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*American Politics Research* 1999; 27; 488

DOI: 10.1177/1532673X99027004006

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# THE POLITICS OF DISSENTS AND CONCURRENCES ON THE U.S. SUPREME COURT

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Why do justices author or join separate opinions? Most attempts to address the dynamics of concurrence and dissent focus on aggregate patterns across time or courts. In contrast, we explain why an individual justice chooses to author or join a separate opinion. We argue that separate opinions result from justices' pursuit of their policy preferences within both strategic and institutional constraints. Using data from the Burger Court (1969 to 1985 terms), we estimate a multinomial logit model to test the influence of these factors on justices' decisions to join or author a regular concurrence, a special concurrence, or a dissent, as opposed to joining the majority opinion. Our results show that this choice reflects the justices' conditional pursuit of their policy preferences. We also disentangle the decision to join or author separate opinions, and we find that the latter decision is also influenced by the time remaining in the Court's term.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

—*Canon 19, Judicial Canons of  
Ethics, American Bar Association*

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*Authors' Note:* All authors contributed equally to this article. The authors thank Sarah Binder, Saul Brenner, Elliot Slotnick, and Harold Spaeth for their helpful comments. A previous version of this article was delivered at the 1997 Annual Meeting of the American Political Science Association.



AMERICAN POLITICS QUARTERLY, Vol. 27 No. 4, October 1999 488-514  
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The Judicial Canons of Ethics explicitly discourages justices from writing dissents and concurrences.<sup>1</sup> Indeed, separate opinions are frequently seen as weakening the institution of the Supreme Court and undermining the Court majority (Gerber & Park, 1997; Moorhead, 1952; O'Brien, 1996, p. 336; Ulmer, 1986). Nevertheless, in the post-World War II period, Supreme Court justices regularly author and join opinions that disagree with the opinion embraced by the majority of the Court (Walker, Epstein, & Dixon, 1988). Even when a justice agrees with the disposition favored by the Court majority, post-war justices frequently write or join a concurring opinion that contradicts the majority opinion. The general weakening of consensual norms that apparently limited the number of dissents and concurrences before the 1940s has been attributed to the leadership styles of chief justices, especially Chief Justices Hughes and Stone (Caldeira & Zorn, 1998; Haynie, 1992; Walker et al., 1988). Still, we know little about the factors that influence an individual justice's decision to author or sign a concurring or dissenting opinion.

Why do individual justices support or write opinions that disagree with the majority? Canon 19 suggests that the presence of concurring or dissenting opinions should stem from a "conscientious difference of opinion on fundamental principle." In other words, legal and policy differences should be the motivating factors behind separate opinions. Such a view suggests that separate opinions are little more than a justification for one's unwillingness to support the Court's outcome or ruling. Alternatively, some scholars (e.g., Brace & Hall, 1993; Epstein & Knight, 1998; Murphy, 1964; Spriggs, Maltzman, & Wahlbeck, in press) argue that a justice's willingness to concur or even dissent is a strategic calculation that reflects more than just a preference over case outcomes. Rather than viewing separate opinions as simply an expression of one's preferred outcome, this view portrays separate opinions as a tool or bargaining chip that can be used to shape the final opinion and ultimately the law. Finally, some scholars (e.g., Brace & Hall, 1990, 1993; Walker et al., 1988) view the presence or absence of separate opinions as a reflection of institutional factors that structure judicial decision making.

We argue that separate opinions result from the justices' pursuit of their policy preferences within both strategic and institutional constraints. We test our expectations using data from the Burger Court

(1969 to 1985 terms). First, we explain under what conditions a justice will either author or join a regular concurrence, a special concurrence, or a dissent, as opposed to joining the majority opinion. Second, we distinguish between the decision to author or join concurring opinions—explaining why justices author or join regular concurrences and why justices author or join special concurrences, as opposed to joining majority opinions. Our results demonstrate the value of a broad theoretical approach to explaining the development of Court opinions: Justices make choices based on their policy preferences while simultaneously responding to the institutional and strategic context of decision making on the Supreme Court.

### THE MECHANICS AND POLITICS OF SEPARATE OPINIONS

Prior to the Court releasing its opinion, each justice who is participating in a case must make one of the following choices: to join the majority opinion, to join or author a regular concurrence, to join or author a special concurrence, or to join or author a dissent. A justice who supports a dissent disagrees with both the disposition favored by the majority and the legal reasoning in the majority opinion. A justice who specially concurs, like one who dissents, disagrees with the legal reasoning espoused by the majority, but he or she agrees with the case outcome. A regular concurring opinion, by contrast, agrees with both the disposition and the legal reasoning contained in the majority opinion, but it highlights a point, discusses a related topic, or expands on the majority's logic. A special concurrence (but not a regular) therefore offers an alternative legal rationale for the case outcome and, in so doing, parts company from the rest of the majority (see Kimura, 1992, p. 1595; Segal & Spaeth, 1993, p. 276). A special concurrence can also possibly produce a judgment of the Court, which generally lacks precedential value and thus represents a more potent sanction than a regular concurrence.<sup>2</sup>

Separate opinions play a key role in shaping the law and determining the role of the Supreme Court in the broader polity. Lacking fail-proof means of enforcing its decisions, the power of the Supreme Court depends in part on the legitimacy the public affords its rulings

(Caldeira & Gibson, 1995; Cox, 1976, p. 104; Mondak, 1994). Any signals suggesting disagreement on the Court possibly weaken the standing of the Court as an institution. As observed by Judge Learned Hand, any opinion that disagrees with the majority “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends” (Hand, 1958, p. 72). Or, as others note, separate opinions “may shake public confidence in the judiciary by bringing into question the certainty of the law” (Walker et al., 1988, p. 387; see also Danelski, 1968; Pritchett, 1954; Ulmer, 1970, 1971, 1986). For this reason, a norm of consensus prevailed for much of the Court’s history. Even when he disapproved of the direction embraced by the majority of the Court, for example, Justice Story wrote to a friend that he was reluctant to write separately because he did not want to appear “desirous of weakening the [word unclear] influence of the court” (quoted in Murphy, 1964, p. 61).

Concurring and dissenting opinions exert a more direct effect on the Court and its opinions than simply questioning their legitimacy. They can reduce an opinion’s impact by outlining the flaws in the majority’s legal logic and thus affecting the future development of the law (Ball, 1978; Brennan, 1986a; Murphy, 1964, pp. 60, 66; Segal & Spaeth, 1993, p. 261; Ulmer, 1970). Justice Brennan (1986a) articulates this point when he writes that a separate opinion “challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority’s reasoning can continue to be evaluated, and perhaps, in time, superseded” (p. 435). Justice Antonin Scalia, like Justice Brennan, views separate opinions as a vehicle for informing “the public in general, and the Bar in particular, about the state of the Court’s collective mind” (Scalia, 1994, p. 38).

Court opinions inevitably contain some ambiguity, and separate opinions provide individual justices the opportunity to shape the public’s understanding of a majority opinion (Baum, 1998, p. 139). For example, they send signals to lower court judges, administrative agencies, and the broader legal community about the tentative nature of the Court opinion, and in so doing may affect how implementers react to it (Johnson, 1987; Peterson, 1981, p. 425; Ulmer, 1970, p. 581). Justice William Brennan, responding to Justice Thurgood Marshall’s concurrence in *Batson v. Kentucky* (1986) that criticized the majority because its rule could be easily circumvented, emphasizes this point:

May I, however, presume to suggest the fear that some language in Part II of your opinion might inadvertently help an unscrupulous prosecutor, determined to strike blacks from the jury, to convince both trial and appellate courts to read the Court's opinion as embracing the narrow standard that has been adopted by some state courts. My worry is that we might accidentally lose some of the ground that you and I have fought long and hard to attain. (Brennan, 1986b)

Brennan clearly saw Marshall's concurrence as playing a role in shaping the implementation of the Court's ruling. Because separate opinions can influence the implementation of the majority's opinion, Justice Powell informed his clerks that "The force of a Court opinion is sometimes weakened by concurrences" (Powell, 1984, p. 17; cf. Murphy, 1964, p. 47).

Finally, separate opinions may serve a strategic purpose by moving the majority opinion author to accommodate the preferences of a particular justice (Ginsburg, 1990; Murphy, 1964, p. 63). According to Scalia, a separate opinion "often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule" (1994, p. 41). Justice Ruth Bader Ginsburg, like Scalia, recognizes that "there is nothing better than a good dissent to force one to sharpen her presentation for the Court" (1995, p. 2126) and that "when drafted and circulated among the judges, they [separate opinions] may provoke clarifications, refinements, and modifications in the court's opinion" (1990, p. 142). For this reason, Murphy (1964), Spriggs et al. (in press), Epstein and Knight (1998), and others view separate opinions, and even the mere threat of them, as an important bargaining tactic that can be used to shape the final majority opinion.

### EXPLANATIONS OF NONCONSENSUAL BEHAVIOR

The importance of concurring and dissenting opinions has not escaped either justices or political scientists. As a result, scholars have explored varying rates of dissents among different courts and over time (e.g., Atkins & Green, 1976; Beiser, 1974; Brace & Hall, 1990; Caldeira & Zorn, 1998; Canon & Jaros, 1970; Gerber & Park, 1997; Glick & Vines, 1973; Hall, 1987; Hall & Brace, 1989; Haynie, 1992; Jaros & Canon, 1971; Sickels, 1965; Walker et al., 1988). By comparing

levels of nonconsensus across state courts, between different federal court levels, and over time, these studies highlight the importance of institutional factors—such as norms of behavior, the appointment process, and court size—in encouraging judicial consensus.

Although many scholars examine the factors that account for non-consensus at the aggregate level, relatively few look at nonconsensus at the individual level (Brace & Hall, 1993). In other words, our understanding of what promotes division on a court is significantly more advanced than our understanding of the conditions that lead individual justices to join or author separate opinions. Studying the politics of separate opinions at the individual level is critical for understanding the dynamics of judicial decision making.

Inevitably, this is one of the reasons why Brace and Hall (1993) develop an individual-level model of judicial dissent. In their work, Brace and Hall explain whether supreme court justices in six states vote to dissent in death penalty cases from 1980 through 1988. Their study is noteworthy because of its implications for models of judicial decision making. Most important, they show that state supreme court justices pursue their policy preferences within a number of institutional and contextual constraints. In other words, justices are strategic in the sense that they take into account factors other than their policy preferences when making their judicial choices (cf. Hall, 1992).

The Brace and Hall findings build on empirical studies of Supreme Court dissents that preceded their work. Studies of the tendency of individual U.S. Supreme Court justices to author or join separate opinions usually treat the presence of either dissents or concurrences as a reflection of a justice's social characteristics, such as religious affiliation (Ulmer, 1970) or policy preferences (Brenner & Spaeth, 1988). Because personal attributes are in part related to individual attitudes (Brace & Hall, 1993, p. 923; Tate, 1981) and because supporting a dissenting (rather than a concurring) opinion stems from one's preferred disposition, these findings lend credence to the large body of literature that shows a justice's final vote on a case's merits stems from policy preferences (e.g., Pritchett, 1948; Rohde & Spaeth, 1976; Schubert, 1959, 1965; Segal & Spaeth, 1993).

The notion that a Supreme Court justice's willingness to write separately is a strategic calculation is consistent with Segal and Spaeth's discussion of special concurrences (1993, pp. 291-293). Segal and

Spaeth show that conservative justices (O'Connor, Rehnquist, and Scalia) are more likely to be responsible for a plurality opinion than liberal justices (Brennan, Marshall, and Blackmun). This occurs because in 5-4 cases conservative justices are more likely to author a special concurrence than liberal justices. Segal and Spaeth (1993) attribute this phenomenon to the fact that

At least since . . . the beginning of the 1981 term, conservative justices have constituted a majority. As such, they have less to lose than their opponents when they fail to avail themselves of their built-in majority to articulate binding policy. The liberals, along with a moderate such as Blackmun, find themselves in the majority far less frequently. When they do, they may be more reluctant to eviscerate their victory by unyielding adherence to their individual policy preferences. (p. 293)

Whereas Segal and Spaeth (1993) argue that justices' dispositional choices solely reflect their personal policy preferences, they recognize that a justice's willingness to support a particular opinion stems in part from strategic calculations about the implications of joining it. Segal and Spaeth, like Brace and Hall, recognize that more than policy preferences shape the politics of separate opinions.

### **A THEORETICAL ACCOUNT OF SEPARATE OPINIONS**

Building on the theoretical framework of Brace and Hall, Murphy, Ulmer, and others, we explain the politics of separate opinions as a function of both ideological preferences and institutional and strategic considerations. That is, we argue that Supreme Court justices seek their preferred policy outcomes conditionally—subject to a number of factors that temper justices' ability to secure their most preferred legal and political outcomes.

#### **IDEOLOGICAL COMPATIBILITY**

Canon 19's statement that separate opinions should reflect "difference of opinion on fundamental principle" is consistent with the notion that justices' voting behavior largely reflects their policy pref-

erences. Indeed, justices who disagree with a majority opinion should be more likely to support a separate opinion. Past research, moreover, demonstrates a link between justices' attitudes and the writing of separate opinions, showing, for example, that because of shared policy preferences blocs of justices tend to vote together and join similar opinions (Brenner & Spaeth, 1988; Pritchett, 1948; Schubert, 1959; Sprague, 1968; Ulmer, 1960; cf. Brace & Hall, 1993). Whether an opinion reflects a justice's policy preferences is likely to depend on two factors.

First, because the majority opinion writer has a disproportionate ability to shape the opinion (Murphy, 1964; Rohde, 1972b; Rohde & Spaeth, 1976), the acceptability of the majority opinion to a justice is likely to depend in part on the ideological distance between the justice and the majority opinion author. The closer a justice's preferences are to those of the majority opinion author, the more likely he or she will agree with the opinion and will join it without writing separately (Segal & Spaeth, 1993, p. 252).

Second, when a case is more complex, it is less likely that an opinion will reflect a justice's policy preferences, thus affecting the desirability of separate opinions. Although the disposition of a particular case can usually be thought of as a dichotomous choice (affirm or reverse), some cases require opinions that address issues in multiple dimensions (McGuire & Palmer, 1995; Schubert, 1962; Wenzel, 1994). In these instances, accommodating an individual justice becomes significantly more difficult, if not impossible. As Justice Ginsburg (1990) put it, "Hard cases do not inevitably make bad law, but too often they produce multiple opinions" (p. 148). In a multidimensional setting, moreover, what is acceptable to one set of justices is likely to be objectionable to another (see Arrow, 1951).

The influences of policy preferences on justices' calculations suggest the following hypotheses:

*Hypothesis 1:* The greater the ideological distance between a justice and the majority opinion author, the more likely the justice will either join or author a separate opinion.

*Hypothesis 2:* When the majority opinion addresses issues that fall into multiple dimensions, the more likely a justice will either join or author a separate opinion.

### STRATEGIC FACTORS

A justice's decision to author or join a separate opinion depends on factors beyond his or her policy preferences. Instead, justices are strategic in making calculations about the short- and long-term costs and benefits of supporting a separate opinion. In making their choices, justices recognize that the utility they receive from an opinion is in part a function of the actions of other justices (Murphy, 1964; Rohde, 1972a; Schubert, 1959). Thus, the costs and benefits of a choice reflect both their policy preferences and the implications of a particular course of action for securing their policy objectives and facilitating positive relationships with their colleagues.

First of all, justices are engaged in long-term interactions with their colleagues and thus are likely to adopt tit-for-tat strategies (Axelrod, 1984; Murphy, 1964, pp. 38-39, 53; Schwartz, 1996). Justices are likely to reward colleagues who have cooperated with them in the past and punish those who have not. Segal and Spaeth (1993, p. 295) suggest that justices tend to write separately when, for example, Justice O'Connor is authoring the Court's opinion because of her propensity to write separate opinions against their majority opinions. These separate opinions represent punishment for O'Connor's tendency to write separately. Atkins and Green (1976) suggest as well that the frequency of unanimous decisions on the Court of Appeals stems from a norm of reciprocity rather than sincere consensus (see also Sickels, 1965). Thus, we posit that past interactions of the justices should affect decisions regarding separate opinions.

*Hypothesis 3:* The more often the present majority opinion author has cooperated with a justice in the past, the less likely the justice will now author or join a separate opinion.

Another relevant consideration for a justice is the importance of a case. Not all cases are equally salient to the justices, and they are more likely to be concerned with the legal rules announced in important cases (Murphy, 1964; Slotnick, 1978). Murphy (1964), Slotnick (1978), and Spriggs et al. (in press) argue that the tactics justices pursue are shaped in part by their calculations regarding a case's vitality.

In unimportant cases, justices may be willing to ignore their preferences and thus create an illusion of consensus. This is suggested in a memo from Chief Justice Warren Burger to Justice Hugo Black in 1971: "I do not really agree but the case is narrow and unimportant except to this one man. . . . I will join up with you in spite of my reservations" (Burger, 1971). The policy implications of an important case are broader, because they presumably have greater or more widespread economic, political, or social effects. Thus, we expect the following:

*Hypothesis 4:* A justice is more likely to write or join a separate opinion in important cases.

Indeed, consistent with this hypothesis are claims that courts with discretionary dockets, which presumably contain more salient cases, generate more dissents (Brace & Hall, 1990; Hall, 1985; Halpern & Vines, 1977; Walker et al., 1988).

Because opinion authors seek to establish a binding precedent, they try to put together a majority coalition. Consistent with this is previous research that shows that when a winning coalition is small, majority opinion authors make an extra effort to accommodate their colleagues (Murphy, 1964, p. 65; Rohde, 1972b, 1972c; Wahlbeck, Spriggs, & Maltzman, 1998). This empirical claim is reinforced by Justice Rehnquist's (1987) observation:

The willingness to accommodate on the part of the author of the opinion is often directly proportional to the number of votes supporting the majority result at conference; if there were only five justices at conference voting to affirm the decision of the lower court, and one of those five wishes significant changes to be made in the draft, the opinion writer is under considerable pressure to work out something that will satisfy the critic. (p. 302)

Because authors are more likely to accommodate justices if the conference coalition is minimum winning, we hypothesize that:

*Hypothesis 5:* Justices in a minimum winning majority conference coalition are less likely to write or join a concurrence.<sup>3</sup>

## INSTITUTIONAL CONTEXT

The institutional context of a case also affects the writing or joining of separate opinions. Indeed, this is the primary conclusion reached by those who have taken a macroapproach to the study of dissenting on courts (e.g., Brace & Hall, 1990; Walker et al., 1988). Although institutional effects should be most visible when studying levels of dissent over time and across courts, institutional effects may also be observable either by noting differences among justices or across cases.

Chief justices occupy a unique institutional position that may affect their willingness to concur or dissent (Brenner & Hagle, 1996). Because of the chief's leadership role on the Court, the Court's institutional interest in releasing opinions that create as little ambiguity as possible, and the chief's ability to assign the majority opinion when he is part of the majority, Ulmer (1986) argues that chief justices "have some unique reasons for discouraging conflict in the Courts and avoiding the dissenting position generally in casting their individual votes" (p. 51). This leads to the following prediction about the likelihood of separate opinions.

*Hypothesis 6:* Chief justices are less likely to join or write separate opinions than their colleagues.

The process of new justices assimilating to the Court may also affect the writing or joining of separate opinions. Scholars often suggest that justices experience a so-called "freshman effect," with new justices taking a few years to develop experience and become comfortable in their new setting (Brenner & Hagle, 1996; Hagle, 1993; Howard, 1968; Wood, Keith, Lanier, & Ogundele, 1998). This process of adjustment may, for example, lead justices to avoid conflict and take more neutral points of view, vote more moderately, or exhibit somewhat unstable voting patterns (Howard, 1968; Snyder, 1958; Ulmer, 1959; Walker et al., 1988). If, as Howard (1968) suggests, freshman justices are "following rather than leading" (pp. 45-46), then

*Hypothesis 7:* Justices will be less likely to author or join a separate opinion when they are new to the bench than later in their careers.

We discuss and test two other institutional factors below: the Court's calendar and workload pressures. However, because no additional time is spent if a justice decides to join a concurrence rather than join the majority, we do not expect time pressures to affect the joining of concurrences compared to joining the majority. We therefore wait to discuss these two variables until presenting our second model, which distinguishes between joining and authoring concurrences.

## DATA AND METHODS

To test these hypotheses, we identified whether every justice (other than the majority opinion author) wrote or joined a regular concurrence, a special concurrence, or a dissent in cases decided during the Burger Court (1969 to 1985 terms).<sup>4</sup> We then estimated a multinomial logit model on a four-category dependent variable: justice joins majority opinion, justice writes or joins a regular concurring opinion, justice writes or joins a special concurring opinion, and justice writes or joins a dissenting opinion. Multinomial logit is the appropriate estimator when the dependent variable is a nominal variable with multiple categories (Aldrich & Nelson, 1984; Greene, 1993; Maddala, 1983).<sup>5</sup> Because this technique estimates the likelihood that an action will be chosen compared to another alternative, which serves as a base, it provides three sets of estimates.<sup>6</sup> Because each of the justices in our study appears repeatedly over time, it is possible that the residual for a particular justice's decision to circulate a separate opinion in one case is correlated with the residual for that justice in another case (see Stimson, 1985). We control for correlated errors within justices by using the robust variance estimator, which relaxes the independence assumption and requires only that observations be independent across justices (Kennedy, 1992, pp. 278-289; White, 1980).<sup>7</sup>

## INDEPENDENT VARIABLE MEASURES

To measure a justice's ideological distance from the majority opinion author, we created an issue-specific compatibility score between the author and each justice deciding a case. The score is the absolute

difference between the justice's value-specific liberalism and the majority opinion author's liberalism score for the 12 value groups identified by Spaeth (1994; Epstein, Segal, Spaeth, & Walker, 1994, Table 6-1).<sup>8</sup> Thus, if the justice's ideology is identical to the author's, the author distance is zero; and the more distant the justice is from the majority opinion author, the higher the score.

To test whether legal complexity affects separate opinion writing, we combined two indicators derived from Spaeth (1994): the number of issues raised by a case and the number of legal provisions relevant to a case. Factor analysis of these two indicators produced a single factor with an eigenvalue of greater than one. We used each case's factor score as a measure of legal complexity.

We also included three variables tapping strategic constraints. First, to measure the degree of previous cooperation between the majority opinion author and a justice, we calculated the percentage of time that the author joined a separate opinion (i.e., concurrence or dissent) written by the justice in the previous term. The number of separate opinions written by each justice and the number of those separate opinions that the author joined were drawn from Spaeth (1994). To purge our measure of cooperation of ideological compatibility between justices, we regressed the percentage of time that the author joined another justice's separate opinions on Author Distance, using the residual from this regression as our measure of Cooperation. The Cooperation variable ranges from a low of  $-.16$  to a high of  $.84$ , with higher values representing greater past cooperation by the author with a justice (after controlling for their ideological similarity).<sup>9</sup> Second, because case importance operates on both political and legal dimensions (Cook, 1993), we need two measures of case importance to test Hypothesis 4.<sup>10</sup> As an indicator of political salience, we used the *United States Supreme Court Judicial Database, Phase II: 1953-1993* (Gibson, 1997) to calculate the number of amicus curiae briefs filed in each case. We then created a dichotomous variable that assumes the value of one if the case contains at least 1.65 standard deviations more amicus briefs than the average number of briefs filed in all cases that term.<sup>11</sup> As a measure of legal salience, we determined whether an opinion overturned precedent or declared a state or federal law unconstitutional using Spaeth (1994). If a case overruled one or more of the

Court's own precedents or overturned a piece of state or federal legislation, we coded the case as 1. Finally, we created a variable to identify whether a justice in the final majority coalition was part of a minimum winning conference coalition.<sup>12</sup>

To capture the institutional position of the Chief Justice, we coded each observation for Chief Justice Burger as 1. We also created a freshmen variable to denote whether a justice had served less than two complete terms on the bench.

## RESULTS

Justices frequently express disagreement with the majority opinion by joining or writing a concurrence or dissent. Of the 17,472 justice observations in these 2,265 cases, 852 (4.9%) authored or joined a regular concurrence, 1,175 (6.7%) authored or joined a special concurrence, and 3,957 (22.6%) dissented in cases decided during the Burger Court. Table 1, moreover, provides the results of a multinomial logit model explaining justices' decisions to affiliate themselves with one of these types of separate opinions. It yields strong evidence for our theoretical expectations about the underlying causes of separate opinions. The Wald test indicates, as seen in the chi-squared statistic presented in Table 1, that we can reject the null hypothesis that all of the independent variables jointly have no influence.<sup>13</sup> The model also correctly predicts 66.6% of the cases, for a 34.4% reduction of error above the null model.<sup>14</sup>

The data analysis supports nearly all of our substantive hypotheses. First, as indicated by the positive and significant coefficient for Author Distance, justices are more likely to author or join any kind of separate opinion the further they are ideologically from the majority opinion author. Take, for example, Justices Brennan, Marshall, and Rehnquist in a civil rights case. If Justice Marshall is the majority opinion author, the likelihood that Brennan will write or join either a special concurrence or a dissent is, respectively, 4.4% and 9.2%. In contrast, Justice Rehnquist is likely to take these steps in 17.3% and 36.1% of the cases, respectively.<sup>15</sup> Additionally, the legal complexity of a case, which influences the degree to which an opinion comports

**TABLE 1**  
**Multinomial Logit Model of Justices' Decisions to Join Majority,  
 Concur Regularly, Concur Specially, or Dissent (1969 to 1985 Terms)**

<i>Variable</i>	<i>Regular Concur Versus Majority Estimates</i>	<i>Special Concur Versus Majority Estimates</i>	<i>Dissent Versus Majority Estimates</i>
Constant	-3.088 (.131)**	-3.052 (.127)**	-1.626 (.119)**
Ideological compatibility			
Author distance	.018 (.004)**	.034 (.004)**	.034 (.003)**
Legal complexity	.079 (.025)**	.052 (.032)*	.105 (.022)**
Strategic constraints			
Political salience	.358 (.136)**	.516 (.079)**	.073 (.097)
Legal salience	.448 (.115)**	.508 (.117)**	.036 (.352)
Cooperation	-2.071 (.420)**	-2.623 (.438)**	-2.559 (.650)**
Minimum winning coalition	.246 (.125)	-.532 (.156)**	-5.371 (.761)
Institutional constraints			
Chief justice	-.026 (.106)	-.205 (.085)**	-.561 (.095)**
Freshman	.151 (.193)	-.180 (.148)	-.060 (.134)

NOTE: Robust standard error in parentheses.  $N = 17,472$ , chi-squared = 360.65\*\*, percentage correctly predicted = 66.6, and percentage reduction of error = 34.4.

\* $p < .05$ , one-tailed test. \*\* $p < .01$ , one-tailed test.

with a justice's policy goals, also significantly increases the prevalence of separate opinions. In legally noncomplex cases where there is only a single legal provision and issue in debate, justices write or join a regular concurrence, a special concurrence, or a dissent 5.2%, 6.8%, and 14.0% of the time. In the most complex cases, however, where there are four legal provisions and three issues in question, these figures increase to 7.5%, 8.1%, and 24.6%, respectively.

Justices also respond to strategic constraints. Cooperation, which accounts for tit-for-tat dynamics between justices, dramatically affects justices' behavior. The pair of justices who cooperated more closely than any other pair during the Burger Court was Brennan and Marshall in 1969. This is true even after controlling for the effects of their ideological compatibility. When Marshall was writing the Court's opinion, Justice Brennan was likely to regularly concur, specially concur, or dissent 1.2%, 1.0%, and 2.2%, respectively. Chief Justice Burger and Justice Blackmun offer a contrast in 1971, cooperating less frequently than any Burger Court pair after controlling for

ideological agreement. In those cases where the Chief Justice was authoring the majority opinion, these numbers increased for Blackmun to 6.6%, 9.3%, and 19.4%.

Politically and legally salient cases also motivate justices to author or join either special or regular concurrences, but not dissents. Justices, for example, write or join special concurring opinions 6.8% of the time in politically nonsalient cases, but 10.5% of the time in politically salient ones. Cases that are legally salient also increase the probability of a justice supporting a regular concurring opinion from 5.1% to 7.4%, as well as increasing the likelihood of a justice specially concurring from 6.6% to 10.2%. Justices who were part of a minimum winning conference coalition are, as we expected, less likely to author or join a special concurrence, but this strategic context exerts no influence on regular concurrences. Specifically, the probability of a justice specially concurring decreases from 6.5% to 5.1% if the conference coalition was minimum winning in size. We suspect that justices are less likely to specially concur because such an opinion can result in a judgment of the Court, which for most purposes lacks precedential value, and thus majority opinion authors are much more likely to accommodate justices' concerns. A regular concurrence, by contrast, generally cannot result in a plurality opinion because it agrees with the majority's legal reasoning and thus provides less of an incentive for authors to modify majority opinions.

Finally, the data support our argument that institutional constraints affect justices' decisions.<sup>16</sup> Consistent with our expectation, Chief Justice Burger is less likely to either specially concur or dissent than his colleagues.<sup>17</sup> Burger, for example, dissents 9.5% of the time, as compared to a rate of 15.4% for the remaining justices. The Chief, however, is not less likely to regularly concur. Because our analysis is limited to the Burger Court, it is impossible to ascertain whether this finding reflects idiosyncratic factors unique to Burger or his institutional position. However, Brenner and Hagle (1996) and Ulmer (1986) demonstrate that this finding most likely stems from his institutional position. Indeed, Brenner and Hagle (1996, pp. 252-253) demonstrate that Chief Justices Vinson, Warren, Burger, and Rehnquist were 2.4 times less likely to concur and 2.48 times less likely to dissent than associate justices. Contrary to the freshman effect

hypothesis, freshman justices are no less likely to join or author a concurring or dissenting opinion than their more senior colleagues.<sup>18</sup>

### INFLUENCES ON THE DECISION TO AUTHOR A CONCURRENCE

Justices who disagree with the legal reasoning of the majority must make two choices. First, they have to decide whether to concur or dissent. Second, they have to decide whether to join or write a separate opinion. Although the decision to author a dissent is primarily determined by the assignments made by the senior justice in the minority (Cook, 1995; Rehnquist, 1987, p. 302; Wood & Gansle, 1997), justices who plan to concur must independently decide whether to join or author a concurrence.<sup>19</sup> We know that many justices who support the disposition favored by the majority confront this choice. During the Burger Court, 10.9% of justices in the final majority coalition decided to author a regular or special concurring opinion, whereas 4.1% of them joined one.<sup>20</sup>

In our first model, we treated justices who authored and those who simply joined a concurring opinion as identical choices. Although we expect that the same variables that account for the decision to join a concurring opinion will also account for the decision to write one, the amount of time a justice can devote to writing a concurrence is also likely to affect his or her decision.<sup>21</sup> The time pressures a justice encounters are a function of two factors: the justice's workload and the amount of time that he or she has to complete the work. Indeed, previous research suggests that justices will be less likely to author a concurrence rather than join the majority the higher their workload (Atkins & Green, 1976; Songer, 1986; cf. Haynie, 1992; Walker et al., 1988). This assertion is supported by Justice Ginsburg's (1990) observation that all justices "operate under one intensely practical constraint: time . . . [and thus] concurrences are written on one's own time" (p. 142). Workload pressures are also likely to be heightened at the end of the Court's annual term. Justice Harlan (1971) made this point in a memo to Chief Justice Burger: "I am glad to join your opinion in each case. If end-of-Term pressures permit, I may write something in addition." Because joining another justice's concurring opin-

ion does not entail any additional writing responsibilities, we hypothesize the following:

*Hypothesis 8:* A justice with a heavier workload will be less likely to author a concurrence than join the majority.

*Hypothesis 9:* As the end of the Court's annual term approaches, justices will be less likely to author a concurring opinion than join the majority.

To test these hypotheses, we used a multinomial logit model with a five-category dependent variable for all justices who cast a vote in favor of the final majority's disposition: join the majority opinion ( $n = 11,505$ ), join a regular concurrence ( $n = 209$ ), author a regular concurrence ( $n = 645$ ), join a special concurrence ( $n = 343$ ), or author a special concurrence ( $n = 833$ ). Once again, we derived these data from Spaeth (1994). As before, we use robust standard errors to control for any within-justice error correlation over time.

In addition to including the independent variables used in Table 1, we incorporated two variables to tap the additional institutional constraints of workload and end of term. We operationalized each justice's workload as the number of majority opinions on which he or she was working on the day the first draft of the majority opinion was released.<sup>22</sup> We measured end of term by counting the number of days between the day the first draft of the majority opinion was circulated and July 1, the traditional end of the Court's term. When the draft majority opinion is released at the beginning of the term, the end-of-term value is high, and it decreases as it is circulated closer to July 1.

The results reported in Table 2 support our claim that justices pursue their policy preferences within institutional and strategic constraints. With the exception of case complexity, political and legal salience, and chief justice, the same independent variables that are significant in Model 1 are significant for both authoring and joining either regular or special concurrences. Although case complexity increases the odds of a justice authoring either a regular or a special concurrence, it has no effect on the joining of either type of concurring opinion. We suspect that this occurs because, on cases that deal with several issues in multiple dimensions, it is less likely that two justices who plan to concur agree on the legal rationale. Thus, each writes independently. Political and legal salience increase a justice's ten-

**TABLE 2**  
**Multinomial Logit Model of Justices' Decisions to Author or Join**  
**Regular or Special Concurrences (1969 to 1985 Terms)**

<i>Variable</i>	<i>Join Regular Concurrence Estimates</i>	<i>Join Special Concurrence Estimates</i>	<i>Write Regular Concurrence Estimates</i>	<i>Write Special Concurrence Estimates</i>
Constant	-4.865 (.315)**	-4.388 (.210)**	-3.597 (.186)**	-3.472 (.214)**
Ideological compatibility				
Author distance	.031 (.006)**	.043 (.006)**	.013 (.004)**	.032 (.003)**
Legal complexity	-.074 (.066)	.063 (.059)	.122 (.032)**	.059 (.031)*
Strategic constraints				
Political salience	-.065 (.302)	.713 (.101)**	.487 (.144)**	.459 (.144)**
Legal salience	.385 (.262)	.347 (.199)*	.420 (.104)**	.489 (.129)**
Cooperation	-1.906 (.784)**	-2.794 (.794)**	-2.125 (.445)**	-2.612 (.554)**
Minimum winning coalition	-.061 (.272)	-.709 (.239)**	.314 (.147)	-.463 (.149)**
Institutional constraints				
Chief justice	.489 (.177)	.333 (.154)	-.191 (.133)	-.430 (.110)**
Freshman	.159 (.310)	-.244 (.221)	.138 (.265)	-.164 (.234)
Workload	-.032 (.027)	-.022 (.020)	.002 (.018)	-.007 (.018)
End of term	.001 (.001)	-.001 (.001)	.002 (.001)*	.001 (.001)*

NOTE: Robust standard error in parentheses.  $N = 13,531$ , chi-squared = 5,340.21\*\*, percentage correctly predicted = 85.0, and percentage reduction of error = 44.5.

\* $p < .05$ , one-tailed test. \*\* $p < .01$ , one-tailed test.

dency to author or join special concurrences or to author regular concurrences, but they have no influence on the joining of regular concurrences. In addition, Chief Justice Burger is less likely to author a special concurrence, but he is indistinguishable from other justices in terms of joining special concurrences. The result for Chief Justice in Table 1 is thus driven by his propensity to avoid authoring special concurrences.

Most important, Table 2 provides support for the notion that a justice's willingness to author a concurring opinion depends in part on the institutional constraint caused by time pressures. Consistent with Hypothesis 9, justices are less likely to author a regular or special concurrence as the end of the Court's annual term approaches. If there are 227 days left in the Court's term (November 16) then a justice authors either a regular or special concurrence 5.2% and 5.8% of the time, whereas if there are only 92 days left in the term (March 31) then these

probabilities drop to 4.1% and 5.0%, respectively.<sup>23</sup> We, however, find no support for the idea that justices with heavier workloads are less likely to author a concurrence than join the majority opinion.

## CONCLUSION

Our empirical results show, first of all, that justices choose to either author or join special concurrences, regular concurrences, or dissents the further they are ideologically from the majority opinion author. We further determine that the complexity of a case increases a justice's tendency to author both types of concurrences and to dissent, but it has no effect on the joining of concurrences. Strategic factors also influence justices' decisions, and justices are less likely to author or join any type of separate opinion if the author has cooperated with them in the past. Political and legal salience also generally increase the chances that a justice will concur, but do not affect dissents. Because in a minimum winning conference coalition the author is more likely to accommodate another justice, justices in such a context are less likely to write or join special concurrences than join the majority. Chief Justice Burger is also less likely to author special concurrences than his colleagues, though without including other chief justices in the analysis this inference is still somewhat tentative. Finally, justices are less likely to both author regular and special concurrences as the end of the Court's annual term approaches. We, however, found no support for two other institutional characteristics, freshman justices and workload.

Because of the legal and political significance of Supreme Court opinions, justices carefully weigh the value and need to express disagreement with the majority of the Court. Although attitudinal factors have been given the predominant role in accounting for justices' votes on case dispositions, it is clear that the willingness to disagree with the majority's legal reasoning stems from a combination of attitudinal, strategic, and institutional factors. Our analysis lends credence to the view that Supreme Court justices are rational actors who pursue their policy goals within constraints—strategic and institutional factors temper justices' pursuit of their policy preferences. Indeed, as Brace and Hall (1990) conclude,

Courts are institutions, comprised of individuals, that respond to a greater or lesser extent to environmental stimuli. . . . Institutions structure conflict by creating incentives or barriers for cooperation. A complete model of judicial decision making must consider the manner in which institutions influence individuals and mediate the effects of the environment. (p. 67)

Clearly, the lessons Brace and Hall derive from their study of state supreme courts fit well with the politics of the U.S. Supreme Court.

In addition to teaching us something about the politics of separate opinions, we believe that our empirical results illustrate the value that judicial scholars can derive from both integrating models that embrace several theoretical traditions and teasing out the empirical complexity of their dependent variables. Although such analyses may not be as parsimonious as some would like (and clearly are more difficult to empirically test), they are frequently right. Although we can develop theoretically and empirically rigorous explanations of judicial politics, it is often a complicated enterprise.

## NOTES

1. Canon 19 was adopted by the American Bar Association on July 9, 1924. On August 16, 1972, the American Bar Association replaced the "Canons of Judicial Ethics" with an abbreviated "Code of Judicial Conduct." The Code's focus is proscribing activities that explicitly infringe on judges' impartiality. The Code does not contain language similar to that contained in Canon 19.

2. Traditionally, a plurality opinion did not establish a legal precedent. In 1977, however, the Supreme Court, in *Marks v. United States*, ruled that "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." Thus, it is possible that a plurality opinion might create a precedent (see Thurmon, 1992).

3. We expect a minimum winning coalition to influence members of the majority conference coalition and thus affect concurrences and not dissents. The empirical analysis below tests this hypothesis by using a dependent variable that distinguishes between concurrences and dissents.

4. We gathered these data from Spaeth (1994), including all orally argued cases resulting in a full signed opinion, a per curiam opinion, or a plurality opinion. Also, we excluded the majority opinion author because including him or her would obviously introduce bias, given that we are explaining why justices decide to write or join separate opinions.

5. One could assume that these four categories represent an implicit order regarding the acceptability of the majority opinion. If one makes this assumption, ordered probit would be the

appropriate estimator. Theoretically, we question whether these categories should be seen as ordinal. Ordered probit assumes that as the value of each independent variable increases, the likelihood of each higher ranked dependent variable category (e.g., moving from special concurrences to dissents) also increases. Although this assumption seems plausible for the ideological compatibility variables (in that the further a justice is ideologically from the author the more likely he or she is to dissent than specially concur), it is not appropriate for some of our other independent variables. The minimum winning coalition variable, for example, only applies to concurring opinions and thus ordered probit cannot adequately test our hypothesis. Empirically, moreover, there is little indication that these categories should be ordered. An ordered probit assumes that the coefficients are equal for each category. We tested this assumption using a log-likelihood ratio test. The test indicated that this assumption is not plausible, as we are compelled to reject the null hypothesis that the coefficients are equal across categories. Multinomial logit models relax this assumption by calculating separate coefficients for each category. Thus, we opted to employ a multinomial logit model. Nevertheless, we alternatively estimated our models using ordered probit, and the results were consistent with those of the multinomial logit presented in Tables 1 and 2. These results are available from the authors.

6. If join majority is the baseline, for example, each type of separate opinion is compared to joining the majority opinion. For example, one set of estimates compares a justice's decision to write or join a special concurrence, as opposed to joining the majority.

7. It is also possible that one should control for certain majority opinion authors' tendency to lead other justices to concur or dissent. We therefore also ran our two models with indicator variables for every majority opinion author but one, and the results are nearly identical to those that we present. The results are consistent with those presented in Tables 1 and 2.

8. This score was calculated by using the percentage of cases between 1953 and 1991 terms in which each justice voted for the liberal outcome in each of Spaeth's (1994) 12 substantive value groups (Epstein, Segal, Spaeth, & Walker, 1994, Table 6-1).

9. If a justice was not serving on the Court in the prior term, we set his agreement with the author at zero.

10. Judicial scholars often disagree about measuring case importance. For a review of issues regarding its measurement, see Brenner (1997), Cook (1993), Slotnick (1978).

11. Because the amount of amicus participation has grown substantially over the past 25 years (Epstein, 1993), we use term-specific mean and standard deviation. In the 1969 term, Chief Justice Burger's first term on the Court, there were on average 1.1 amicus briefs filed in every case. This more than tripled during Burger's tenure on the Court. In 1985, Chief Justice Burger's final term on the Court, there was an average of 3.6 amicus briefs filed in every case. Thus, to be considered salient in 1969, a case would need more than 4 amicus briefs. In 1985, a case needed more than 11 briefs to be deemed salient.

12. This means that in cases in which eight or nine justices participated a minimum winning coalition contains five justices, whereas if fewer than eight justices participated the relevant number of justices is four. We collected data on conference votes from Justice Brennan's docket sheets, which are available at the Library of Congress's Manuscript Division.

13. We use a Wald test statistic to test the null hypothesis that the coefficients jointly equal zero rather than the more conventional log-likelihood ratio test, because the Wald test is the appropriate test when using robust standard errors (Korn & Graubard, 1990).

14. In this (and the following) model, we use tau as our reduction of error statistic. It compares the proportion of correctly classified observations to the null model of random assignment based on the actual distribution of observations across all four dependent variable categories. Alternatively, one could use lambda, which calculates error reduction from a model in which all

cases are predicted to fall into the modal category. We use tau because we are interested in predicting all four categories of the dependent variable, and only tau takes into account the distribution of nonmodal cases (see Sigelman, 1984).

15. These calculations indicate how each independent variable influences the likelihood of a justice authoring or joining a separate opinion. We calculated it by holding each factor constant at its mean value and varying the variable of interest. The Author Distance values were set at 4.0 for the Marshall-Brennan civil rights case comparison and 64.9 for the Marshall-Rehnquist civil rights case comparison. Legal Complexity assumes the value of  $-0.53$  in cases with only one issue and one legal provision and 6.89 in cases with three issues and four legal provisions. Cooperation takes on the values of  $-0.16$  for the uncooperative Burger and Blackmun and 0.84 for the cooperative Marshall-Brennan pair. All remaining factors are dichotomous and thus are varied from 0 to 1.

16. We also included an additional control variable for whether a justice voted with the majority at conference. Including this variable had no influence on our results.

17. The results for all of our independent variables remain consistent if, instead of using a single Chief Justice dummy, we include a dummy variable for every justice but Burger.

18. This result does not change if we instead measure it as a justice's first term on the Court (rather than the first two terms).

19. We exclude dissents from this portion of our analysis because they are generally assigned by the senior justice in the minority, and thus the difference between authoring and joining a dissent is not comparable to a concurrence.

20. If a justice both authored a concurring opinion and joined another, we coded the justice as having authored an opinion.

21. We excluded workload and end of term from the prior model because it included authors and joiners of concurrences in the same dependent variable category. Because we expect workload to influence authors and not joiners of a concurrence, we must separate them to test our hypothesis. The results in Table 1, however, do not change if we include workload and end of term.

22. We determined the date of the first draft's release from Justice Brennan's circulation records, which contain, among other information, the dates on which all majority opinion drafts are circulated. If an author had not yet circulated the final draft of an opinion, we assumed that he or she was still working on the opinion.

23. These two reference points represent one standard deviation change above and below the mean value of end of term (January 23).

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