEN, *supra* note 103, at 194.

105. *See* Rehnquist, *supra* note 20, at 641, 649.

106. *Id.* at 648-49.

107. John M. Nannes, *The "Lone Dissenter,"* 31 J. SUP. CT. HIST. 1, 2-3 (2006).

108. *Id.* at 3.

109. Saul Brenner & Timothy M. Hagle, *Opinion Writing and Acclimation Effect*, 18 POL. BEHAV. 235, 250-51 (1996).

110. O'Brien, *Institutional Norms*, *supra* note 1, at 106-07.

writing practices.¹¹¹ In an interview in 2006, Roberts remarked, “I think that every [J]ustice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”¹¹² During his confirmation hearings, Roberts expressed his desire to help the Court speak with greater unanimity and to speak as an institution rather than a collection of nine individuals.¹¹³ As the Chief Justice, Roberts said he would encourage members of the Court to subordinate their “views of the correct jurisprudential approach and evaluate those views in terms of [their] role as a judge” and the institutional interest in “achieving consensus and stability.”¹¹⁴

As suggested above, since 1986, the Court has been led by Chief Justices who are respected leaders and committed to restoring consensual opinion-writing norms. It has also been dominated by a new generation of New Right jurists who reject legal liberalism. But despite these changes, the Court’s opinion-writing practices are as fragmented today as ever. What explains the continued persistence of fragmented opinion-writing norms on the Court?

IV. THE MYSTERIOUS PERSISTENCE OF NON-CONSENSUAL OPINION-WRITING NORMS

We argue that two factors have prevented the return of consensual opinion-writing practices on the Court, despite the leadership efforts of Rehnquist and Roberts and the replacement of liberal Justices with New Right Justices.

A. *Fissures in Conservative Legal Thought: The Lasting Legacy of Realism.*

Simply because legal liberalism contained internal tensions that spurred separate opinion-writing, it does not follow that the abandonment of legal liberalism will lead to a restoration of consensual opinions. Indeed, Tushnet, Keck, and other scholars have suggested that the judicial conservatism of Republican appointees to the Court since 1968 contains its own internal tensions and divisions.¹¹⁵ Tushnet, for example, argues that the modern Republican Party is a coalition of economic and cultural conservatives with different substantive constitutional agendas.¹¹⁶ Keck has argued that a clear jurisprudential divide exists between a pragmatic judicial conservatism embraced by Justices such as O’Connor, Kennedy, and Rehnquist, and a more formalistic judicial conservatism embraced by Justices such as Scalia, Thomas, Alito, and Roberts.¹¹⁷

If the legal conservatism of New Right Justices is similarly conflicted and incoher-

111. ROSEN, *supra* note 103, at 8.

112. *Id.*

113. Douglas Kmiec, *Assessing Chief Justice John Roberts at Mid-Term: Why He Deserves Kudos for His Ability to Lead the Supreme Court to Speak in One Constitutional Voice*, FINDLAW (Feb. 19, 2007), http://writ.lp.findlaw.com/commentary/20070219_kmiec.html.

114. ROSEN, *supra* note 103, at 7.

115. See KECK, *supra* note 79, at 7; TUSHNET, *supra* note 91, at 102-05.

116. TUSHNET, *supra* note 91, at 17-18. It is important to note their economic efforts focus on limiting congressional regulatory power, expanding protection of corporations and private property rights, and upholding markets; whereas cultural conservatives focus on overturning abortion rights, limiting affirmative action, and lowering the wall separating church-state.

117. KECK, *supra* note 79, at 7-8.

ent as the legal liberalism of the New Deal Justices, then the impact on the Court's opinion-writing practices should be similar. In particular, during the 1930s and early 1940s, as traditional legal doctrines and constitutional understandings came under attack from New Deal appointees, the level of dissent on the Court increased.¹¹⁸ Concurring opinions did not grow nearly as rapidly during this period, as the new liberal Justices unified in their opposition to existing legal doctrines and constitutional interpretations.¹¹⁹ However, once a majority of New Deal Justices firmly established control over the direction of the Court's decisions, there was a surge in the number of concurring opinions as the new liberal Justices began to express and address the divisions within legal liberalism itself.¹²⁰ A similar pattern should exist on the Burger and Rehnquist Courts. There should be an initial increase in the number of dissents as New Right Justices increasingly voice their disapproval of existing constitutional doctrines and understandings. Once New Right Justices consolidated their control over the Court by the early 1990s, however, we expect a drop in the level of dissents, and an increase in the incidence of concurring opinions, as the new conservative majority consolidated its control and then turned to grapple with the tensions inherent in legal conservatism.

A review of separate opinions as a percentage of Court opinions presented again in Figure 4 supports our expectations. From the late-1960s through the mid-1980s, dissents grew more rapidly than concurrences. Once New Right Republican Justices began to dominate the Court, however, average concurrences grew at a greater rate than dissenting opinions. It was not until 1992 that the average number of concurring opinions (one per case) actually surpassed the average number of dissenting opinions (.88 per case) on the Court since 1953. Dissensus was low during this time period (.84 per case in 1997) and the average number of concurrences had reached rather high levels in comparison to other time periods (e.g., in 1995 the Court averaged 1.75 concurring opinions per case).¹²¹

B. The Normative Infrastructure of Separate Opinion-Writing.

A final factor that has prevented the reestablishment of consensual opinion-writing practices on the Court is the lack of what we call the "normative infrastructure" to encourage consensual behavior. Indeed, the existing institutional arrangements support non-consensual practices and frustrate any efforts of the Chief Justice to change those practices. We argue that these institutional arrangements have encouraged separate opinions and discouraged consensual behavior.

1. Computerization and new technology.

The technological infrastructure of the Court underwent a process of rapid modernization and computerization during the 1970s and 1990s. With fax machines, computer technology, and word processors leading to heightened efficiency in both the private and public sector, there is also reason to believe that new technology contributes to the per-

118. O'Brien, *Institutional Norms*, *supra* note 1, at 101.

119. *Id.*

120. *But see id.* at 101-02.

121. *See* Supreme Court Database, *supra* note 99.

sistence of non-consensual norms by lowering the costs, or burden, to individual Justices of writing separate opinions. In the late 1970s, the first set of computer terminals was installed in the Supreme Court building, reducing the costs of information searches and staying abreast of developments within the legal profession.¹²² Access to legal databases such as Lexis-Nexis and Westlaw became available to Justices in the late 1980s, and further reduced the time expenditures necessary for legal research.¹²³ Indeed, technological developments may serve an even greater function outside of the Justices' chambers. With access to computer technology, law clerks and librarians within the Supreme Court building are able to quickly compile information not available prior to the computer age. We therefore expect and test whether access to this technology increases the average number of separate opinions written per year, per Justice.

2. The role of law clerks and the decreasing number of cases heard on the merits.

Previous research has demonstrated the important role that clerks play in the decision-making processes of the Court.¹²⁴ For the purposes of this analysis, we argue that the presence of additional law clerks expands the capacity of individual Justices to write separate opinions.¹²⁵ It is reasonable to expect that increases in the number of law clerks will lower the opportunity costs associated with researching and drafting separate opinions.

Until 1919, the employment of law clerks was ad hoc and paid for privately by the individual Justices themselves.¹²⁶ From 1919, when Congress authorized funding for the positions, until 1941, each Justice was assigned two assistants, one of which performed the duties of a law clerk.¹²⁷ It was not until 1942 that the number of law clerks assigned to Supreme Court Justices doubled.¹²⁸ At this time, law clerks were also given more freedom in the decision-making process, drafting opinions and managing the burgeoning *certiorari* process.¹²⁹

The added number of clerks and their contributions to the Supreme Court's work since 1942 appears to have impacted the number of opinions written by the Justices.¹³⁰

122. O'Brien, *Institutional Norms*, *supra* note 1, at 110.

123. See David M. O'Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 671 (1985) [hereinafter O'Brien, *Managing the Business*].

124. See, e.g., BRADLEY J. BEST, LAW CLERKS, SUPPORT PERSONNEL, AND THE DECLINE OF CONSENSUAL NORMS ON THE UNITED STATES SUPREME COURT 1935-1995, at 232 (2002); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 70 (1991); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 231 (2006); O'Brien, *Managing the Business*, *supra* note 123, at 672; Todd C. Peppers & Christopher J.W. Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 76-77 (2009).

125. See BEST, *supra* note 124, at 214.

126. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 135 (8th ed. 2008) [hereinafter O'BRIEN, STORM CENTER] (discussing how Horace Gray began the practice of personally hiring law clerks, a practice which Oliver Wendell Holmes continued until Congress appropriated funding for the hiring of law clerks).

127. WARD & WEIDEN, *supra* note 124, at 34.

128. *Id.* at 36.

129. Peppers & Zorn, *supra* note 124, at 55-58.

130. See O'Brien, *Institutional Norms*, *supra* note 1, at 110.

With law clerks increasingly contributing to the opinion-writing process, the proportion of unanimous decisions decreased from approximately .61 in 1941, to .49 in 1942, a .12 total decrease.¹³¹ The proportion of unanimous decisions only continued to decrease, possibly due to the establishment of divisions of labor and specialization of duties in the Justices' chambers.

| | |
|---|--|
| Table 1 Proportion of Unanimous Decisions during Different Law Clerk Regimes | |
|---|--|

| | |
|---|-----|
| 1919-1941 (Research Assistants) | .78 |
| 1942-1969 (Junior Justices, Clerks Doubled) | .35 |
| 1970-Present (3 rd and 4 th Clerks Added) | .38 |

In Table 1, the proportion of unanimous decisions are divided into three time periods specified by Ward and Weiden: 1919-1941, when law clerks traditionally performed the role of research assistants; 1942-1969, when two clerk positions were established for each Justice; and 1970-present, when Justices were assigned a third and then a fourth law clerk.¹³² Table 1 shows the dramatic decrease in the proportion of unanimous decisions rendered by the Court between 1919-1941, and 1942-1969, corresponding with a decrease in the proportion of unanimous decisions. However, the addition of the third and then a fourth law clerk after 1969 corresponded with a .03 increase in the proportion of unanimous decisions by the Court.¹³³ From these data alone, it is therefore difficult to argue conclusively what impact additional law clerks may have had on the opinion-writing norms of the Court. Our intention below is to perform a more rigorous examination of how the increase in law clerks combined with other factors—such as changes in technology and fissures in legal thought—to influence the Court's norms, and we expect that the addition of law clerks will increase the average number of separate opinions written per year, per Justice.

3. The decreasing number of cases heard on the merits.

The Judges Bill of 1925 was a major step toward giving the Supreme Court discretionary control over its docket.¹³⁴ Since that time, the Court has enjoyed nearly complete

131. EPSTEIN ET AL., *supra* note 32, at 152, 157.

132. WARD & WEIDEN, *supra* note 124, at 22-23.

133. Supreme Court Database, *supra* note 99.

134. See 68th Cong. ch. 229, February 13, 1925, 43 Stat. 936; see also EPSTEIN ET AL., *supra* note 32, at 46.

discretion over the number of cases it will decide each term. While the number of cases that the Court has heard and decided each term has fluctuated since the Court gained discretionary control, there has been a dramatic decline in that number since the 1980s. In 1926, the Court rendered opinions in nearly 200 cases, but by the 1980s, that number had decreased to about 150 cases,¹³⁵ and in 2002, the Court produced only 74 decisions.¹³⁶ As the Court decides fewer cases, the Justices are free to spend more time deciding each case, and it would be reasonable to expect that they are freer to write more separate opinions as they are deciding these cases. We expect that the decreasing number of cases heard on the merits will increase the average number of separate opinions written per year, per justice.

4. Use of the Supreme Court's *certiorari* pool.

We also suspect that a Justice's use of the *certiorari* pool will lead Justices to author more separate opinions. The adoption of the *certiorari* pool in 1972 was an organizational reform in response to the heightened workload of the Court, particularly the increasing number of unpaid petitions, which composed about 50% of the docket.¹³⁷ By pooling the burden of reviewing *certiorari* petitions and creating common *certiorari* memos for the Justices in the vast majority of cases that come to the Court, the *certiorari* pool frees both the time of the Justices and their clerks from the *certiorari* stage so that more time can be devoted to opinion-writing functions. Some Justices, however, have chosen not to participate in the pool and have even elected to screen those petitions themselves. Justices Stevens, Marshall, Brennan, and Alito opted out of the pool;¹³⁸ we expect non-participation to adversely impact the Justices' ability to write separate opinions.¹³⁹ Therefore, we predict that access to the *certiorari* pool will increase the average number of separate opinions written per year, per justice.

5. Other individual-level factors.

A long line of research on Supreme Court decision-making suggests that Justices vote according to several individual level characteristics, such as their ideological predispositions or "attitudes."¹⁴⁰ Just as the so-called attitudinal model demonstrates that individual-level characteristics of Justices shape their voting behavior, we expect that ideology and other personal characteristics of the Justices, such as their ages, their professional backgrounds, or their seniority on the Court may influence their determination to write separate opinions. As Justices become older, for instance, they may encounter a variety of new obstacles that take away from the time they devote to opinion-writing. The professional background of Justices may also be a factor. Justices who were law pro-

135. ESPTEIN ET AL., *supra* note 32, at 156, 158.

136. *Id.* at 158.

137. See O'BRIEN, STORM CENTER, *supra* note 126, at 140.

138. WARD & WEIDEN, *supra* note 124, at 121; Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool'*, N.Y. TIMES (Sept. 25, 2008), http://www.nytimes.com/2008/09/26/washington/26memo.html?_r=0.

139. Liptak, *supra* note 138.

140. See, e.g., SEGAL, & SPAETH, *supra* note 17, at 86.

fessors, for example, may have a history of voicing their own opinions in law journals and academic work, and we might therefore expect them to be more inclined to write separately once they are on the Court.¹⁴¹ Finally, we also expect extremely conservative justices, as measured by their Martin-Quinn scores, to feel more passionately about their positions and to find less in common with others on the Court, thus leading them to author more separate opinions.¹⁴² When median justices are assigned the writing of opinions to bring together majorities, justices on the extreme ends of the ideological continuum should be more likely to voice their disapproval of the opinion's reasoning. In summary, we expect individual-level characteristics, such as professional background, rank, and ideological orientation to influence the average number of separate opinions written per year, per justice.

V. TESTING FOR THE PERSISTENCE OF NON-CONSENSUAL NORMS

To test the expectations set forth above, we now examine how the normative infrastructure on the Court has influenced the decision of Justices to write separately, with a special focus on concurring opinions. Above, we have argued that fissures within jurisprudential thought existed both in legal liberalism and now in the New Right's constitutional agenda. While we agree with Haynie that dissents indicate the general level of ideological disagreement on the Court, we argue that the number of concurring opinions best indicate the level of dissensus within the majority coalition at any given time, and for this reason, are an apt individual-level indicator of the persistence of non-consensual norms.¹⁴³ After all, the decision to write a concurrence presents a higher cost to the justices and to the majority coalition as a whole because separate concurrences detract from the ability to offer clear guidance in a unified voice to judicial audiences about the majority coalitions' policy view.

Shifts in consensual norms among Supreme Court Justices (as evidenced in variation of the levels of concurrences) occur slowly, characteristic of long-term and long-memory processes, and vary by the leadership of Chief Justices.¹⁴⁴ Like Haynie, and Caldeira and Zorn, we accept the assumption that levels of concurrences on the Court are functions of consensual norms.¹⁴⁵ Unlike these authors who focus on changes in norms at the macro-level, we look to the lack of change in non-consensual norms at the level of the individual Justice to advance our claim that changes in institutional infrastructure have potentially impacted the ability of strong Chief Justices to alter the opinion-writing

141. PAMELA C. CORLEY, *CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT* 33 (2010).

142. We consider Martin-Quinn scores to be an appropriate and superior measure in testing for the effects of ideology on opinion-writing behavior, given their ability to measure ideology over time. In other words, some measures of ideology do not account for the likelihood that other variables (e.g., docket change) bias measurements, especially measures that assume that time is invariant. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, at 10 *POL. ANALYSIS* 134 (2002).

143. Haynie, *supra* note 10, at 1158.

144. Caldeira & Zorn, *supra* note 7, at 874.

145. Our approach focuses solely on concurrences which reflect a high degree of disagreement over the reasoning of majority opinions. *But see id.* at 877-78; *see also* Haynie, *supra* note 10 (using both dissents and concurrences to measure the breakdown of consensual norms on the Court).

behavior of the Justices. Specifically, an increase in institutional capacity (including access to computers, use of the *certiorari* pool, and increased access to law clerks) influences Supreme Court Justices' decisions to write separately, leading to the persistence of non-consensual norms, despite efforts by the Chief Justice to reassert more consensual opinion-writing practices.

Our argument draws on both rational choice theory and new institutionalism; institutional capacity enables justices to make the strategic decision to write separately. In the qualitative evidence proffered above, we offer several reasons the current normative infrastructure encourages separate opinion-writing and discourages consensual behavior. In an effort to build upon these qualitative findings, the quantitative model presented below examines the individual and institutional characteristics which predict the expected number of concurrences an individual Justice will strategically choose to write per year, particularly the lowered opportunity costs of making such a choice.

We hypothesize that increased access to law clerks, use of the *certiorari* pool, new technology (access to Lexis-Nexis and word processors), along with the number of cases on the docket, reinforces a normative infrastructure, which enables non-consensual norms to manifest in concurrence-writing. Additionally, we include individual-specific covariates such as age, professional experience, ideological orientation, and position on the court (Chief Justice or not) in our model.

We utilize a random-intercept Poisson regression model to estimate the likelihood that a Supreme Court Justice's decision to write separately is a function of institutional capacity.¹⁴⁶ This approach allows us to contribute to the work of Walker et al., Haynie, and Caldeira and Zorn, by offering a unique look at micro-level Supreme Court decision-making.¹⁴⁷ Moreover, the model enables us to disentangle the influence of within persons effects while uncovering the impact of institutional capacity and Justice-specific characteristics on the Court's operational norms.¹⁴⁸ We suggest that significant institutional covariates indicate that the decision to write separately is influenced by the institutional environment, in part explaining the persistence of non-consensual norms. Thus while institutional memory may be long, as Caldeira and Zorn demonstrate, technology changes the opinion-writing game and the choices Justices make.¹⁴⁹

146. See Nathaniel Beck & Jonathan N. Katz, *Random Coefficient Models for Time-Series-Cross-Section Data* (2004) (presented at the 2001 meeting of the American Political Science Association) (reviewing the appropriate models for TSCS data, including the use of multilevel models such as the random-intercept); Nathaniel Beck, *Time-Series Cross Section Data: What Have We Learned in the Past Few Years*, 4 ANN. REV. POL. SCI. 271 (2001).

147. See generally Caldeira & Zorn, *supra* note 7; Haynie, *supra* note 10; Walker, Epstein & Dixon, *supra* note 10.

148. "Within persons effects" refers to the change within an individual justice over time.

149. Caldeira & Zorn, *supra* note 7, at 900.

VI. DATA

The dependent variable, concurrences, is a count variable representing the number of concurrences written per year per Justice for the time period of 1953-2007.¹⁵⁰ We include an offset variable, which treats the event counts (the number of concurrences written by Justices each year) as a set of responses offset by the number of opportunities a Justice has to write a concurrence, including when they are sitting in the majority and not assigned to write the majority opinion (see Table 2).¹⁵¹ The data are measured in time-ordered increments per individual with yearly observations nested in Justices, characteristic of time-series-cross-sectional data (“TSCS”).¹⁵² The dataset consists of 421 observations, 55 time periods, nested in 23 Justices.¹⁵³ Inherent to this sort of data structure are issues of dependence and unobserved heterogeneity. To capture the effects of clustering, both fixed and random intercepts were computed (see Table 2).¹⁵⁴

150. Similar to Walker, Epstein & Dixon, we chose to base our analysis from data provided by the U.S. Supreme Court Database. Unlike Walker, Epstein & Dixon and Haynie, but similar to Caldeira & Zorn, we use the raw number of concurrences rather than the number of opinions per 100 decisions. *See* Caldeira & Zorn, *supra* note 7; Haynie, *supra* note 10; Walker, Epstein & Dixon, *supra* note 10.

151. *See infra* Table 2.

152. Data organized by Justice, then by year.

153. Years in which an individual Justice did not write a concurrence were coded 0.

154. *See infra* Table 2. We collected our individual background data from the most recent edition of the Supreme Court Compendium. Additional data compiled from the Supreme Court Database. *See supra* note 99. For the use of the *certiorari* pool, we retrieved data from O'BRIEN, STORM CENTER, *supra* note 126, at 140-41, 197 (describing who has chosen to opt out of the *certiorari* pool).

| Table 2 Variable Descriptions | |
|--------------------------------------|--|
| <i>Variable</i> | |
| Wrt Conc | Dependent variable representing the number of times each justice per year was sitting, in the majority, and not assigned to writing the majority opinion. |
| Cert Use | A binary dummy variable representing an individual justice's use of the cert pool. |
| Age | Age of justice per year mean-centered. |
| Lexis | A binary dummy variable representing the start of Supreme Court personnel's access to <i>Lexis-Nexis</i> (1979). ¹⁵⁵ |
| Clerks | An ordered binary dummy variable representing increased use of law clerks; the two time periods for which there was an increase in the number of law clerks included in our data from two clerks (1953-1969), to three and four clerks (1970-Present) per justice. |
| Case Load | Represents the number of cases on the Supreme Court docket measured by the number of signed opinions and orally argued per curiams (1953-2004) centered on the mean. |
| Computer Access | A binary dummy variable representing the start of the Supreme Court personnel's access to computers (1980). |
| Prof | A binary dummy variable representing prior experience as a law professor from Epstein, Segal, Spaeth, and Walker (2006). In addition to Full Professors and Assistant Professors at law schools, we chose to include those who served as Lecturers and Instructors because they, too, were exposed to the intellectual climate of the academic environment and classrooms. |
| MQ | Posterior mean, or ideal point, Martin-Quinn score for each individual justice per year. ¹⁵⁶ |
| CJ Term | A binary dummy variable representing justice per year serving as the Chief Justice. |
| Os (offset) | The number of times a justice wrote a concurrence per year offset by the opportunities each justice had to write a concurrence per year; in other words the number of times a justice was sitting, in the majority, and not assigned to writing the majority opinion per year. |
| By Just | Random effect and unique identifier per judge panel which estimates a random intercept per justice to account for variability between justices to be modeled. |

To account for the TSCS and count characteristics of the model, we turn to a class of count models referred to as multilevel.¹⁵⁷ These models include both fixed and random effects at one, two, or more levels to account for unobserved heterogeneity of units and dependence.¹⁵⁸ A random-intercept Poisson regression model was fit with a random

155. Despite our efforts to find an exact date for the introduction of Lexis Nexis to the Supreme Court building, we were only able to estimate an approximate date based upon anecdotal correspondence with former U.S. Supreme Court law clerks. Nonetheless, an exact date for the introduction of the database to the building does not measure its use by Supreme Court law clerks. In other words, there is no possible way of measuring the ability of law clerks or Supreme Court personnel to be familiar or efficient with the legal research database.

156. See Martin & Quinn, *supra* note 142.

157. See generally SOPHIA RABE-HESKETH & ANDERS SKRONDAL, MULTILEVEL AND LONGITUDINAL MODELING USING STATA (2008); Marco R. Steenbergen & Bradford S. Jones, *Modeling Multilevel Data Structures*, 46 AM. J. POL. SCI. 218 (2002). A pooled Poisson with cluster-robust standard errors was also estimated with suspect results.

158. Fixed effects are estimated directly as standard regression coefficients. Random effects, on the other hand, are indirectly estimated according to the data's structure, in this case by Justice. Random effects may be entered in to the equation as either intercepts or slopes. The distribution of the random effects is Gaussian and the log likelihood is approximated via adaptive Gaussian quadrature due to lack of closed form solution.

intercept at level one to model within panel correlation or variability between Justices because event count variables cannot be less than zero, and are inherently non-linear, making OLS regression inappropriate.¹⁵⁹ To address within persons dependence, the model fits a separate regression line to each Justice with the lines constrained to have the same slope.

VII. RESULTS

Do institutional and individual covariates vary significantly in predicting the number of concurrences written per year by Justice? The random-intercept Poisson regression model results presented in Table 2 suggest the answer is yes. The significance of several covariates representing institutional capacity including access to computers, use of the *certiorari* pool, and increased access to law clerks support our hypothesis that the decision to write separately is influenced by the institutional environment. Individual-specific covariates, such as prior experience as a law professor and rank as a Chief Justice or Associate Justice are also significant predictors.

Table 3 Predictors of Concurrence-writing

| Parameter | Estimate | IRR | Standard Error |
|-------------------------|---------------------|--------------|----------------|
| <i>Fixed Effects</i> | | | |
| Cert Use | -.1679118* | .845* | .0844783 |
| Age | .0055277 | 1.006 | .0046253 |
| Lexis | .0815572 | 1.084975 | .1237276 |
| Clerks | .6557181*** | 1.926526*** | .1900676 |
| Case Load | -.0000975 | .9999025 | .0011116 |
| Computer Access | -.1925587* | .8248459* | .0933876 |
| Prof | .5682829*** | 1.765233 *** | .2723065 |
| MQ | -.0074621 | .9925657 | .0277832 |
| CJ Term | -1.025259*** | .3587034 *** | .0603599 |
| Os (offset) | --- | | |
| <i>Random Intercept</i> | | | |
| By Just | .3404102 (.0615905) | | |
| Log-likelihood | -1153.4875 | | |

***p<.01; **p<.05; *p<.1

Fixed effects are estimated directly as standard regression coefficients. Random effects are entered as either intercepts or slopes, in this case intercept, and are indirectly estimated according to the data's structure; here by justice.

159. See generally ALAN AGRESTI, AN INTRODUCTION TO CATEGORICAL DATA ANALYSIS (1996); J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES (1997); Gary King, *Statistical Models for Political Science Event Counts: Bias in Conventional Procedures and Evidence for the Exponential Poisson Regression Model*, 32 AM. J. POL. SCI. 838 (1988). But see BEST, *supra* note 124, at 227-38 (attempting to determine the causes of non-consensual behavior on the U.S. Supreme Court which pointed toward personnel changes, ideological factors, and size of the caseload, but unable to overcome issues of multicollinearity). The Poisson Mixed Effects Model was estimated using Stata/SE 10.0 xtmepoisson function and maximum likelihood estimation.

The incidence-rate ratios (“IRR”) included in the third column of Table 3 represent factor change in the expected number of written concurrences per year by Justice, for given values of all other covariates.¹⁶⁰ As we expected, increased access to law clerks has a significant positive effect with an estimated 93% increase on the expected number of written concurrences per year by Justice with access to four clerks compared to two clerks, for given values of all other covariates. This suggests that on average, increasing the number of clerks available to Justices significantly increases the likelihood that a Justice will write separately when compared to the likelihood that a Justice with two clerks will write separately. Though not all Justices opted to utilize the additional clerk support, this effect has a strong and positive effect on separate opinion-writing across the board.¹⁶¹ Having prior experience as a law professor has a positive effect of a similar magnitude (approximately 77% increase on expected count), which suggests that Supreme Court Justices with this professional background are more likely to write a concurrence than their colleagues. Also, in line with others who have found that Chief Justices are less likely to write separately,¹⁶² our Chief Justice variable is significant and negative, suggesting this position of leadership decreases the expected number of written concurrences per year by Justice by approximately 64% for the given values of all other covariates.

As expected, the covariates Age and Lexis are positive in direction and the caseload covariate negative, suggesting that as age increases, caseload decreases, and access to Lexis-Nexis becomes available, the expected number of written concurrences per Justice per year increases. However, these covariates fail to reach statistical significance. The Martin-Quinn covariate is also negative in direction, which suggests that as Justices become more conservative in ideology, the expected number of written concurrences per Justice per year decreases. Though an interesting directional relationship, again this covariate did not reach significance. Two covariates stand out for their unexpected negative direction: use of the *certiorari* pool and access to computers. Use of the *certiorari* pool and access to computers decreases the expected number of written concurrences per year per Justice by 15% and 18% respectively.

160. We provide both coefficients and incidence-rate ratios (“IRR”) in Table 3. However, we focus on IRRs because Poisson regression coefficients are interpreted as, for a one-unit change in the predictor, the difference in the logs of expected counts is expected to change by the regression coefficient, given the other variables are held constant at their values. This interpretation is not intuitive by any means; for this reason we opt to use IRRs. IRRs are akin to the use of odds-ratio in logit models. IRRs tell us the change in the incidence rate for a unit change in a given variable. We interpret this as a one-unit increase in the likelihood a Justice will write separately per year, given values of other variables. In other words, what factors increase the likelihood a Justice will write separately in a given year?

161. One possible explanation for this is that the increase in clerks was concomitant with an increased expectation to write separately. Another possibility is that those Justices opting to use additional clerks were able to write more because of the additional help, while Justices who opted against the use of additional clerks either did not require additional help to write more, or felt pressure to write more despite the support of only two clerks versus four.

162. See, e.g., Saul Brenner & Eric S. Heberlig, “In My Opinion...”: Justices’ Opinion Writing in the U.S. Supreme Court, 1946-1997, 83, SOC. SCI. Q. 762, 772 (2002).

We hypothesized that increased institutional capacity reinforces a normative infrastructure that encourages concurrence-writing and non-consensual behavior. The results indicate that both institutional and individual-level characteristics influence the expected number of concurrences a Justice will write per year.

Discussion

In the tradition of other scholars who have sought to understand the impact of institutional practices and their effect on decision-making, we have considered several ways in which institutional characteristics set the stage for behavior exhibited on the Court. For instance, scholars such as Maltzman, Spriggs II, and Wahlbeck¹⁶³ argue that members of the Court are interdependent participants in the decision-making game, and scholars in this tradition have compiled a persuasive stockpile of evidence to suggest that this is so.¹⁶⁴ However, in order to participate interdependently in the decision-making “game,” it is important to account for the institutional characteristics that provide Justices with the capacity to pursue strategic behavior. Other scholars, such as Gerber and Park,¹⁶⁵ have pursued a similar line of argument and have shown that the institutional characteristics of the Supreme Court lead to nonconsensual opinion-writing, but what are those specific characteristics?

Our findings suggest that the opportunity for cost-lowering effects of law clerks and technology access are both significant to our understanding of the persistence of non-consensual norms. We have argued that these developments have diminished the ability of Chief Justices (or senior Associate Justices) to foster consensual opinion-writing, especially when managing fissures in jurisprudential thought. Our quantitative analysis demonstrates a sizable effect for the role of law clerks, and suggests that Court personnel lower the opportunity costs of writing separately. This makes research that has been conducted on the role of law clerks in the decision-making process particularly interesting.¹⁶⁶ Baum and Distlear, for instance, find that in recent years Justices have been more likely to choose ideologically-driven clerks.¹⁶⁷ As law clerks assume a greater role in the opinion-writing process,¹⁶⁸ we should expect to observe fewer opinions capable of satisfying all nine Justices.

While we find that clerks play a significant role in a Justice’s decision to write separately, we find that Lexis-Nexis has no significant effect on the decision to write separately.¹⁶⁹ Although Lexis-Nexis is not a significant covariate, we caution against

163. Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING 43 (Cornell W. Clayton & Howard Gillman eds., 1999).

164. See generally FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

165. Scott D. Gerber & Keeok Park, *The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices*, 91 AM. POL. SCI. REV. 390, 404-06 (1997).

166. See generally COREY DISTLEAR & LAWRENCE BAUM, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001).

167. *Id.*

168. Peppers & Zorn, *supra* note 124, at 56.

169. See *supra* Table 3.

dismissing the role of this particular technology. The role of legal search engines may be more complicated than we have suggested in our analysis, and accurately representing the effects of this technology raises a number of methodological challenges. For instance, it may be important to identify the conditions under which a law clerk or justice *understands how to use the program*. Moreover, some law clerks may have already had access to legal databases on their personal computers prior to the date we have identified as the adoption of the technology by the Court. The use of technology by Justices and law clerks is a grey area, which should be further illuminated by additional research.

We also note that the size of the Court's plenary docket has a negative relationship with the expected count of separate opinions.¹⁷⁰ This suggests that a decrease in the size of the Court's plenary docket frees up time for Justices to consider writing separately. Independent of our other variables, this finding is insignificant and does not contribute to our understanding of the heightened capacity Justices have during the opinion-writing stage. In our analysis, however, we consider other administrative reforms that were intended to provide greater institutional capacity to the Court, such as the creation of the *certiorari* pool and the hiring of additional law clerks.

The decision to create a *certiorari* pool was initially designed to cut back on the time Justices devote to screening petitions reaching the Supreme Court.¹⁷¹ Our finding that use of the *certiorari* pool is negatively related to concurrence-writing leads us to believe that the reform has not had the intended effect, either because it does not free up more time for justices or because justices who opt in are inclined to write fewer concurrences than justices who opt out.¹⁷² The choice to opt in to the *certiorari* pool likely comes with problems of moral hazard, and one explanation may be that the *certiorari* pool is inherently inefficient because Justices must spend time scrutinizing memos written by clerks from other chambers. Another explanation may be that those Justices who do not participate in the *certiorari* pool do so for personal reasons (such as being more detail-oriented or less trusting of their colleagues) that might also lead them to prefer to write separate opinions. In other words, these Justices may have personal characteristics that make them less "consensual" at all levels of the decision-making process.

We also tested several individual-level characteristics in hopes of gaining a better understanding of what contributes to the decision to write separately. As our results indicate, age is not significant in explaining why Justices choose to author separate concurring opinions.¹⁷³ It may be the case that age affects individual Justices differently, thus leading some Justices to alter their decision-writing practices while leaving others unaffected. Our test of the professional background of Justices, however, appears to factor into the calculation to write separately. Those Justices having experience as law professors are more likely to write separate opinions than Justices who began their careers in other professions.¹⁷⁴ These Justices, such as Breyer and Scalia, who often travel or speak

170. *Id.*

171. O'BRIEN, STORM CENTER, *supra* note 126, at 140.

172. *See supra* Table 3.

173. *Id.*

174. *Id.*

publicly to promote their jurisprudential views, may maintain an intellectual curiosity as Justices which naturally leads them to seek individual expression through separate opinions. One's rank on the Court also contributes to the likelihood of authoring separate opinions. Chief Justices are less likely to write concurring opinions either because they normally assign opinions to Justices with similar views, or suppress their own views in order to promote more consensual opinions.

Finally, in keeping with research that emphasizes the role of ideology in the decision-making process, we argue that more conservative Justices would be more likely to write concurring opinions. According to our test of this variable, conservative Justices are less likely to author concurring opinions than liberal Justices, but this variable fails to reach levels of statistical significance. Although this variable does not reach significance, it suggests that arguments which implicate fissures in legal liberalism should be tested further.¹⁷⁵ On reflection, the role ideology plays in the opinion-writing process is likely more qualitative in nature. The opinion-writing process is complex and strategic as Justices seek to attract a majority opinion that holds precedential value and is closest to their sincere preferences. This process raises the possibility that many potential concurrences have already been incorporated in the language of majority opinions.¹⁷⁶

Conclusion

Walker, Epstein, and Dixon argue that the dramatic decline of consensus and the concurrent increase in separate opinions is an artifact of the leadership of Chief Justices.¹⁷⁷ On the other hand, O'Brien argues that norm change can be traced back to American legal realism and the rise of legal liberalism as a result of Roosevelt's appointments.¹⁷⁸ Yet, both explanations fall short of explaining why consensual norms have not returned since the 1980s because both Chief Justice Rehnquist and now Roberts are considered strong leaders. Furthermore, since 1992, the Court has been dominated by Justices who eschew legal liberalism, with the New Right consolidating control over the Court.

We argue that a combination of the fissures within conservative jurisprudence and the normative infrastructure which enable Justices to write more separate opinions has

175. See, e.g., O'Brien, *Institutional Norms*, *supra* note 1. If, in fact, fissures within legal liberalism alone explain the persistence of non-consensual opinion-writing practices, liberal ideology as measured by Martin-Quinn scores should have been a significant predictor in our model. Since the covariate failed to reach significance, it seems the effect of fissures within legal liberalism is either not of the magnitude O'Brien claims, or are subsumed by the effects of shifts in infrastructure and individual-level characteristics.

176. Assuming that liberal or conservative Justices who spend a considerable amount of intellectual effort drafting majority opinions want their opinions to hold precedential value, then the threat of a concurrence should lead to the incorporation of moderate viewpoints, all else being equal. Thus, the lack of consensual opinion-writing on the Court may be better understood as the collapse of equilibrium in opinion-writing practices. This means that moderate Justices, when faced with a majority opinion that is too conservative or too liberal, must take the time to use concurrences as credible threats for leverage in future opinion-writing processes. Increased capacity to write separately reinforces the lack of equilibrium on the Court. It should, therefore, be necessary that Justices write concurring opinions from time to time because it is in their long-term interest to do so. If the threat to write a concurrence becomes no longer credible, then moderate Justices will likely write more concurrences in the long run to express their individual views, all else being equal, thus increasing their opportunity costs and taking time away from other pursuits they consider to be important.

177. Walker, Epstein & Dixon, *supra* note 10, at 384-88.

178. See generally O'Brien, *Institutional Norms*, *supra* note 1.

contributed to the persistence of non-consensual norms and hampered the ability of the chief justice to change the Court's opinion-writing behavior. Although we did not test directly for the New Right's contribution to the increased number of concurrences on the Court, our inclusion of ideology in the model does suggest a directional, though insignificant association between liberal Justices and concurring opinions. We feel it is important to examine this effect on opinion-writing in future research.

Since norms have shifted, an infrastructure providing the conditions for a strategic choice mechanism has prevented the court from reverting back to the days when it was more likely to craft consensual decisions. Indicators of the Court's capacity provide persuasive evidence that institutional arrangements have a significant impact on the court's operation. Our findings indicate that law clerks significantly affect the operation of the Court, providing Justices with the capacity to author more concurring opinions. In addition to these institutional-level variables, some Justices simply are more likely to author concurring opinions than others. These findings suggest that professional background and rank on the Court lead some Justices to write separately more often than their colleagues.

These findings have important implications for understanding the operation of the court as an institution. One implication is that Supreme Court Justices operate under significant time constraints that lead them to adopt reforms that may or may not have intended consequences. Certainly it was not the intention of members of the Court or Congress to provide more law clerks so that Justices could draft more concurring opinions. Whether or not the drafting of concurring opinions should be viewed positively or negatively, we feel, is a matter of debate. Another implication is that scholars should be more cognizant of the institutional characteristics under which judges operate, and how those characteristics influence decision-making, especially the observation that the institutionalization of law clerks provides the capacity for Justices to pursue their preferences strategically.