
The Constraint of Law

A Study of Supreme Court Dissensus

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To study the behavior of judges, one must first consider whether judges are just like any other political actor (e.g., legislators) or whether, because of their affiliation with the judiciary, law constrains their behavior to some extent. Research aimed at considering the extent to which judges are constrained by the law is sparse, and conclusions resulting from such research are mixed. In this article, the authors explore the extent to which law constrains judges by focusing on the decision to dissent rather than concur when Supreme Court justices write separately. The authors find that, although law matters, it does not constrain.

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Shepsle and Bonchek (1997) assert that “judges . . . may be thought of, essentially, as *legislators in robes*” (p. 418). Similarly, though far earlier, Justice Cardozo (1921) said, approvingly, “Everywhere there is a growing emphasis on the analogy between the function of the judge and the function of the legislator” (p. 119). To study the behavior of judges, one must first consider whether judges are, in fact and as asserted, just like any other political actor (e.g., legislators) or whether, because of their affiliation with the judiciary, and their training as lawyers, law might constrain their behavior, at least to some extent.

We certainly expect judges to be different. Indeed, Americans generally buy into the trappings of judicial impartiality and majesty (Segal & Spaeth, 2002). Judges wear robes, they work in buildings built to resemble places of worship, they are seated above anyone else in a courtroom, we rise when they

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enter. This is all in furtherance of the importance of the rule of law to democracy. Surely, the rule of law would be compromised were judges *not* to behave as distinctly nonpartisan interpreters of the constitution and of statutes.

However, the prevalent model of decision making, the attitudinal model, posits that, antithetical to this perception of “justice from on high,” judges are indeed like legislators. They are seekers of policy, and they make decisions in accordance with their ideology (Segal & Spaeth, 2002). They are, in fact, normal people with policy preferences (e.g., Posner, 1993, 2004). Perhaps, though, there is room for both the view that judges are constrained or affected by law and the view that they are able to enact their policy preferences into law. Surely, judges are not exactly legislators. Indeed, the legal system in which they are steeped may permeate their decisions in some way.

Hence, the search for the extent to which judges are constrained by law becomes relevant. Although this literature is in its early stages, there are already mixed results (e.g., Howard & Segal, 2002, 2004; Spaeth & Segal, 1999; cf. Hausegger & Baum, 1999; Kritzer & Richards, 2003, 2005; Richards & Kritzer, 2002). Because such research is extremely important, although difficult, scholars should continue to attempt to disentangle law’s effect on judicial decision making. In this article, we seek to contribute to this question by exploring the extent to which law constrains Supreme Court justices in their separate opinion writing.

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We offer a test of the extent to which law constrains by attempting to discern whether the way a case is framed, for example, the issue, the legal provision, and the authority for decision on which the majority opinion author focuses, affects the decision of a justice driven to separately write to either concur or dissent. If justices agree with the case frame—what the case is about—but nonetheless disagree with the resolution of the case—who wins and who loses—this suggests that law is not as constraining as we might expect it to be. In other words, if justices dissent because they disagree with the case frame, their view of the law as it relates to the particular case at hand is referenced. If they agree with what is at stake but still disagree with the resolution, their disagreement does not appear to be legally driven.

Most literature on the decision to dissent assumes that the major explanatory variable is ideological divergence. Indeed, Spaeth and Segal (1999) so assume in measuring justices’ sincere preferences by whether or not they vote, in the first instance, with or against the majority. We seek to

explicitly determine whether, in addition to ideological divergence, legal disagreements might drive justices to dissent. Given that a justice chooses to write or join a separate opinion, does disagreement over what the case is about or disagreement over how the case ought be resolved lead to dissent?

Dissent in the U.S. Supreme Court

Scholars have spent much time attempting to discern the reasons for the increased propensity of Supreme Court justices to issue dissents (see Epstein, Segal, & Spaeth, 2001). Some argue that early in the Court's history a "norm of consensus" existed, which, in the 1930s and 1940s, fell from use (Caldeira & Zorn, 1998; Haynie, 1992; Walker, Epstein, & Dixon, 1988). Others argue that the cases became increasingly difficult as the Court obtained more and more control over its docket; hence, today's cases present more room for disagreement than Supreme Court cases in earlier times (Pritchett, 1941). Epstein et al. (2001) critically analyze the reasons offered for enhanced levels of dissent on the Supreme Court and find that, by comparing dissent rates at conference with published dissent rates, there is evidence that a norm of consensus did indeed exist—justices cast far more dissents at conference than were published in the U.S. Reports, and all justices were more likely to switch to the majority when originally in the minority than to follow through with their expression of disagreement.

Although historical evidence of a norm of consensus is interesting, it is notable that the norm no longer exists; the justices today feel little compunction airing their disagreements with one another. In fact, some dissents, particularly those authored by Justice Scalia, are scathing in their attack on the majority's views. Certainly, this raises questions of legitimacy, as much of the reason proffered for a norm of consensus is to enhance legitimacy (Danelski, 1986b; Morgan, 1956; Pritchett, 1954; Ulmer, 1986; Walker, et al., 1988).¹ In fact, given the prevalence of the attitudinal model in understanding judicial decision making (Segal & Spaeth, 2002), dissent might be seen as particularly deleterious to the image of the Court, stemming, we assume, from mere differences over preferred outcomes. In other words, if the Court is to disagree, surely disagreement over the relevant law or over the definition of the issues in the case or over the authority the Court uses to decide the case would be more defensible than disagreement driven solely by politics. It is this question with which we are occupied in this article: What does drive dissent? Is dissent wholly driven by ideological divergence, or are other, more "legal" disagreements also to blame?

Modeling Dissent

Moving from the question of how often the justices on the U.S. Supreme Court engage in dissent to why they do so, we immediately notice that the literature on point is scarce. Wahlbeck, Spriggs, and Maltzman (1999), in their treatment of the decision to issue either concurrences or dissents, say “we know little about the factors that influence an individual justice’s decision to author or sign a concurring or dissenting opinion” (p. 489). They consider all behavior in which a justice chooses to write or join a separate opinion and focus on the language of the opinion (Wahlbeck et al., 1999). In considering a justice’s choice to join the majority, write or join a regular concurrence, write or join a special concurrence, or write or join a dissent, they find that a combination of factors matter: ideological distance from the majority opinion author, institutional role (whether the justice is the Chief or not), complexity, and tit-for-tat behavior. Their conclusion, then, is that “the willingness to disagree with the majority’s legal reasoning stems from a combination of attitudinal, strategic, and institutional factors” (p. 513).

Leaving aside the question of why a justice chooses not to join the majority opinion coalition, we focus instead on why a judge who has decided to defect from the majority opinion chooses to concur rather than dissent. A preference to reversing over affirming should be unaffected by the language of the majority’s opinion. Indeed, even if that language is problematic but the disposition is the justice’s preferred disposition, the likely reaction of such a justice is to issue a concurrence, not to go down the orthogonal path and dissent. Therefore, we focus on those factors that should help differentiate between a concurrence and a dissent, given that the justice decides not to join the Court’s majority and leave it at that.

Our innovation is in the consideration of legal constraints as potentially determinative. Other studies of dissent on the U.S. Supreme Court have focused on attitudinal explanations for dissensus to the exclusion of legal considerations (Danelski, 1986a; Heck 1986) or have focused on institutional features of courts that facilitate the deviation of judges from the majority opinion (Gerber & Park, 1997; Hall & Brace, 1987). None of the empirical literature on dissent considers legal dissensus. Could it not be the case that one of the reasons justices dissent is explicitly because the majority has framed the case wrongly in their view? In other words, justices may dissent not only because of attitudinal divergence (which we obviously think weighs very heavily on their decision) but also because of disagreements with the majority about what the case is about.

The Case Frame

Strong norms exist against *sua sponte* consideration of issues on the Supreme Court (Epstein, Segal, & Johnson, 1996). This norm may well serve to identify issues in the case as derivative of those presented by the parties to the suit (and not derivative of the attitudes of the justices). But are these norms also enough to keep all justices on the same page thereby suppressing dissent?

To examine the potential of the case frame to suppress dissent, we transform the original Spaeth (n.d.) databases to the individual level and code separate opinions for differences in case perception from the majority (Benesh & Spaeth, 2005). These databases contain data identifying the legal provision, issue or policy matter, and basis for decision for each justice as coded from their separate opinions (whether they authored or merely joined them). We argue that legal provision, issue, and authority for decision all constitute what the case is about and hence may be seen as legal constraints, especially in light of the norm against *sua sponte* consideration of issues. Deviation as to any of these may enhance the likelihood that a justice will dissent from the majority's opinion, but none of them require that the justice do so. Indeed, a justice disagreeing with the majority need not go so far as to decide not to become a member of it; rather, the justice may merely issue a special concurrence. Our contention, however, is that disagreement over what the case is about could contribute to a justice's decision to dissent. Of course, ideological distance from the majority should affect this decision as well. Considering only those justices who authored or joined separate opinions, we seek to explain the decision to author or join a concurrence over authoring or joining a dissent.

Although the unit of analysis for our study is each justice's vote at the case citation level, we consider a justice's deviation in any record of any case as a manifestation of a legally based disagreement. We consider a justice's reliance on the common law rules that empirically evidence a behavioral component—abstention, retroactivity, the various exclusionary rules, harmless error, *res judicata*, and estoppel—as potentially rooted in legal rather than attitudinal differences but do not consider opinions that verbally rely on judicial activism or restraint, overbreadth, least restrictive means, and similar doctrines or tests to be such. We discuss each legal factor in turn.

The first legal factor about which the justices may disagree is the legal provision at bar. The legal provision notes the constitutional provision, statute, or court rule or rules considered by the justice. This is coded as

that considered by the majority for all justices who merely sign on to the majority opinion and is individually coded for all justices who identified an alternative legal provision in a concurring or dissenting opinion. In the Warren, Burger, and Rehnquist Courts (which are the only available at the individual level), approximately 3% of all votes note at least one deviation as to the legal provision at issue; 13.7% of separate opinion writers or joiners so deviate. Most frequently, disagreement as to legal provision focuses on the Due Process Clause of the Fourteenth Amendment—it is the most often added and dropped legal provision (during the Warren, Burger, and Rehnquist Courts).

How does this work in practice? Take, for example, the case of *Boddie v. Connecticut* (1971). The Court concludes

that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve [a marriage] without affording all citizens access to the means it has prescribed for doing so. (p. 383)

Hence, the legal provision for the Court is the Fourteenth Amendment's Due Process Clause. Justice Douglas disagrees with the legal provision on which the decision is based but agrees with the case's resolution. He argues that it is the Fourteenth Amendment's equal protection clause referenced by the case: "Thus, under Connecticut law divorces may be denied or granted solely on the basis of wealth. . . . Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate" (p. 386). This difference over legal provision did not lead Douglas to the opposite conclusion of that of the Court, but it could have, as seen in *Jackson v. Metropolitan Edison Co.* (1975), where Justice Brennan dissents because he disagrees with the majority's reliance on the Fourteenth Amendment's Due Process Clause, resting his decision on the case or controversy requirement instead (finding there to be none). There are more than 150 different legal provisions coded by Spaeth. Although it is certainly the case that not all of them would likely be reasonable bases on which a given case may rest, this does suggest the potential for much disagreement.

Second, identifying the relevant issue in the case may produce dissensus on the Court. The potential for disagreement as to issue is even larger than that over legal provision, given that for each legal provision (e.g., the First Amendment, due process, equal protection) there are many distinguishable issues. The Equal Protection Clause, for example, may pertain to sex discrimination, school desegregation, affirmative action, the employability of

aliens, denial of welfare benefits, legislative districting and apportionment, the access of political parties and candidates to the ballot, durational residency requirements, the status of juveniles, the status of Indians, and the imposition of costs and filing fees on indigents in the justice system. Again, we would not expect every issue to be substitutable for every other, but there are many over which justices can disagree in a given case. Overall, approximately 1% of all votes over the Warren, Burger, and Rehnquist Courts contained at least one issue deviation; 5.1% of those joining or writing separate opinions disagreed as to issue. The most frequently disputed issues involved sufficiency of evidence and jurisdiction. More often, justices considered additional issues to those considered by the majority. The most frequent of these issue additions were the Supreme Court's certiorari jurisdiction, remands to determine the bases on which state court decisions rest, and the jurisdiction of the federal courts. In *Neil v. Biggers* (1972), for example, the majority rests its decision on the Sixth Amendment's Self-Incrimination Clause, arguing that a questionable lineup was not problematic. In dissent, Brennan, Douglas, and Stewart suggest that the Court's analysis of the merits of the case was unnecessary because the writ of certiorari was improvidently granted insofar as the substantive question in the case are concerned. (They agreed with the Court in its procedural determination that an affirmation by an equally divided state supreme court did not bar further federal habeas relief.)

The third element in the framework of a judicial opinion that we consider is the basis—the authority—on which the individual opinions rest. These are judicial review of federal action; judicial review of state action; the Supreme Court's exercise of supervisory authority over the lower federal courts, including its determination of its own non-statutorily mandated authority; statutory construction; interpretation of federal executive orders, administrative rules, and regulations; the exercise of diversity jurisdiction; and the application of federal common law. Each legal provision on which an opinion depends has an associated basis on which it rests. Not uncommonly, a legal provision may pertain to two of these bases (e.g., the interpretation of agency regulations under the provision of a federal statute). Although one may cavil that differences among these bases verge on the trivial when unaccompanied by differences in legal provision or issue, we demur. In *Steel Company v. Citizens for a Better Environment* (1998), for example, a case with four opinions, three justices disputed the Court's decision about Article III standing, preferring to focus on a statutory basis. Given the far-reaching access to the federal courts that citizens might have had to redress environmental injury had the Court addressed the statutory

Table 1
Frequency of Disagreement

Type of Disagreement	No Deviations		One Deviation		Two Deviations		Three Deviations		Four Deviations	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Legal provision	8,632	86.13	1,200	11.97	143	1.43	41	0.41	6	0.06
Issue in the case	9,509	94.87	480	4.79	32	0.32	0	0.00	2	0.02
Authority for decision	9,096	90.76	853	8.51	67	0.67	6	0.06	0	0.00

Note: Using the justice vote as the unit of analysis, this table demonstrates how little disagreement there is over issue, legal provision, and authority for decision between the majority and those writing separately (regular concurrences, special concurrences, or dissents).

question, such disagreement over the basis for decision arguably has consequence. Other examples where the basis of decision differentiates the Court's opinion from those of a special character include *Lechmere, Inc. v. N.L.R.B.* (1992), where the majority rested its decision on a provision of the National Labor Relations Act (NLRB), buttressing it with a 36-year-old precedent, whereas the dissenters relied on the relevant provision as applied by the NLRB, and *Schlup v. Delo* (1995), in which the majority used common law, coupled with the Court's supervisory authority to resolve a habeas corpus case, whereas two of the four dissenters simply relied on the habeas corpus statute. Overall, the justices' votes (on the Warren, Burger, and Rehnquist Courts) deviate as to authority for decision more than 2% of the time—9.1% of the votes of joiners or writers of separate opinions disagree over the authority for the decision—and the most disputed authorities are those pertaining to judicial review and federal common law.

Analysis

The first step in our analysis is to consider the incidence of disagreement over the case frame. To that end, we present Table 1. As seen there, disagreement over the controlling legal provision, the issue in the case, and the authority for decision is notable by its absence. Indeed, it is extremely rare for any justice to disagree as to the case frame and rarer still that they disagree on several dimensions in the case at hand. All the justices do indeed seem to be on the same page.

Even though there is not much disagreement over case frame, it may still serve to influence the choice to concur over dissenting and so we also examine the decision to dissent more systematically, controlling for ideology, complexity, and institutional position.

We suggest that the extent to which law constrains can be seen as the degree to which deviation as to the legal provision at issue, the issue under consideration, or the basis on which the Court's decision rests promotes dissent. We also test for the influence of ideology, positing that as ideological distance from the majority coalition (measured as distance from the mean Segal & Cover [1989] score as updated by Segal, Epstein, Spaeth, & Cameron [1995]) increases, the justice will be less likely to remain in the majority.

We include two controls. The first is for complexity: It has been argued that dissenting opinions more often issue in complex cases because there are more dimensions with which a given justice might disagree. In addition, complex cases might just be more difficult to decide and hence, reasonable people may disagree on their resolution.² Thus, we include a dummy variable indicating whether the case has more than one legal provision or not, expecting that variable to detract from the likelihood that the justice will concur.

The second control is a dummy variable denoting the chief justice. Much of the literature on dissent suggests that the chief, concerned with the Court as institution, will be less likely to dissent. (He may also behave strategically in this regard, for if the chief is in the majority, he can assign the opinion; otherwise, he cannot.) This variable, then, takes a value of 1 for Warren during the Warren Court, Burger during the Burger Court, and Rehnquist during the Rehnquist Court, 0 otherwise. We expect the chief to more likely issue concurrences than dissents.

The results of our model are presented in Table 2. As can be seen from the logistic regression results, both legal and attitudinal variables influence majority coalition membership (and all do so in the expected direction with the exception of multiple legal provisions). However, we turn to Table 3 and Figure 1 to specifically discuss the relative influence of the variables on the probability that a justice will find him or herself in the majority.

Table 3 reports the substantive impact of the variables, and that impact is relatively large for both the legal (at least when they are present) and the ideological measures. For example, regarding legal provision, one deviation lowers the probability that a given justice will concur rather than dissent from nearly 30% (when all variables are set to their mean or modal categories) to 26%, two lowers it to 22%, three lowers it to 18%, and four deviations lowers it to less than 15%. For issue, one deviation lowers the likelihood to 21%, two lowers it to 14%, three lowers it to 9%,

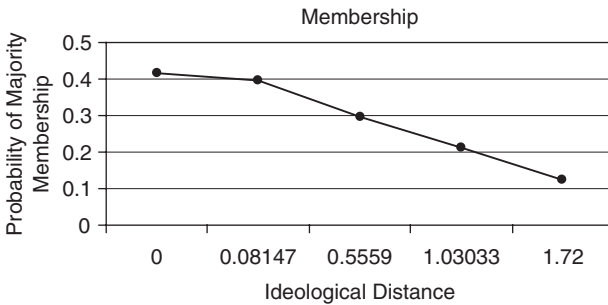
Table 2
Logistic Regression of Deviations and Ideology
on Membership in Majority

Variable	Coefficient	Robust SE ^a
Ideological distance from mean of majority	-0.924	0.191***
Number of legal deviations	-0.230	0.088**
Number of issue deviations	-0.510	0.186**
Number of authority for decision deviations	-0.268	0.108**
More than one legal provision	0.263	0.051***
Chief justice	-0.120	0.368
Constant	-0.249	0.153*

Note: The above shows results from a logistic regression on the choice between joining the majority via a concurrence (dependent variable = 1) and parting from the majority via a dissent (dependent variable = 0). There were 10,022 votes considered. Model fit statistics show a modest fit (68% are correctly predicted and the Cox and Snell pseudo R^2 is .039). As can be seen, ideological distance is a strong predictor, but disagreements over the case frame (number of legal deviations, issue deviations, and authority for decision deviations) are also relevant.

a. Clustered on justice.
 *Significant at .10. **Significant at .01. ***Significant at .000.

Figure 1
Ideological Distance and Majority Membership



and four brings it to just more than 5%. For authority for decision, one deviation makes the likelihood 25%, two deviations make it 20%, and three make it 16%. However, when any of them are absent (e.g., there is no disagreement—which is the usual case, as seen in Table 1) the probability

Table 3
Substantive Impact of Legal Variables (All Other Variables at Respective Means or Modes)

Variable	Value (All at Mean or Mode)	Predicted Probability of Majority Membership	Change in Probability
Baseline Probability		0.297	
Ideological distance	0	0.415	
	0.118		
	0.086	0.396	0.099
	1.038	0.214	-0.083
	1.724	0.126	-0.171
Number of legal deviations	0	0.305	0.008
	1	0.259	-0.038
	2	0.217	-0.080
	3	0.181	-0.116
	4	0.149	-0.148
Number of issue deviations	0	0.303	0.006
	1	0.207	-0.090
	2	0.136	-0.161
	3	0.086	-0.211
	4	0.054	-0.243
Number of authority for decision deviations	0	0.303	0.006
	1	0.249	-0.048
	2	0.203	-0.094
	3	0.163	-0.134

Note: Dichotomous variables (chief justice and multiple legal provisions) are set at their modal category (in both cases, 0). Predicted probabilities are calculated by multiplying the logit coefficient by the value of the variable (its mean or its maximum), adding those, and applying the density function for logit: $P(Y = 1/X) = \exp(\sum bkXk) / [1 + \exp(\sum bkXk)]$. Values of the variables were then varied to obtain the change in probability. Note that although deviations do increase the likelihood that a given justice will dissent rather than concur, their absence does little to the mean predicted probability.

hovers around 30%, which is barely distinguishable from the case in which everything is set at mean or modal values. In other words, when justices disagree over case frame (which they rarely do), they are more inclined to dissent.

Ideological distance exerts a more substantial and more real influence on the decision to dissent rather than concur. As shown in both Table 3 and in Figure 1, we see that likelihood of being in the majority changes more than 30% over the distribution of distances, which is a stronger impact than any of the case frame variables. In addition, it is quite likely that justices will

disagree ideologically, whereas it is very unlikely that they will disagree over the case frame. Therefore, although it is in fact the case that when the justices do disagree over legal aspects of cases that disagreement often leads them to dissent, they do not often disagree about the legal aspects of their cases. Indeed, were legal reasons the only reasons for dissent, we would see many fewer issued. Of course, we know the reality to be different—modern justices dissent more than ever—and so we conclude that the legal premise of the case does not exert a strong enough constraint to suppress dissent. That they rarely disagree, though, does lend credence to the influence of a different legal norm—that against *sua sponte* consideration of issues—but we leave that to another study to examine.

Discussion and Conclusions

Are judges just like legislators? No. They do not often raise different issues from those raised by the parties to the case (and hence the majority). But, they do not appear to be constrained by case frame. It is not the case that most dissents are driven by a difference of opinion over what the case is about. Rather, it is more likely the case that dissents are driven by increased ideological distance between the mean of the majority opinion coalition and the separately writing justice. Although we do find some support for the notion that legal dissensus can drive dissent, variables measuring such disagreement do not end up to be substantively important because of the impressive and overwhelming agreement across justices as to the legal definition of a case. This comports well with Epstein et al.'s (1996) conclusions about issue creation on the Court. Indeed, it is likely that disagreements over legal provisions or issues influence a justice's decision over whether or not to join the majority. But because the justices rarely disagree over those matters, dissent must be a result of some other disagreement. Perhaps that other disagreement is mostly ideological divergence.

Notes

1. Of course, we do not know whether such a norm actually confers legitimacy, nor do we know that scathing dissents detract from it. That question, though, is seemingly a very important one that someone, sometime, ought to answer. Research by Pamela Corley (2004) is showing promise in that regard.

2. Wahlbeck, Spriggs, and Maltzman's (1999) assertion that accommodation is more difficult in complex cases applies here as well.

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