

SILENT CONCURRENCES

*Greg Goelzhauser**

INTRODUCTION

In *L.A. County Flood Control District v. Natural Resources Defense Council*, the Supreme Court unanimously reversed a Ninth Circuit holding that navigable water passing through a concrete channel does not constitute “discharge” under the Clean Water Act.¹ This case had the unusual distinction of having the petitioner and respondent agree on the proper judgment. As Justice Ginsburg’s majority opinion noted, “the parties and the United States as *amicus curiae* agree [with the result].”² After the Court described the outcome as “hardly surprising” in light of existing precedent,³ one Supreme Court litigator and commentator publicly wondered “why the Court bothered setting the case for briefing and argument, rather than just summarily reversing, given that all the parties have agreed on the answer to the question presented from the beginning.”⁴ But the case included another oddity: despite the unanimous judgment, it was not a unanimous opinion because Justice Samuel Alito had it noted without explanation that he “concur[s] in the judgment.”⁵

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1. 133 S. Ct. 710 (2013).

2. *Id.* at 711.

3. *Id.* at 713.

4. Kevin Russell, *Opinion Analysis: The Court Unanimously Agrees With Everyone Else*, SCOTUSblog (Jan. 10, 2013, 10:14 AM), <http://www.scotusblog.com/2013/01/opinion-analysis-the-court-unanimously-agrees-with-everyone-else/>.

5. *L.A. County Flood Control District*, 133 S. Ct. at 714. See also Russell, *supra* note 4 (“The second odd part of the case is that Justice Alito concurred in the judgment—meaning he agreed with the result, but did not join in the Court’s reasoning—but wrote no concurring opinion to explain what part of the Court’s analysis he disagreed with.”).

The silent concurrence is a puzzling institutional practice for several reasons.⁶ By definition it provides no explanation for why a Justice agrees with the judgment but refuses to join the majority opinion. As a result, silent concurrences conflict with the norm that opinions are the primary currency by which judges translate their preferences into law.⁷ Moreover, this practice is puzzling because Justices have several low-cost alternatives to noting concurrence. As an initial matter, Justices might issue perfunctory opinions that offer a brief explanation for staking out a separate position. As a circuit court judge, for example, Alito once had it noted that he “concur[s] in the judgment for essentially the reasons given by the District Court.”⁸ Although readers may have to turn elsewhere, such as to a lower court opinion, for explanation, a perfunctory opinion at least provides some indication of the judge’s thinking. Alternatively, there is a long history of Justices silently acquiescing in opinions with which they disagree.⁹

Why do Justices sometimes choose to note their concurrence in the result without explanation rather than go along silently with the majority opinion or write separately? This question has received little attention, most likely because it is inherently difficult to answer without access to private information. Of course, one might observe Justice Alito’s silent concurrence in *L.A. County Flood Control District* and quickly

6. This practice is also referred to as a “noted concurrence.” This nomenclature may be due to the fact that Justices will ask the majority opinion author to “note” concurrence or dissent at the end of a majority opinion rather than filing a separate opinion with the printer.

7. See, e.g., Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

8. *McCurdy v. Dodd*, 352 F.3d 820, 831 (3d Cir. 2003) (Alito, J., concurring). Perfunctory concurrences are occasionally issued by Supreme Court Justices. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (“Mr. Justice Harlan concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective.”).

9. See Greg Goelzhauser, *Graveyard Dissents on the Burger Court*, 42 J. SUP. CT. HIST. 188 (2015) [hereinafter Goelzhauser, *Graveyard*]; Greg Goelzhauser, *Silent Acquiescence on the Supreme Court*, 36 JUST. SYS. J. 3 (2015) [hereinafter Goelzhauser, *Silent*]. See also Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001) (detailing silent acquiescence on the Waite Court); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 143–52 (1999) (discussing reluctance to dissent on the Marshall Court); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1344 (2001) (describing a “norm of acquiescence” on the Taft Court).

surmise that the case's unusual posture and comparative unimportance had something to do with his decision.¹⁰ But this offers little in the way of explanation. After all, other cases that have unusual postures or are comparatively unimportant do not generate silent concurrences. Moreover, the case's posture or importance does not provide any information about why Alito refused to join the majority opinion. This is also exactly the type of case where we are more likely to observe Justices who disagree with the majority go along silently without publicly indicating any opposition.¹¹

In this Article, I leverage private information to explain why Justices silently concur. Specifically, I utilize the private papers of several Justices who served during the Burger Court, OT 1969-OT 1985.¹² Using these private papers, I find that a variety of factors influence decisions to concur silently. Time constraints and perceptions about case importance are among the most important determinants of concurring silently. In addition, silent concurrences may be driven by vote switching and uncertainty about the proper disposition or legal rule, a desire to maintain a consistent voting record and withhold support for disfavored precedents, and bargaining failures over opinion language and scope. Silent concurrences may also be driven by a combination of those factors. Before addressing these determinants in more detail, the next section illuminates the underlying puzzle with a brief discussion of concurring opinions.

I. WRITTEN VERSUS SILENT CONCURRENCES

Concurring opinions are a mainstay in Supreme Court decision making. As the consensual period of Supreme Court decision making came to a close in the early twentieth century, Justices increased their production of concurring and dissenting opinions.¹³ With a regular concurring opinion, a Justice writes

10. In light of its unusual posture, it would not be surprising to learn that Alito preferred to dismiss the case as improvidently granted or summarily reverse rather than hear oral arguments.

11. See Goelzhauser, *Graveyard*, *supra* note 8.

12. These papers are archived online as part of The Supreme Court Opinion Writing Database. Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *The Supreme Court Opinion Writing Database*, <http://supremecourttopinions.wustl.edu> (last visited March 26, 2016). All referenced papers are available electronically in the archive.

13. See, e.g., PAMELA C. CORLEY, AMY STEIGERWALT, & ARTEMUS WARD, *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* (2013);

separately but also joins the majority opinion; with a special concurring opinion, a Justice agrees with the judgment reached by the majority but disagrees about the justification for reaching that result. Concurring opinions, whether regular or special, come in a variety of forms. They might be written to limit or expand the majority opinion, propose an alternative legal theory, or make an idiosyncratic point.¹⁴

Written concurrences, like written dissents, are potentially valuable for a number of reasons. As an initial matter, a concurring opinion may prove to be highly influential in the subsequent development of law. Among the best known is Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁵ delineating a three-part framework for analyzing the constitutional validity of unilateral executive actions.¹⁶ Even if the opinion's influence is not immediate, a written concurrence may have downstream effects on the development of law and over time come to be influential.

Of course, Justice Jackson's *Youngstown* concurrence is the exception not the rule. Most concurrences do not find their way into the constitutional law canon. Nonetheless, it is not uncommon for written concurrences to shape the development of law at the margin. As noted previously, written concurrences can help frame the majority opinion by suggesting limiting or expansive interpretations. Empirical evidence suggests that written concurrences can play an important role in determining the extent to which lower courts comply with majority opinions.¹⁷ Thus, written concurrences can be valuable insofar as they provide signals to lower court judges about how to interpret precedent. More immediately, as Justice Ruth Bader Ginsburg

Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874 (1998); Epstein et al., *supra* note 8; Marcus E. Hendershot et al., *Dissensual Decision Making: Revisiting the Demise of Consensual Norms Within the U.S. Supreme Court*, 66 POL. RES. Q. 467 (2013); Mark S. Hurwitz & Drew Noble Lanier, *I Respectfully Dissent: Consensus, Agendas, and Policymaking on the U.S. Supreme Court, 1888-1999*, 21 REV. OF POL'Y RES. 429 (2004); Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

14. See PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT (2010); Laura Ray Krugman, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990).

15. 343 U.S. 579 (1952).

16. 343 U.S. at 634 (Jackson, J., concurring).

17. CORLEY, *supra* note 14.

once noted about separate opinions generally, “they may provoke clarifications, refinements, [and] modifications in the court’s opinion.”¹⁸

Written concurrences also allow Justices to communicate their sincere preferences. Commentators have long disagreed about the extent to which legal, policy or strategic goals guide judicial decision making.¹⁹ Regardless, Justices that agree with the result of a case but not the reasoning must write separately in order to communicate their sincere preferences. Moreover, as Justice Antonin Scalia once noted, writing separately allows for “writ[ing] an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one’s colleagues; to add precisely the points of law that one considers important and no others; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority’s disposition should engender.”²⁰ In this way, separate opinions stand in stark contrast to majority opinions, which are often the product of compromise in order to maintain or enlarge a winning coalition.

Legitimacy and reputation-enhancing effects also flow from separate opinions.²¹ This occurs in at least two ways. First, written opinions are the primary currency through which Justices build their reputations. Justices who refuse to write opinions aside from assigned majority opinions miss out on opportunities to enhance their professional standing. Second, written opinions provide a measure of public accountability. Indeed, some judges are required to justify their votes. For example, the California constitution requires “[d]ecisions of the Supreme Court and courts of appeal that determine causes [to] [] be in writing with reasons stated.”²² Although Article III judges enjoy life tenure during good behavior, political actors and the public nonetheless

18. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 143 (1990).

19. See, e.g., LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); RICHARD L. PACELLE, JR., BRETT W. CURRY, & BRYAN W. MARSHALL, *DECISION MAKING BY THE MODERN SUPREME COURT* (2011); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

20. Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 42 (1994) (emphasis removed).

21. See *id.* at 39–41.

22. CAL. CONST. ART. VI, § 14.

play a substantial role in shaping judicial decision making through informal appeals and formal institutional attacks.²³ Obscuring justifications for votes may complicate the task of maintaining or building institutional legitimacy.²⁴

All of these justifications for not merely going along with the majority disposition and opinion despite disagreement have one thing in common: benefit accrual requires Justices to *write* separate opinions. This makes the silent concurrence especially puzzling. Moreover, the existing literature on separate opinion writing lends little insight into why Justices would decide to concur without explanation. Although recent research offers insight into why Justices sometimes silently acquiesce to the majority position despite disagreement,²⁵ concurring without explanation is a fundamentally different practice insofar as it involves a Justice noting disagreement but refusing to explain the reasons underlying this disagreement. A leading opinion-writing treatise recognizes the practice of silently concurring, but criticizes it for “cast[ing] doubt on the principles declared in the main opinion without indicating why they are wrong or questionable.”²⁶

The most comprehensive study of noting disagreement without explanation focuses exclusively on Justice William O. Douglas’s voting behavior in tax cases and other select matters concerning economic regulation.²⁷ Although sometimes remembered first for his colorful public law opinions, Douglas came to the Court with considerable experience in private law fields such as business organizations and finance.²⁸ Drawing on the economic expertise he developed in private practice, as a professor at Yale Law School, and as Chairman of the Securities and Exchange Commission, Justice Douglas made substantial contributions to the Court’s jurisprudence on corporate

23. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

24. See Ginsburg, *supra* note 18, at 140.

25. See Goelzhauser, *Silent*, *supra* note 9; Goelzhauser, *Graveyard*, *supra* note 9.

26. B. E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* (1977).

27. BERNARD WOLFMAN, JONATHAN L.F. SILVER, & MARJORIE A. SILVER, *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* (1975).

28. See generally Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 *YALE L.J.* 920 (1964).

reorganizations, securities regulation, and tax. Although Douglas “devoted considerable time and thought to the writing of tax opinions”²⁹ early in his career, he tended to merely note disagreement in later years.³⁰ Unfortunately, Douglas’s reasons for noting disagreement without explanation are not clear from the study—undoubtedly because the behavior cannot be explained without access to private information.

Professor Corley’s leading study of concurrences and their consequences refers to the practice of noting concurrence as an “unnecessary concurrence,”³¹ and demonstrates that these silent concurrences occurred irregularly from 1986 through 1989.³² Although this study provides important insights into the causes and consequences of concurring opinions, the question of why Justices sometimes silently concur was beyond its scope. Again, the difficulty scholars have encountered with this practice is that published opinions are inherently unable to provide much insight into why Justices concur without explanation. As Corley notes after proposing general explanations for decisions to silently concur, “because the Justice has not revealed why he or she is concurring, one is left to speculate regarding the possible reason.”³³ The next section looks to uncover the reasons motivating these decisions.

II. JUSTIFICATIONS FOR SILENT CONCURRENCES

As noted previously, public information such as published opinions do not provide information about the reasons for noting concurrence by definition. To learn more about this puzzling practice, I leverage the private papers of Justices serving during the Burger Court. These archival records offer unique insights into judicial behavior. The records indicate that silent concurrences may be driven by time constraints, perceptions about case importance or the importance of a prospective concurring opinion, vote switching, uncertainty about the proper disposition or legal rule, a desire to maintain a consistent voting record and withhold support for disfavored precedents, and bargaining failures over opinion language and

29. WOLFMAN ET AL., *supra* note 27, at 20.

30. *Id.* at 27.

31. CORLEY, *supra* note 14, at 19.

32. *Id.* at 32.

33. *Id.* at 19.

scope. Often more than one of these factors combines to motivate silent concurrences.

Before proceeding it is important to clarify that all of the cases discussed here involve special concurrences, or concurrences in the judgment but not the majority opinion. Regular concurrences, where a Justice joins the majority opinion but also writes separately, are not silent concurrences by definition since the act of joining the majority opinion provides information about the Justice's thinking. Indeed, the notion of a silent regular concurrence seems to be a conceptual impossibility since the only reason for issuing a regular concurrence is to make or emphasize some point.³⁴ As a result, this section seeks to explain the puzzle of Justices noting their concurrence in the judgment while refusing to join the majority opinion without offering any public explanation for their posture.

A. IMPORTANCE AND TIME CONSTRAINTS

The existing literature demonstrates that Justices may refrain from writing dissenting opinions when they disagree with the majority position if the opportunity cost of doing so is too high.³⁵ Time constraints or belief that a case or prospective opinion is not particularly important may supply motivation for refusing to write. Justice Ginsburg once explained, with respect to writing separate opinions, that judges "operate under one intensely practical constraint: time."³⁶ Ginsburg added: "In collegial courts, one gets no writing credit for dissenting or concurring opinions; however consuming the preparation of a separate opinion may be, the judge must still carry a full load of opinions for the court. Dissents or concurrences are written on one's own time."³⁷ Moreover, comparatively unimportant cases and prospective opinions necessarily receive less attention.³⁸

These factors also seem to influence decisions to concur without explanation. In *Engle v. Isaac*, the Court held that

34. In contrast, the silent (special) concurrence withholds a vote from the majority opinion. Of course, one might describe an unpublished regular concurrence as a "silent concurrence," but that would be an example of acquiescence rather than a "silent concurrence" as that phrase is used here.

35. Goelzhauser, *Silent*, *supra* note 9; Goelzhauser, *Graveyard*, *supra* note 9.

36. Ginsburg, *supra* note 18, at 142.

37. *Id.*

38. Goelzhauser, *Silent*, *supra* note 9; Goelzhauser, *Graveyard*, *supra* note 9.

defendants could not litigate a constitutional claim in a federal habeas proceeding that had been forfeited in state court by failing to object contemporaneously at trial.³⁹ After Justice O'Connor's opinion for the Court attracted a majority, Justice Blackmun wrote: "You have my vote, too, if you could make the following changes."⁴⁰ Blackmun then listed five specific requests.⁴¹ O'Connor later responded: "I am circulating a draft with several revisions which I hope will alleviate several of your concerns," though she noted a "reluctan[ce] to delete footnote 32 and all of the text on page 23" as Blackmun had requested.⁴² O'Connor added: "I hope you will consider joining the opinion with the proposed changes, and perhaps merely noting separately your view as to the language on page 23 and in footnote 32."⁴³ Blackmun responded: "My primary difficulty with your opinion is footnote 32. I therefore shall not join your opinion. At the end of the next draft, please show the following: 'Justice Blackmun concurs in the result.'"⁴⁴ Although Blackmun did not explain his reason for merely concurring, it is plausible that he thought it too tedious to write an opinion—however perfunctory—focusing on a single footnote.⁴⁵

A noted concurrence in *Hathorn v. Lovorn*⁴⁶ may have been jointly motivated by a perception of case importance and time

39. 456 U.S. 107 (1982).

40. Letter from Harry A. Blackmun to Sandra Day O'Connor, No. 80-1430 (Mar. 11, 1982), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1981/80-1430.pdf.

41. *Id.*

42. *Id.*

43. *Id.*

44. Letter from Harry A. Blackmun to Sandra Day O'Connor, No. 80-1430 (Mar. 12, 1982), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1981/80-1430.pdf.

45. On occasion, however, Justices have joined all of an opinion except a single footnote. Indeed, Blackmun once had it noted that he joined all of an opinion written by Justice O'Connor except for a single footnote. *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 576 (1983). The text of footnote 32 is not clear from the records. In the published opinion, footnote 32 seems to be a fairly innocuous one noting authority for the proposition that the "absence of finality...frustrates deterrence and rehabilitation." *Engle v. Isaac*, 456 U.S. 107, 127 n.32 (1982). Footnote 33, however, which may have been moved one place during revision, is more notable. It criticized the Court's creation of "novel [constitutional] claims" for defendants "[d]uring the last two decades," and lamented that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover...new constitutional commands." *Id.* at 127 n.33. The note added: "Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own." *Id.*

46. 457 U.S. 255 (1982).

constraints. In *Hathorn*, the Court held that a state court could not order implementation of a change in election procedure without ensuring compliance with the Voting Rights Act.⁴⁷ Notwithstanding the Voting Rights Act's general importance, Justice Powell seemed to consider the specific issue raised by *Hathorn* to be comparatively unimportant and fact bound. After Justice O'Connor circulated a draft opinion for the Court on May 29, 1982, Powell wrote to Rehnquist, both of whom were of the view at Conference that Congress did not intend to have state courts enforce the Voting Rights Act: "I have read Sandra's opinion. My disposition is simply to join in the judgment. The case is a 'sport' that should never have been granted. I see no purpose, however, in dissenting—especially at this season of the year."⁴⁸ After Rehnquist nonetheless circulated a brief dissent on June 3, Powell wrote to O'Connor on June 4, with the end of Term nearing, informing her that he would like it noted at the end of the opinion that he joined the judgment.⁴⁹

Another silent occurrence that seemed to be jointly motivated by time constraints and end-of-term pressures occurred in *Robbins v. California*.⁵⁰ In *Robbins*, the Court reversed a lower court judgment upholding the constitutional validity of a search of a closed container found inside a vehicle's luggage compartment during a lawful but warrantless search. After apparently passing at Conference, Chief Justice Burger sent a memorandum to the Conference indicating his vote to reverse, and drawing a distinction between a vehicle's "interior" (including "jackets, pockets, packages, containers, glove

47. *Id.*

48. Letter from Lewis F. Powell to William Rehnquist, No. 81-451 (May 31, 1982), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1981/81-451.pdf. The word "sport" seems to indicate that a case is fact specific. See, e.g., Letter from John Marshall Harlan II to Warren E. Burger, No. 32 (Nov. 12, 1969) ("[A] case which is as much of a 'sport' as this one is not deserving of a full-dress opinion, and therefore would hope that another vote could be garnered simply to dismiss the case as improvidently granted."); Memorandum from William Rehnquist to the Conference, No. 72-656 (May 9, 1973) (suggesting the case posed "a question of undoubted importance to the litigants, but certainly a 'sport' if there ever was one in this general area of law"); Letter from William Rehnquist to Stevens, No. 77-477 (Oct. 30, 1978) (suggesting he would be content with a DIG if the case were a "sport," but noting that "these cases will recur [and] there will be constant conflicts").

49. Letter from Lewis F. Powell to Sandra Day O'Connor, No. 81-451 (June 4, 1982), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1981/81-451.pdf.

50. 453 U.S. 420 (1981).

compartments”) and “the trunk or the area under the hood.”⁵¹ Thus, Burger’s decision to reverse seems to have been based on the fact that the container was inside the vehicle’s luggage compartment rather than the interior. On June 3, 1981, Justice Stewart (having received the assignment from Burger in the above-referenced memorandum) circulated a first draft of an opinion for the Court. On June 10, Burger wrote to Stewart: “I contemplate joining but with a few ‘observations.’”⁵² Two days later, Burger wrote again, this time formally joining Stewart’s opinion and unveiling a four-paragraph regular concurrence.⁵³ On June 22, Burger wrote to Stewart again to note that he was “having some ‘second thoughts’ on my concurring opinion.”⁵⁴ The following day Burger sent a personal note to Justice Powell asking if he would insert a single paragraph (not part of the original four-paragraph concurrence) emphasizing the Fourth Amendment’s use of the word “reasonable” into his concurring opinion, to which Powell replied that he “preferred not” to make the addition.⁵⁵ With the end of Term nearing, and with no evidence that he attempted to bargain with Stewart over opinion language before or after joining, Burger sent a memorandum to the Conference on June 29 withdrawing his joinder and noting that he “concluded to be simply shown as joining the judgment, without more.”⁵⁶ As for the draft concurring statements, Burger wrote that he had “done several separate opinions, but looking at the whole picture I have decided none of them will add to the jurisprudence.”⁵⁷

End-of-term pressures, which Justice Louis Brandeis once indicated bring about “haste and fatigue,”⁵⁸ may have also

51. Memorandum from Warren E. Burger to the Conference, No. 80-148 (May 6, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/80-148.pdf.

52. Letter from Warren E. Burger to Potter Stewart, No. 80-148 (June 10, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/80-148.pdf.

53. Letter from Warren E. Burger to Potter Stewart, No. 80-148 (June 12, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/80-148.pdf.

54. Letter from Warren E. Burger to Potter Stewart, No. 80-148 (June 22, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/80-148.pdf.

55. Letter from Warren E. Burger to Lewis F. Powell, No. 80-148 (June 23, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/80-148.pdf.

56. Memorandum from Warren E. Burger to the Conference, No. 80-148 (June 29, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/80-148.pdf.

57. *Id.*

58. Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143, 148 (1980) (quoting Brandeis).

motivated a silent concurrence in *Palmer v. City of Euclid*.⁵⁹ In *Palmer*, the Court issued a per curiam opinion concluding that a “suspicious person ordinance” was unconstitutionally vague as applied to a man “seen late at night in a parking lot . . . parked with his lights on, and us[ing] a two-way radio.”⁶⁰ Two days after Justice White circulated a draft per curiam opinion, Justice John Marshall Harlan II wrote that the case seemed “more difficult than I had first thought” and indicated that he would write separately while warning that “[t]his will take me a little time, because of other priorities.”⁶¹ More than one month later, after Justice Stewart circulated a concurring opinion joined by Justice Douglas while the other joined the per curiam, Harlan wrote to White with copies to the Conference: “After spending more time on this case than I should have, I have decided not to write and am content to go along with your result.”⁶² Harlan merely asked that the opinion note: “Mr. Justice Harlan concurs in the result.”⁶³ As with other instances, Harlan’s decision may have been informed by a belief about the case’s comparative unimportance. Given that per curiam opinions are typically reserved for short statements that make little precedential contribution, Harlan’s decision to focus on other efforts would be understandable.⁶⁴

While time constraints might be most prevalent near term’s end, collegial pressure to produce timely opinions is manifest throughout given the Court’s periodic and regular release of opinions. This may have played a role in motivating a silent concurrence in *United States v. Cortez*, where the Court held that certain facts and circumstantial evidence that a particular vehicle was being used to further criminal activity justified an investigative stop of that vehicle.⁶⁵ On December 15, 1980, Justice Brennan sent Justice Marshall a note that read: “You and

59. 402 U.S. 544 (1971).

60. *Id.* at 544–45.

61. Letter from John Marshall Harlan II to Byron R. White, No. 70–143 (Apr. 8, 1971), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1970/70-143.pdf.

62. Letter from John Marshall Harlan II to Byron R. White, No. 70–143 (May 13, 1971).

63. *Id.* The per curiam also suggests that the case did not strike the Justices as particularly important. This is also evidenced by Justice Black’s decision to “acquiesce” in the result. Letter from Hugo Black to Bryon R. White, No. 70–143 (Apr. 8, 1971), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1970/70-143.pdf.

64. The per curiam opinion in *Palmer* totals about 500 words.

65. 449 U.S. 411 (1981).

I are in dissent in [*Cortez*]. I'll be happy to undertake the dissent for us."⁶⁶ After Burger circulated a draft opinion for the Court on January 9, 1981, Brennan wrote to him on January 13 indicating that he would join the opinion if he could make three changes.⁶⁷ On the same day, Marshall wrote to Burger that he would "await the dissent."⁶⁸ Also on January 13, in a note that presumably arrived after Marshall wrote to Burger, Brennan informed Marshall that he "decided to join the Chief's opinion if he adopts the suggestions [in his January 13 letter to Burger]."⁶⁹ Brennan subsequently joined Burger's revised opinion on January 16.⁷⁰ Later the same day, Burger wrote to Marshall: "Now that Bill Brennan has joined there will be no dissent unless you do so. All are now in. Should you join this case can come down next Wednesday."⁷¹ On January 19, Marshall asked Burger to "add to the bottom of your opinion that I concur in the judgment."⁷² The opinion was released on January 21 with Marshall's noted concurrence.

B. VOTE SWITCHING AND UNCERTAINTY

The respective silent concurrences by Marshall and Powell in *Cortez* and *Hathorn* demonstrate that concurring without explanation may occur after a Justice switches votes. These decisions seem to be part of a more general manifestation of Justices concurring silently when they are uncertain about the proper case disposition or doctrinal rule. This may partially explain Burger's silent concurrence in *Robbins*, for example, where the facts made for uneasy application of his preferred legal rule governing searches. Although vote switching may be motivated by policy concerns and institutional pressures, it is

66. Letter from William J. Brennan to Thurgood Marshall, No. 79-404 (Dec. 15, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

67. Letter from William J. Brennan to Warren E. Burger, No. 79-404 (Jan. 13, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

68. Letter from Thurgood Marshall to Warren E. Burger, No. 79-404 (Jan. 13, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

69. Letter from William J. Brennan to Thurgood Marshall, No. 79-404 (Jan. 13, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

70. Letter from William J. Brennan to Warren E. Burger, No. 79-404 (Jan. 16, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

71. Letter from Warren E. Burger to Thurgood Marshall, No. 79-404 (Jan. 16, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

72. Letter from Thurgood Marshall to Warren E. Burger, No. 79-404 (Jan. 19, 1981), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1980/79-404.pdf.

also driven by case complexity.⁷³ Any number of idiosyncratic factors may lead a Justice to switch votes between Conference and release of the final opinion. When this happens, or when a Justice remains genuinely uncertain about the proper disposition or doctrinal rule, concurring without explanation may be an appealing alternative to joining a written opinion or otherwise writing separately.

In *Blackledge v. Allison*, the Court reviewed a lower court judgment that a defendant could raise a claim that the prosecutor had not kept a promise made to induce a plea bargain and was entitled to an evidentiary hearing on that claim, despite having answered a series of questions when the plea was initially approved suggesting that there had been no unkept promise.⁷⁴ With Justice Rehnquist not participating, the Conference vote was 4-4.⁷⁵ After Conference, Powell wrote to Burger with copies to the Conference: "At present, our options are limited to affirmance by an equally divided vote or to set the case for reargument. . . . [I]n the interest of avoiding these unattractive alternatives, I will change my vote to affirm."⁷⁶ With the vote now 5-3 to affirm, and with Burger in the minority, Brennan wrote to Burger: "If you adhere to your vote and therefore I am to assign the writing of the opinion for the Court, I assign it to [Powell]."⁷⁷ The same day, however, Burger sent a memorandum to the Conference indicating that he too would now vote to affirm and assigned the opinion to Stewart.⁷⁸ After Stewart circulated a draft opinion for the Court, however,

73. See Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996) (demonstrating that vote switching is driven by policy factors, institutional pressures, and uncertainty). See also Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526 (1980); Timothy M. Hagle & Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 W. POL. Q. 119 (1991); J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968).

74. 431 U.S. 63 (1977).

75. Letter from Lewis F. Powell to Warren E. Burger, No. 75-1693 (Mar. 10, 1977), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

76. *Id.* Powell also noted that the decision had been a close call for him at Conference.

77. Letter from William J. Brennan to Warren E. Burger, No. 75-1693 (Mar. 10, 1977), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

78. Memorandum from Warren E. Burger to the Conference, No. 75-1693 (Mar. 10, 1977), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

Burger simply responded: "Please show me as concurring in the judgment."⁷⁹

Burger's silent concurrence in *Blackledge* is odd in two respects. First, he switched votes and assigned the opinion to Stewart (rather than staying with his initial vote and having Brennan assign the opinion to Powell), presumably because he favored Stewart's approach. Although it is possible that Burger attempted to negotiate changes in Stewart's opinion, there is no indication in the archival records that he made any effort on this front or otherwise considered writing a concurring opinion. Moreover, the case appears to have been written narrowly as Burger preferred,⁸⁰ and as Powell seemed to demand in exchange for his switch to affirm.⁸¹ Indeed, White and Blackmun, the other Justices who initially voted to reverse, ultimately joined the majority opinion without separate comment.⁸² Although Burger might have switched votes solely to maintain control over opinion assignment,⁸³ it is not clear from the records why he would have perceived a Stewart opinion to be more agreeable than a Powell opinion, the latter of whom, along with Burger himself, would have presumably been the "least persuaded." A possible explanation for Burger's silent concurrence is that he favored the majority disposition on

79. Letter from Warren E. Burger to Potter Stewart, No. 75-1693 (Apr. 28, 1977), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

80. See Memorandum from Warren E. Burger to the Conference, No. 75-1693 (Mar. 10, 1977), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

81. See Letter from Lewis F. Powell to Warren E. Burger, No. 75-1693 (March 10, 1977), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

82. Letter from Byron R. White to Potter Stewart, No. 75-1693 (Apr. 14, 1977), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf. Justice Blackmun, the other remaining Justice who initially voted to reverse, eventually joined Stewart's opinion with the note: "I feel that you have arrived at a very reasonable resolution of this case, and I am glad to join your opinion." Letter from Harry A. Blackmun to Potter Stewart, No. 75-1693 (Apr. 11, 1977), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1976/75-1693.pdf.

83. For details on the strategic factors that may influence opinion assignment, see Saul Brenner, *Strategic Choice and Opinion Assignment on the U.S. Supreme Court: A Reexamination*, 35 WESTERN POL. Q. 204 (1982); Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007); Forest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RES. Q. 551 (2004); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PENN. L. REV. 1729 (2006).

balance, but preferred not to provide additional clout to the opinion by joining.

Another vote switch leading to a silent concurrence occurred in *Walter v. United States*, where the Court considered whether federal law enforcement officials needed a search warrant to view obscene films mistakenly delivered by a private carrier to the wrong address.⁸⁴ At Conference, five Justices voted to affirm the lower court decision that a search warrant was not necessary under these circumstances. After Conference, however, Justice Marshall switched his vote to reverse, creating a five-Justice majority for that judgment.⁸⁵ One day after Justice Stevens circulated the first draft of an opinion for the Court about two months later, but before there was any bargaining over opinion content, Marshall asked for his concurrence in the judgment to be noted at the bottom of the opinion.⁸⁶ Although the records do not indicate why Marshall favored this approach, his quick response, and decision not to bargain over opinion content in a case where his vote was outcome determinative, suggests that he might have been uncertain about the proper disposition or at least not particularly pleased with the doctrinal options.⁸⁷

84. 447 U.S. 649 (1980).

85. Memorandum from Thurgood Marshall to the Conference, No. 79-67 (Mar. 3, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-67.pdf.

86. Letter from Thurgood Marshall to Stevens, No. 79-67 (May 2, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-67.pdf.

87. Marshall's behavior is made somewhat more intriguing by the fact that the other four Justices voting to affirm at Conference also consented to a DIG. Although Powell initially suggested a DIG at Conference, the other three offered their support for that disposition on the same day that Marshall switched votes. See Memorandum from Burger to the Conference, No. 79-67 (Mar. 3, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-67.pdf (supporting Powell's Conference suggestion to DIG). See also Letter from Harry A. Blackmun to Warren E. Burger, No. 79-67 (Mar. 3, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-67.pdf (stating he "could join a DIG"); Letter from William Rehnquist to Warren E. Burger, No. 79-67 (Mar. 3, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-67.pdf (same). In light of these facts, the effort to DIG may have been a "heresthetical maneuver" designed to avoid losing on the merits. See generally Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the U.S. Supreme Court*, 14 J. THEORETICAL POL. 93 (2002) (describing the use of procedural tools to split a winning coalition, particularly on the Burger Court). See also WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986) (discussing heresthetical maneuvers as attempts by losing coalitions to split winning coalitions and avoid defeat); Ryan C. Black et al., *Trying to Get What You Want: Heresthetical Maneuvering and U.S. Supreme Court Decision Making*, 66 POL. RES. Q. 819 (discussing heresthetical maneuvering during oral

Switching votes is not the only manifestation of uncertainty that may lead to silently concurring. Sometimes Justices are simply uncertain about the proper disposition or legal rule and seem to use silent concurrences as a hedge. Although little known or used, the “dubitante” designation allows Justices to express doubt about the correct result rather than writing or signing on to a majority, concurring, or dissenting opinion.⁸⁸ Chief Justice Burger once analogized his silent concurrence to a dubitante designation. In *Andrus v. Allard*, the Court reversed a lower court judgment invalidating regulations promulgated under two conservation statutes prohibiting commercial transactions in parts of birds legally killed prior to the statutes being passed.⁸⁹ Although Burger voted to affirm at Conference, he later wrote to Justice Brennan, the opinion’s author, that he had been “persuaded” to distinguish an important precedent, but added: “the best I can do is join the judgment. In that ‘dubitante’ status!, I am more comfortable joining only the judgment.”⁹⁰ This suggested that Burger’s reservations persisted despite formally switching his vote.

Chief Justice Burger also seemed uncertain about his vote in *Bose Corp. v. Consumers Union of United States*.⁹¹ In *Bose Corp.*, the Court affirmed a lower court judgment evaluating a claim of “actual malice” in a product disparagement suit de novo rather than using the Federal Rules of Civil Procedure’s “clearly-erroneous” standard of review.⁹² Although Burger voted to reverse at Conference, shortly thereafter he sent a memorandum to the Conference indicating that “[f]urther consideration, particularly on the points Lewis [Powell] made at

argument); Greg Goelzhauser, *Avoiding Constitutional Cases*, 39 AM. POL. RES. 483, 511 (2011) (discussing the use of justiciability doctrines in heresthetical maneuvers).

88. See Jason J. Czarnecki, *The Dubitante Opinion*, 39 AKRON L. REV. 1 (2006) (detailing use of the dubitante designation in state and federal courts).

89. 444 U.S. 51 (1979).

90. Letter from Warren E. Burger to William J. Brennan, No. 78-740 (Nov. 19, 1979), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/78-740.pdf. Justice Stevens had also voted to affirm at Conference, but later switched his vote, suggesting to Brennan that he had been persuaded by the majority opinion. Letter from John Paul Stevens to William J. Brennan, No. 78-740 (Oct. 31, 1979), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/78-740.pdf.

91. 466 U.S. 485 (1984).

92. *Id.*

Conference, persuades me to vote to affirm in this case.”⁹³ Four months later, Justice Stevens circulated a draft opinion for the Court, and Justice Rehnquist circulated a draft dissent about one month later. About two weeks after Rehnquist’s dissent circulated, Burger informed Stevens that “[t]he dissent has given me a good deal of trouble and I conclude that I will join only in the judgment.”⁹⁴

C. VOTING CONSISTENCY AND PRECEDENT

Other silent concurrences seem to be driven primarily by a desire to maintain a degree of voting consistency across cases. As the examples below illustrate, this type of silent concurrence raises an interesting theoretical issue regarding the influence of precedent on subsequent decision making. In the ongoing empirical debate over the extent to which precedent influences judicial decision making,⁹⁵ one of the key tests has been whether Justices change their voting behavior after dissenting in previous cases.⁹⁶ The logic behind this test is that a precedent becomes binding once decided and should therefore be followed in subsequent cases even by those who initially dissented.⁹⁷ The examples that follow demonstrate that silent concurrences can serve as a type of middle ground between joining an opinion that follows the previous precedent and writing a dissenting opinion revisiting settled principles.

93. Memorandum from Warren E. Burger to the Conference, No. 82-1246 (Nov. 11, 1983).

94. Letter from Warren E. Burger to John Paul Stevens, No. 82-1246 (Apr. 26, 1984).

95. See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); PACELLE, JR. ET AL., *supra* note 19. Brandon L. Bartels, *The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court*, 103 AM. POL. SCI. REV. 474 (2009); Brandon L. Bartels & Andrew J. O’Green, *The Nature of Legal Change on the U.S. Supreme Court: Jurisprudential Regimes Theory and Its Alternatives*, 59 AM. J. POL. SCI. 880 (2015); Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273 (2010); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

96. See HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999).

97. Of course, the dichotomy of following versus not following precedent is over simplified given that most subsequent cases, particularly before the Supreme Court, deal with new factual scenarios that the previous precedent may not reach.

In *Vlandis v. Kline*, the Court held that a state statute fixing residence for college tuition purposes at the moment of application violated the Fourteenth Amendment's Due Process Clause.⁹⁸ Although Justice Stewart's opinion for the Court referred to the statute as one that set an "irrebuttable presumption,"⁹⁹ a dissenting opinion written by Justice Rehnquist, joined by Chief Justice Burger and Justice Douglas, rejected the concept in favor of the view that the state had merely required applicants to demonstrate a prior connection to the state in order to qualify for in-state tuition.¹⁰⁰ The following Term, in *Cleveland Board of Education v. LaFleur*, the Court held that mandatory paternity leave policies violated the Fourteenth Amendment's Due Process Clause.¹⁰¹ Justice Stewart wrote the majority opinion in *LaFleur*, and cited the "irrebuttable presumption" aspect of *Vlandis* for support.¹⁰² Although Rehnquist wrote another dissenting opinion, joined again by Burger, criticizing Stewart's "quixotic engagement in his apparently unending war on irrebuttable presumptions,"¹⁰³ Justice Douglas joined Stewart's opinion.¹⁰⁴ However, after Justice Powell, who joined Stewart's opinion in *Vlandis*, circulated a concurring opinion noting that he had "re-examine[d] the 'irrebuttable presumption' rationale... [and] conclu[ded] that the Court should approach that doctrine with extreme care,"¹⁰⁵ Douglas had second thoughts. He wrote to Stewart: "As you know I joined your opinion [in *LaFleur*] but Lewis' separate opinion stirs in me some of the doubts I had in *Vlandis* where I was in dissent. So I have decided to withdraw my concurrence with you in *LaFleur* and ask you to note at the end that I concur in the result."¹⁰⁶

In *McKaskle v. Wiggins*, the Court clarified the role that standby counsel may play in assisting a pro se defendant over the defendant's objection.¹⁰⁷ The case was progeny to *Farretta v.*

98. 412 U.S. 441 (1973).

99. *Id.* at 454.

100. *Id.* at 466 (Rehnquist, J., dissenting).

101. 414 U.S. 632 (1974).

102. *Id.* at 644.

103. *Id.* at 657 (Rehnquist, J., dissenting).

104. Letter from John Paul Douglas to Potter Stewart, No. 72-777 (Dec. 4, 1973).

105. *LaFleur*, 414 U.S. at 652 (Powell, J., concurring).

106. Letter from John Paul Douglas to Potter Stewart, No. 72-777 (Jan. 18, 1974).

107. 465 U.S. 168 (1984).

California, decided nearly a decade earlier, recognizing a defendant's constitutional right to pro se representation while also allowing trial courts to appoint standby counsel for assistance if needed.¹⁰⁸ The dissenting opinion in *McKaskle*, signed by three members of the *Farretta* majority, lamented "that the Court's test is unworkable and insufficiently protective of the fundamental interests we recognized in *Farretta*."¹⁰⁹ Moreover, Justice Blackmun, a dissenter in *Farretta*, wrote to Justice O'Connor, *McKaskle*'s author, that he was "pleased to see the Court cutting back a good bit on *Farretta*."¹¹⁰ Nonetheless, Blackmun did not join O'Connor's opinion, seemingly out of a desire to maintain a consistent position against *Farretta*. Blackmun wrote: "I, of course, am no fan of *Farretta*. ...The present litigation and other cases that will follow are its progeny and will give us difficulty. Will you therefore, at the end of your opinion, add 'Justice Blackmun concurs in the result.'"¹¹¹

In *Strickland v. Washington*, the Court developed standards for evaluating a defendant's ineffective assistance of counsel claim and applied those standards to reverse a circuit court's decision to grant habeas in a particular case.¹¹² Justice Marshall issued a dissenting opinion criticizing the majority's analytical framework and voting to affirm the circuit court's habeas decision.¹¹³ In *United States v. Cronic*, decided on the same day as *Strickland*, the Court unanimously reversed a lower court finding of ineffective assistance of counsel without making specific determinations based on conduct or errors made at trial, and remanded for new proceedings.¹¹⁴ Two days after Justice Stevens circulated a draft opinion for the Court in *Cronic*, Justice Marshall joined.¹¹⁵ Nearly one month later, however, Marshall wrote to Stevens: "I have just reread your opinion in [*Cronic*] along with my dissent in [*Strickland*]. I conclude that I

108. 422 U.S. 806 (1975).

109. *McKaskle*, 465 U.S. at 195 (White, J., dissenting).

110. Letter from Harry A. Blackmun to Sandra Day O'Connor, No. 82-1135 (Dec. 30, 1983), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1983/82-1135.pdf.

111. *Id.*

112. 466 U.S. 668 (1984).

113. *Strickland*, 466 U.S. at 706 (Marshall, J., dissenting).

114. 466 U.S. 648 (1984).

115. Letter from Thurgood Marshall to John Paul Stevens, No. 82-660 (Mar. 14, 1984), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1983/82-660.pdf.

must withdraw my join in the opinion of the Court in *Cronic*. I concur only in the judgment.”¹¹⁶ Although the Court’s opinion in *Cronic* did not explicitly rest on *Strickland*, and mentions of the latter appear only in footnotes, the remand in *Cronic* allowed the defendant to make specific arguments for ineffective assistance of counsel at trial that would have been analyzed by the lower court using standards set out in *Strickland*.¹¹⁷ This tension may have led Marshall to note his concurrence in the judgment in order to avoid implying that he supported this approach on remand.

A similar disagreement with previous precedent may have led to Chief Justice Burger’s silent concurrence in *American Export Lines v. Alvez*, where the Court affirmed a lower court judgment concluding that maritime law authorizes a harbor worker’s spouse to sue for damages when that worker is non-fatally injured on a vessel in state territorial waters.¹¹⁸ Several terms prior to the Court’s decision in *Alvez*, it held in *Sea-Land Services v. Gaudet* that maritime law authorizes a widow’s recovery for wrongful death of a spouse even when the deceased recovered damages before dying.¹¹⁹ Thus, *Alvez* marked a fairly straightforward application of *Gaudet*. Concurring in *Alvez*, for example, Powell wrote that he thought *Gaudet* “was decided wrongly,” but nonetheless “recognize[d] the utility of stare decisis in cases of this kind” and could “see no rational basis for drawing a distinction between fatal and nonfatal injuries.”¹²⁰

In *Gaudet*, Burger joined a dissenting opinion authored by Powell that criticized the majority for, among other things, its “unprecedented extensions of admiralty law [that] exhibit little deference for stare decisis.”¹²¹ At Conference in *Alvez*, Powell voted to reverse. However, he later wrote to Stewart and Rehnquist, both of whom also dissented in *Gaudet*: “I continue to ‘gag’ a bit when I think about the Court’s decision in *Gaudet*. Yet, *Gaudet* remains on the books, and we do not have five votes to reverse it. Accordingly, I have concluded reluctantly that I

116. Letter from Thurgood Marshall to John Paul Stevens, No. 82-660 (May 11, 1984), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1983/82-660.pdf.

117. See *Cronic*, 466 U.S. at 666 n.41.

118. 446 U.S. 274 (1980).

119. 414 U.S. 573 (1974).

120. *Alvez*, 446 U.S. at 274 (Powell, J., concurring).

121. *Gaudet*, 414 U.S. at 596 (Powell, J., dissenting).

should follow at least to the extent of joining the judgment in this case.”¹²² Although Powell went on to publish the perfunctory concurrence referenced above, this sentiment may explain Burger’s decision to silently concur in *Alvez*. Given that Rehnquist and Stewart joined a dissenting opinion in *Alvez* arguing that the Court did not have jurisdiction due to lack of finality, no Justice in the *Gaudet* minority joined Brennan’s opinion in *Alvez*.

Burger’s decision to concur without opinion in *Alvez* may have been made easier by the fact that the Justices seemed to consider the case of little importance. Blackmun indicated as much with his vote to affirm. At Conference, Blackmun expressed doubts as to whether the Court had jurisdiction, but indicated that if the Court reached the merits he would vote to affirm.¹²³ Upon joining Brennan’s majority opinion in *Alvez*, Blackmun signaled his impression of the case’s importance when he wrote: “Any reservation I may continue to have about finality—and hence jurisdiction here—ought to be assuaged by the very narrow facts of this case. Surely the decision will cause us no precedential embarrassment.”¹²⁴

D. OPINION LANGUAGE AND SCOPE

Silent concurrences may also be in part a response to disagreement over opinion language or scope. That Justices bargain over opinion content is well known.¹²⁵ When bargaining breakdowns occur, however, written concurrences are a common result.¹²⁶ Alternatively, in conjunction with other factors such as

122. Letter from Lewis F. Powell to Potter Stewart, No. 79-1 (Apr. 14, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-1.pdf.

123. Letter from Harry A. Blackmun to William J. Brennan, No. 79-1 (Mar. 4, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-1.pdf. Blackmun seems to have meant that he would not join the dissent, which focused exclusively on jurisdiction. In his letter to Brennan, Blackmun indicated that it was not uncommon for a Justice to reach the merits despite harboring concern about jurisdiction if a majority was otherwise inclined to reach the merits. After describing his own posture, Blackmun wrote: “I have done this on at least one other occasion, as did John Harlan. I think others have done it, too.” *Id.*

124. Letter from Harry A. Blackmun to William J. Brennan, No. 79-1 (Apr. 11, 1980), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/79-1.pdf.

125. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

126. CORLEY, *supra* note 14.

time constraints and perceptions of case importance, Justices may simply concur silently. One comparatively unimportant dispute over word choice led to a silent concurrence in *Army & Air Force Exchange Service v. Sheehan*, where the Court held that the Tucker Act did not confer federal jurisdiction over a civil damages claim brought by a former military employee contesting his discharge.¹²⁷ After Justice Blackmun circulated a draft opinion for the Court, Chief Justice Burger sent him a private note that read in part: “I have tried—and I think succeeded in getting almost everyone to avoid the term plea ‘bargain.’ That word has no place in the judicial vocabulary. I can join your opinion heartily if you can change ‘bargain’. . . to ‘negotiations.’”¹²⁸ Burger concluded with an ultimatum: “So, show me accordingly as joining or joining the judgment.”¹²⁹ Blackmun refused Burger’s request, suggesting that the phrase had “acquired an accepted meaning in the judicial vocabulary” and was “far more accepted than the noun ‘commute’ for which I fought a battle . . . when no one supported me, and surely is far more acceptable than the Court’s constant misuse of the word ‘viable.’”¹³⁰ Blackmun closed by citing several opinions Burger had joined that included the phrase “plea bargain,” to which Burger playfully responded: “Yes, but I’ve joined the *last* one. It is a perversion of the English language [and] the law!”¹³¹ As a result of this exchange, appended to the end of Blackmun’s otherwise unanimous opinion in *Sheehan* is the line: “The Chief Justice concurs in the judgment.”¹³²

Other differences over opinion language leading to disagreements without explanation involve more serious matters. In these instances, bargaining requests may be implicit or explicit. Justice Blackmun’s requests to Justice O’Connor in *Engle* discussed previously are good examples of explicit

127. 456 U.S. 728 (1982).

128. Letter from Warren E. Burger to Harry A. Blackmun, No. 80-1437 (May 19, 1982), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1981/80-1437.pdf.

129. *Id.*

130. Letter from Harry A. Blackmun to Warren E. Burger, No. 80-1437 (May 20, 1982), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1981/80-1437.pdf. For more on Blackmun’s quest to ensure proper usage of the term “viable,” see Greg Goelzhauser, *Justice Blackmun’s Blood Oath*, 18 GREEN BAG 2D 163 (2015).

131. Letter from Harry A. Blackmun to Warren E. Burger, No. 80-1437 (May 20, 1982), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1981/80-1437.pdf (emphasis in the original).

132. *Sheehan*, 456 U.S. at 741.

requests. And in *United States v. Mason*,¹³³ Justice Douglas informed Justice Marshall that he “would join . . . if the two paragraphs that start on p. 8 were deleted. If not, just note that I concur in the result.”¹³⁴ Marshall refused to accommodate the request, and the Court’s opinion in *Mason* simply notes that “Mr. Justice Douglas concurs in the result.”¹³⁵ An implicit request occurred in *Lockport v. Citizens for Community Action at the Local Level*,¹³⁶ where Chief Justice Burger wrote to Justice Stewart: “As for now, show me as concurring in the judgment. I am, of course, in complete agreement with the result, but I am troubled by several points.”¹³⁷ Burger then detailed three concerning aspects of the opinion, including specific language, but Stewart left the opinion unchanged and Burger abided by his concurrence in the judgment.¹³⁸

A silent concurrence may also be the result of disagreement over what certain language means. In *Ball v. United States*, the Court unanimously held that a felon could not be convicted and concurrently sentenced under separate statutes prohibiting felons from receiving and possessing a firearm in interstate commerce.¹³⁹ After Chief Justice Burger circulated a draft opinion for the Court, Justice Marshall wrote that he was “still up in the air about your opinion” and pointed specifically to what he considered to be conflicting statements.¹⁴⁰ One read: “‘It is clear that a convicted felon may be prosecuted simultaneously for violations of [both statutes] involving the same firearm’”; the other: “‘Congress seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions for the same criminal act.’”¹⁴¹ Marshall closed by writing: “While I am in general agreement with the whole opinion there are apparent conflicts such as the two I mention that make me hesitate. Please

133. 412 U.S. 391 (1973).

134. Letter from William O. Douglas to Thurgood Marshall, No. 72-654 (May 24, 1973), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1972/72-606.pdf.

135. *Mason*, 412 U.S. at 400.

136. 430 U.S. 259 (1977).

137. Letter from Warren E. Burger to Potter Stewart, No. 75-1157 (Mar. 3, 1977), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1976/75-1157.pdf.

138. *Lockport*, 430 U.S. at 273.

139. 470 U.S. 856 (1985).

140. Letter from Thurgood Marshall to Warren E. Burger, No. 84-5004 (Mar. 15, 1985), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1984/84-5004.pdf.

141. *Id.*

help me out.”¹⁴² Burger replied by distinguishing the first statement as having to do with “prosecutions,” while the second dealt with “convictions,” concluding: “no conflict at all!”¹⁴³ As a result of this communication breakdown, the opinion in *Ball* simply noted that “Justice Marshall concurs in the judgment.”¹⁴⁴

There are also instances where Justices silently concur due to differences over opinion language or scope without attempting to bargain or even identify the troubling passages. In *Police Department of the City of Chicago v. Mosley*, the Court held that a city ordinance criminalizing picketing near primary or secondary school buildings during certain times, while making an exception for picketing during labor disputes, violated the Fourteenth Amendment’s Equal Protection Clause.¹⁴⁵ The ordinance was passed after a federal postal employee began peacefully picketing a local high school for its alleged racially discriminatory practices.¹⁴⁶ Although Rehnquist and Blackmun voted at conference to uphold the ordinance, Rehnquist ultimately wrote to Justice Marshall, who wrote for the majority, with a note that read: “Your opinion has convinced me that even under my view of the equal protection clause, there is no basis for the labor union exception to this picketing ordinance.”¹⁴⁷ However, Rehnquist also added: “Since I can’t join in some of the broader statements in your opinion, will you show me as concurring in the result.”¹⁴⁸

In *Lau v. Nichols*, the Court considered whether a school district’s decision to offer supplemental English language courses to some, but not all, students of Chinese ancestry who did not speak English violated the Civil Rights Act of 1964 or the Fourteenth Amendment’s Equal Protection Clause.¹⁴⁹ Although the lower court upheld the policy on both grounds,¹⁵⁰ the Justices voted at Conference to reverse on the statutory

142. *Id.*

143. *Id.*

144. *Ball*, 470 U.S. at 865.

145. 408 U.S. 92 (1972).

146. *Id.* at 93 (noting that the protests alleged “black discrimination” and were a “lonely crusade [that] was always peaceful, orderly, and quiet”).

147. Letter from William Rehnquist to Thurgood Marshall, No. 70-87 (June 6, 1972), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-87.pdf.

148. *Id.* Justice Blackmun also concurred in the result without explanation. *Mosley*, 408 U.S. at 102 (Blackmun, J., concurring).

149. 414 U.S. 563 (1974).

150. *Id.* at 565.

question—leaving the constitutional issue undecided.¹⁵¹ After Justice Douglas circulated his draft opinion for the Court, however, several Justices voiced concern about the extent to which the opinion addressed the constitutional question and made various degrees of threats to withhold joinder until it focused exclusively on the statutory issue.¹⁵² Douglas made subsequent edits to the opinion, including explicitly stating “[w]e do not reach the Equal Protection Clause argument . . . but rely solely on . . . the Civil Rights Act of 1964...to reverse the Court of Appeals,”¹⁵³ but Justice White nonetheless informed him that “[t]he equal protection thesis still shows through . . . too much for me to join” and asked that it be noted that he “concur[s] in the judgment, solely on the statutory ground.”¹⁵⁴ Notwithstanding White’s desire to have what might be considered a perfunctory concurrence noted, the final opinion simply notes that “Mr. Justice White concurs in the result.”¹⁵⁵

In *United States v. United States District Court for the Eastern District of Michigan Southern Division*, the Court unanimously held that certain government surveillance regarding domestic affairs was unlawful.¹⁵⁶ Unlike cases that seem comparatively unimportant, the first sentence of the Court’s opinion indicates that “[t]he issue before us is an important one for the people of our country and their Government.”¹⁵⁷ While the Justices were unanimous at Conference with respect to the result, three Justices (Blackmun, Burger, and White) voted to rest the decision on the statutory ground alone, while five Justices (Brennan, Douglas, Marshall, Stewart, and Powell) did not consider the statute dispositive and

151. See Letter from Warren E. Burger to William O. Douglas, No. 72-6520 (Jan. 2, 1974), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1973/72-6520.pdf.

152. See *Id.* See also Letter from Harry A. Blackmun to William O. Douglas, No. 72-6520 (Dec. 26, 1973), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1973/72-6520.pdf; Letter from Lewis F. Powell to William O. Douglas, No. 72-6520 (Jan. 9, 1974), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1973/72-6520.pdf; Letter from William Rehnquist to William O. Douglas, No. 72-6520 (Dec. 28, 1973), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1973/72-6520.pdf.

153. *Lau*, 414 U.S. at 566.

154. Letter from Byron R. White to William O. Douglas, No. 72-6520 (Jan. 2, 1974), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1973/72-6520.pdf.

155. *Lau*, 414 U.S. at 569.

156. 407 U.S. 297 (1972).

157. *Id.* at 299.

preferred to rest on the constitutional ground.¹⁵⁸ Although convention dictated that Douglas would assign the opinion as the majority coalition's senior Justice, Burger apparently asked White to undertake a draft opinion for Conference consideration.¹⁵⁹ This prompted a private note from Douglas to Burger stating that "the assignment to Byron (much as I love my friend) is not [] appropriate."¹⁶⁰ Douglas continued:

With all respect, I think Powell represents the consensus. I have not canvassed everybody, but I am sure that Byron, who goes on the statute, will not get a court. To save time, may I suggest you have a huddle and see to it that Powell gets the opinion to write? Or if you want me to suggest an assignment, that would be mine.¹⁶¹

Burger replied to Douglas later that day with copies to the Conference, stating that he could "see no reason why Lewis should not undertake to write and see what support his position achieves," adding: "I am not as clear on Lewis' position as your memo suggests but I would be happy if his view could command a majority."¹⁶² However, Burger also suggested "there may be much likelihood of Byron's securing substantial support" and reiterated his "request that Byron proceed to write."¹⁶³ This prompted Douglas to write Powell, making explicit what had been implicit in his previous note to Burger:

Traditionally an opinion [in circumstances like these] would . . . be in the province of the senior Justice to assign. That was not done in this case and the matter is of no consequence to me as a matter of pride and privilege—but I think it makes a tremendous difference in the result. I am writing you this note hoping that you will put on paper the ideas you expressed in Conference and I am sure you will get a majority.¹⁶⁴

158. See Letter from William O. Douglas to Warren E. Burger, No. 70-153 (Mar. 6, 1972), http://supremecourtinions.wustl.edu/files/opinion_pdfs/1971/70-153.pdf.

159. See *id.*

160. *Id.*

161. *Id.*

162. Letter from Warren E. Burger to William O. Douglas, No. 70-153 (Mar. 6, 1972), http://supremecourtinions.wustl.edu/files/opinion_pdfs/1971/70-153.pdf.

163. *Id.*

164. Letter from William O. Douglas to Potter Stewart, No. 70-153 (Mar. 8, 1972), http://supremecourtinions.wustl.edu/files/opinion_pdfs/1971/70-153.pdf.

In the end, six Justices joined Powell's opinion and White concurred only in the judgment, arguing that the case could be disposed on statutory grounds. Burger ultimately refused to join either opinion, asking instead that he be shown as concurring in the result and telling Powell that he found "too much of the language" he could not join.¹⁶⁵

CONCLUSION

The silent concurrence is puzzling. Although the existence of this practice has been recognized, scholars have been unable to explain why Justices sometimes silently concur rather than write separately or acquiesce. The primary difficulty with studying silent concurrences is that explanations for this practice are not made public by definition. Leveraging the Justices' personal papers, it appears that myriad factors precipitate this practice, including time constraints, perceptions about case importance, reluctant vote switching, uncertainty about the proper disposition or legal rule, a desire to maintain voting consistency while withholding support for disfavored precedents, and bargaining failures over opinion language and scope. Often more than one of these factors seem to be at play in motivating the decision to concur silently.

Important questions remain for future research. As an initial matter, Justices have also issued silent dissents throughout the Court's history.¹⁶⁶ Indeed, silent dissents may have played an important intermediate role moving from the breakdown in a norm of consensus to full development of a norm of writing separately when in disagreement. Although the reasons for silently concurring and dissenting are likely to be similar in particular cases, there may be important differences as well. Uncovering the reasons for Justices silently dissenting will require access to private materials such as the Justices' papers. Perusal of the archival records for Justices serving on the Burger Court suggests that silent dissents were much less common than

165. Letter from Warren E. Burger to Lewis F. Powell, No. 70-153 (May 26, 1972), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-153.pdf.

166. See, e.g., WOLFMAN, ET AL., *supra* note 27 (discussing several silent dissents issued by Justice Douglas in tax cases).

their concurring counterparts by this period, making it difficult to draw inferences about this behavior from this era.¹⁶⁷

The relative paucity of noted dissents compared to concurrences during the Burger Court raises questions about how often Justices issue these notations of disagreement and how the institutional practice has changed over time. Unfortunately, there is no systematic information available regarding variation in the use of silent concurrences and dissents across Justices or time. At a minimum, the practice continues on the contemporary Court's "shadow docket."¹⁶⁸ Although costly to collect, comprehensive data on silent concurrences and dissents would allow scholars to recover information about an important opinion delivery practice that has thus far received very little sustained scholarly attention.

Of course, data on the issuance of noted dissents and concurrences would not provide much insight into case-specific justifications for engaging in this practice. Additional insight on this front will require access to private materials such as those employed here. In addition to providing more information about the practice, additional archival evidence may help determine whether the justifications offered here are time bound. There is a reasonable concern, for example, that the Burger Court is not representative of other eras. That the archival records discussed here involve Justices who served before and after Burger somewhat assuages this concern. Nonetheless, the Burger Court is often thought to be among the least harmonious in terms of collegial relations. Although fractured Justices may be more or less likely to note their disagreement, interpersonal discord seems more likely to influence the number of noted disagreements than fundamentally alter the reasons for noting disagreement.

While each of these questions highlights important avenues for future research, this article marks an important step forward in developing our understanding of silent disagreement. Understandably, the burgeoning literature on separate opinions has focused almost exclusively on the written variety. But the

167. *But see* Letter from Hugo Black to Warren E. Burger, No. 206 (Jan. 5, 1971); Letter from William O. Douglas to Lewis F. Powell, No. 71-1022 (Feb. 9, 1973).

168. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015).

practice has played a role in Supreme Court decision making throughout its history and persists to some degree into the modern era as exemplified by Justice Alito's silent concurrence in *L.A. County Flood Control District*. As scholars continue to develop a more complete understanding of silent disagreement as manifested by graveyard dissents and noted concurrences or dissents, a fascinating portrait emerges of Justices engaging in the pursuit of various personal and institutional goals. This picture enhances our understanding of judicial behavior, and the interpersonal dynamics that shape the Supreme Court's output.