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Concurrence and the Study of Judicial Behavior in American Political Science[*1]

> To be able to write an opinion **solely for oneself, without the need to accommodate** [emphasis added], to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important and no others; […] that is indeed an unparalleled pleasure.
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> A. Scalia. The Dissenting Opinion. – Journal of Supreme Court History, 1994, p. 42.

It is telling that in his chapter "Strategic Behavior" from "The Puzzle of Judicial Behavior", law and courts scholar Lawrence Baum chose this excerpt by U.S. Supreme Court Justice Antonin Scalia to indicate the "satisfaction" judges derive "from expressing their preferences directly" — or, in the parlance of some judicial scholars informed by game theoretic accounts of politics, from "voting sincerely".[*2] However one chooses to categorize the "pleasure" of which Scalia speaks, his quote and Baum's use of it suggest a need to account for the behavioral motivations behind separate opinion writing on a judicial institution where the tradition is one of an opinion for the court.

Of separate opinions on the U.S. Supreme Court, dissenting opinions are intuitively easier to understand and, therefore, to explain than concurring opinions.[*3] "Dissent", as Murphy, Pritchett and Epstein remark in the fifth edition of "Courts, Judges and Politics", "is a cherished part of the common-law tradition".[*4] Dis-

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[2] L. Baum. The Puzzle of Judicial Behavior. Ann Arbor, Michigan: University of Michigan Press, 1997, p. 98.

[3] The Estonian legal literature distinguishes these two judicial behaviors in this way: a judge may file a **dissenting opinion to the conclusion of the judgment**, or a judge may file a dissenting opinion to the reasoning of the judgment. It is the latter that is termed a concurring opinion. J. Laffranque. Dissenting opinion and judicial independence. – Juridica International, 2003, p. 162 *ff*.

[4] W. F. Murphy, H. C. Pritchett, L. Epstein. Courts, Judges, and Politics. Boston, MA: McGraw Hill, 2002, p. 622.

senting opinions — and the judicial disagreement over the meaning of the law that they register — are not only an important facet of common law legal systems, they are also fully understandable and, therefore, explainable, in terms of the legal factors identified by a legal model of judicial decision making.[*5] Moreover, dissenting opinions are equally understandable and, therefore, explainable in terms of political scientists' policy-oriented and (designedly) explanatory models of judicial behavior, wherein judges' votes and opinions express policy preferences, institutional goals, or some strategic mixture of the two.

All of the above is much less apparent with respect to concurring opinions, and concurring behavior generally. Concurrence still retains something of a taint to it — that it is somehow more destructive of judicial or judicial institutional integrity, more invidious with respect to legal clarity, less cooperative and more persnickety than dissent.[*6] It is less "a cherished part" of the common-law tradition than simply a part (in the post-*seriatim* opinion era); concurring opinions, unlike dissents, also have the potential to rob the opinion of the court — and its holding regarding "the law" — of its majoritarian, "courtly" force.[*7] It is thus not surprising that sitting judges, including Scalia's colleague Justice Ruth Bader Ginsburg, write critically of the practice of concurring opinion writing — Scalia's juridical "pleasure" in not "need[ing] to accommodate" notwithstanding.[*8]

The concurring vote is also notoriously difficult to understand and, therefore, to explain in terms of American political science's dominant, policy-oriented models of judicial behavior. The attitudinal model, which generally eschews the importance of opinions' doctrinal content, accommodates concurrence mainly as an indication of a less strongly-held ideological preference by members of a majority vote coalition. Yet this is, to some degree, an unsatisfying account, even for attitudinalists. An amusing illustration of this is found in the first edition of Segal and Spaeth's "The Supreme Court and the Attitudinal Model", where the authors admit that they have no good (attitudinal) explanation for the increase in proportion of concurring (special) opinions at the expense of dissents, from the Burger to the Rehnquist Courts. "Is there something about judicial conservatives," they muse, "that causes them to haggle about the details of opinions that support conservatively decided outcomes?"[*9] Other approaches seem to fare no better. Strategic approaches to judicial decision making, where judicial behavior is a collegial game of crafting law, understand concurring opinions as part of the majority opinion-coalition formation process. But they, too, ultimately concede that "it is exceedingly difficult to capture the richness and complexity of justices' responses to majority opinion authors in any single model."[*10] Some Separation-of-Powers, game theoretic models of judicial decision making attempt to incorporate judicial choice of legal doctrine (what these models call "strategically sincere" behavior) into their understanding of judicial behavior, but their measures of legal doctrine are to date insufficiently sensitive to the substantive choice differences which frequently distinguish a concurring opinion from an opinion of the court.[*11] Historical institutionalist accounts of judicial decision making can offer richer descriptions of concurrence as a part of judicial action within macro-level regime politics, but are somewhat unsystematic in explaining the occurrence of this type of separate opinion-writing.[*12]

Thus far, policy-oriented models of judicial behavior explain concurring opinions by falling back on "institutional norms" accounts[*13], tracing "consensual norms" and their impact[*14], or evoking "reaching principled decisions" as part of the mix of institutionally-constrained policy goals which animate judicial

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[5] For such a legal approach to explaining the issuance of separate opinions, see E. M. Maltz. Majority, Concurrence, and Dissent: *Prigg v. Pennsylvania* and the Structure of Supreme Court Decisionmaking. – Rutgers Law Journal, 2000, No. 31, pp. 345–98. There are, of course, countless other illustrative examples.

[6] See *e.g.* R. W. Bennett. A Dissent on Dissent. – Judicature, 1991, No. 74, pp. 255–260.

[7] Such criticism is a rehearsal of the arguments against issuance and publication of dissenting opinions commonly registered in the continental European legal tradition, a tradition that does not uniformly authorize dissenting opinion writing as a judicial practice. J. Laffranque (Note 3), p. 162 *ff*.

[8] R. B. Ginsburg. Remarks on Writing Separately. – Washington Law Review, 1990, No. 65, pp. 133–50; R. B. Ginsburg. Speaking in a Judicial Voice. – New York University Law Review, 1992, No. 67, pp. 1185–1209.

[9] J. Segal, H. J. Spaeth. The Supreme Court and the Attitudinal Model. New York: Cambridge University Press, 1993, p. 282.

[10] F. Maltzman, J. F. II Spriggs, P. J. Wahlbeck. Crafting Law on the Supreme Court: the Collegial Game. New York: Cambridge University Press, 2000, p. 76.

[11] C. M. King. Examining Judicial Choice of Legal Doctrine as Strategic Behavior. Paper presented to the annual meeting of the Southern Political Science Association, Atlanta, GA, 2001; P. Spiller, M. Spitzer. Judicial Choice of Legal Doctrines. – Journal of Law, Economics and Organization, 1992, No. 8, pp. 8–46.

[12] C. Clayton. Law, Politics, and the Rehnquist Court: Structural Influences on Supreme Court Decision Making. – H. Gillman, C. Clayton (eds.). The Supreme Court in American Politics: New Institutionalist Interpretations. Lawrence, KS: University Press of Kansas, 1999.

[13] D. M. O'Brien. Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions. – C. Clayton, H. Gillman (eds.). Supreme Court Decision making: New Institutionalist Approaches. Chicago, IL: University of Chicago Press, 1999.

[14] G. A. Caldeira, Ch. J. W. Zorn. Of Time and Consensual Norms in the Supreme Court. – American Journal of Political Science, 1998, No. 42, pp. 874–902; S. L. Haynie. Leadership and Consensus on the U.S. Supreme Court. – Journal of Politics, 1992, No. 54, pp. 1158–1169.

action.*[15] In other words, the phenomenon of concurrence seems to be an important nexus point between legal, policy preference, and new institutionalist understandings of judicial behavior. Therefore, to examine how dominant models of the judicial process in American political science explain (or could explain) this phenomenon should aid judicial scholars in fashioning constructive critiques of these models and, ultimately, in developing a model which offers a satisfying account of judicial voting **and** opinion-writing behavior in the multi-member appellate court context, and across comparative court contexts.

This article will examine how concurring opinion-writing on the modern U.S. Supreme Court has been explained by the dominant, American political science models of the study of judicial behavior, and assess how the increased incidence of concurrence on the contemporary court has affected (1) the construction and evolution of these models and (2) the discussion within the law and courts field of American political science as to the generation of a unified model of judicial decision making.*[16] A glib (and somewhat testy) subtitle for this article might be, **can** the study of judicial behavior adequately explain concurrence and if not, then why not.

1. Explaining (concurrence as) judicial disagreement

If legal principles guide judicial decision making, why do explanations of judicial decision making which rely on legal factors fare so poorly in accounting for/predicting judicial disagreement? Legalistic explanations of judicial behavior at times function best as *post hoc* accounts for judicial opinions, and a legal factor-based explanation of judging is of limited utility in explaining why certain judges are or are not moved by certain legal considerations in specific situations. These deficiencies in what has come to be called the legal model of judicial decision making were in part responsible for the rise of a political science of judicial process studies; the latter emphasized the predictive explanation of the judicial vote as the key to understanding judicial behavior.*[17]

The emphasis on the judicial vote as that which must be explained, coupled with a diminished respect for legal variables in that explanation, led U.S. judicial behavior scholars of the 1960s to focus on judicial disagreement as the most interesting and salient phenomenon of the newly-characterized "judicial process". Factors or independent variables most relevant to explaining this disagreement, judicial dissensus, took pride of place in the policy-oriented models of judicial decision making that would come to dominate the American political science of law and courts from the 1970s onward. These factors were, of course, judicial policy preferences. Reliance on judicial policy preferences as determinative of judicial decision making was arguably a context-bound assumption: in the U.S. case, judicial partisan identity is known, and is frequently a surrogate measure of judicial ideology or policy preferences, and has long been a factor in the selection of federal judicial nominees by U.S. presidents and the confirmation of those nominees by the U.S. Senate.*[18] Judicial partisan identity is neither known in some non-U.S. court contexts, nor is it a factor in the selection of judges in many non-U.S. court contexts, nor can it be assumed to be related to judicial decision making without corroborating evidence correlating it (or some surrogate measure of judicial ideology) with patterns of that decision making.*[19]

Studies of the U.S. Supreme Court during the early period of judicial attitudinalism employed bloc analysis to account for patterns of agreement and disagreement in judicial voting.*[20] In a sense, then, their behavioral approaches were concerned with the factors which account for judicial consensus **and** dissensus. But the

[15] L. Epstein, J. Knight. The Choices Justices Make. Washington, DC: Congressional Quarterly Press, 1998; see also L. Hauseggar, L. Baum. Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation. – American Journal of Political Science, 1999, No. 43, pp. 162–85; L. Baum. Recruitment and Motivations of Supreme Court Justices. – H. Gillman, C. Clayton (eds.). The Supreme Court in American Politics: New Institutionalist Interpretations. Lawrence, KS: University Press of Kansas, 1999.

[16] L. Epstein, T. Walker, W. Dixon. On the Mysterious Demise of Consensual Norms in the U.S. Supreme Court. – Journal of Politics, 1988, No. 50, pp. 361–389.

[17] See N. Maveety. The Study of Judicial Behavior and the Discipline of Political Science. – N. Maveety (ed.). The Pioneers of Judicial Behavior. Ann Arbor, MI: University of Michigan Press, 2002.

[18] H. J. Abraham. Justices and Presidents. New York: Oxford University Press, 1992.

[19] It is also good to remember that the analytic emphasis on individual judicial votes may not be a possible research methodology if all individual judicial votes are not made public, as is the case for the decisions by many multi-member courts outside the U.S. context.

[20] See L. Baum. C. Herman Pritchett: Innovator with an Ambiguous Legacy. – The Pioneers of Judicial Behavior. N. Maveety (ed.). Ann Arbor, MI: University of Michigan Press, 2002; R. C. Bradley. S. Sidney Ulmer: the Multidimensionality of Judicial Decision Making. – N. Maveety (ed.). The Pioneers of Judicial Behavior. Ann Arbor, MI: University of Michigan Press, 2002; J. A. Segal. Glendon Schubert: the Judicial Mind. – N. Maveety (ed.). The Pioneers of Judicial Behavior. Ann Arbor, MI: University of Michigan Press, 2002.

stress was always on non-unanimous decisions and on the factors explaining voting differences on multi-member courts. Glendon Schubert's phrasing of the judicial behavioralist project, in his introduction to a 1963 volume, is indicative: political scientists of the judiciary "agree that the sets of judges who comprise the bench of relatively large appellate courts characteristically partition themselves into dissenting blocs that reflect the polarization of these courts into liberal, moderate, and conservative subsets".*[21] Judicial disagreement, then, was largely a matter of ideological divergence.

This stress left concurring votes — not to mention concurring opinions — as something of an odd duck. According to attitudinal and bloc analysis, to concur is to agree … but to disagree, yet to disagree about matters which judicial behavioralism discounted as superfluous: the **legal content** of the majority opinion. Concurrence, and the filing of a concurring opinion, was generally understood as weakened attitudinal agreement with the opinion of the court — as the expression of a less-intensively-held judicial preference than would motivate a dissenting opinion. This somewhat unsatisfactory explanation was less troubling in a judicial environment in which concurring behavior was thought to be fairly infrequent, or largely overshadowed by the more dramatic and dramatically attitudinal expression of dissent.

More contemporary attitudinalists — Harold Spaeth, Saul Brenner, Jeffrey Segal — generally continued and refined the policy-preferences model of judging, and continued and refined the attitudinally-based understanding of blocs and bloc voting. There was somewhat more attention to the institutional constraints under which the justices of the Supreme Court operated, but the current attitudinal model of judicial decision making still, by and large, understands opinion coalitions and their formation as a function of ideology.*[22] Special concurrence — that which undermines the majority opinion coalition by concurring in the judgment only — is still largely understood as "faithlessness" by an ideological ally*[23], to be punished in later coalitional configurations of that ideological bloc by a tit-for-tat strategy: another concurrence.*[24] This cycle of uncooperativeness is certainly an explanation for the phenomenon's increase on the U.S. Supreme Court, but it is an explanation that clearly does not partake of attitudinal factors (unless one falls back on "less-intensively-held attitudinal preferences") nor does it fully account for the first "defection" (the concurrence that initiates the tit-for-tat sequence, unless one falls back on "less-intensively-held preferences"). It is also an account that potentially risks missing some of what is "really" going on with respect to concurring opinion writing on the modern Court.

2. Explaining (concurrence as part of) judicial coalition making and the politics of the judicial process

Policy-oriented models of judicial decision making never fully discounted the fact that decision making on collegial courts is interdependent; thus, individual, judicial policy preferences **might** not explain **all** variance in judicial voting. Small group factors and interpersonal institutional influences were first and, some would say, best addressed by Walter Murphy in 1964 in his "Elements of Judicial Strategy".*[25] Murphy was self-consciously cognizant of "the occupational hazards of writing in a **realistic** [emphasis added] fashion about the Supreme Court", and was careful to state his project as "an attempt to understand how, under the limitations which the American legal and political systems impose, a Justice can **legitimately** act in order to **further his policy objectives** [emphasis added]".*[26] He recognized policy preferences as intervening in or affecting "the exercise of considerable discretion" which exists "in performing the judicial function", be-

[21] G. Schubert. From Public Law to Judicial Behavior. – G. Schubert (ed.). Judicial Decision Making. New York: the Free Press of Glencoe, 1963, p. 5.

[22] H. J. Spaeth, J. A. Segal. Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court. New York: Cambridge University Press, 1999; J. A. Segal, H. J. Spraeth. The Supreme Court and the Attitudinal Model. 2nd ed. New York: Cambridge University Press, 2002.

[23] Some may object to the implications of the term "faithlessness". One might observe here that regular concurrences, especially the non-trivial number which do nothing more than attack the dissenting position, do not necessarily indicate faithlessness or weakened ideological agreement with the majority coalition. This is because regular concurrences, unlike special concurrences, join the majority opinion in question in terms of both judgment (reasoning) and result. (One way to conceptualize the difference between the regular and the special concurrence is thus to label them "me too" versus "me instead" concurring opinions.) I owe this clarification to correspondence with Harold Spaeth. My rejoinder would simply be that even regular concurrences are individual policy exertions that fragment the communicative focus of the majority opinion.

[24] J. Segal, H. J. Spaeth (Note 9), pp. 293–295.

[25] W. F. Murphy. Elements of Judicial Strategy. Chicago, IL: University of Chicago Press, 1964, p. vii.

[26] *Ibid*.

cause of the "room" or "need" provided for that discretion due to the broad language of the legal documents which judges are asked to interpret.*[27] In analyzing the courses of action open to the judge in furthering his/her particular policy objectives, given the institutional context, Murphy singled out bargaining over the content of opinions as most salient to the judicial policy making process. He posited, quite simply and common-sensibly, that "to bargain effectively, one must have something to trade and also a sanction to apply if the offer is rejected or if there is a renege on a promise […] the most significant items a Justice has to offer in trade are his vote **and** his concurrence **in an opinion** [emphasis added]".*[28]

It seems apparent in his chapter "Marshalling the Court", that the main kind of trade-off Murphy envisioned was between majority and dissenting opinion coalitions. In discussing "opportunities within the Court for persuasion by negotiation and accommodation"*[29], he mentioned concurring opinion issuance only once, directly. In discussing voting bloc formation, membership, and unanimity, he commented that one tactic of a bloc should be to "conceal as far as possible the fact of its existence, lest other Justices feel it vital to their interests to form a counterbloc"; in pursuit of this, Murphy suggested that "it might be more prudent if on some, perhaps many, issues, the bloc members vote against each other **or at least concur in separate opinions** [emphasis added]".*[30] This intriguing statement — which, to my knowledge, has not be followed-up on by judicial scholars — suggests a very strategic use of concurrence. Moreover, less obliquely, in the final chapter of "Elements", Murphy observes that "the possibilities of negotiation, bargaining, and lobbying […] can […] multiply the number of ways in which [judicial] choices can be expressed", and goes onto cite an example of a concurring opinion filed by Chief Justice Taft.*[31] Concurrence, therefore, is certainly one of the elements of judicial strategy, but it is not highlighted by Murphy, nor singled out as meriting an expansive, explanatory analysis. Leadership — of blocs, and by the Chief Justice — garners more extensive discussion, and was the feature of Murphy's work which later scholars such as David Danelski elaborated upon, in analysis of judicial coalitions and the politics of the judicial process in the U.S. context.

What most distinguished these "group interaction theorists" of the judicial process from the more straightforward attitudinalists of their era was the former's unwillingness to "infer individual attitude from a form of group behavior"*[32], and from its artifact, the vote to join a judicial opinion. But few of these theorists applied their theoretical insights to a sustained explanation of concurring behavior.

Why not? Perhaps because the incidence of concurrence was not considered frequent enough to have significantly altered the decision-making conventions of the court as an institution. This consideration would now seem to be somewhat inapt, as figures on the U.S. Supreme Court's opinion, decision, and outcome trends reported in the third edition of "The Supreme Court Compendium" indicate. Since the late 1960s, the proportion of cases with at least one concurring opinion has held steady at roughly 40% and occasionally exceeded this rate. (Particularly "bad" years were 1980, with a concurrence proportion of .516 and 1993, with a concurrence proportion of .540. The proportion for 2001, the last year for which summary statistics are reported, was .377.) Prior to this period, the proportion of cases with at least one concurring opinion was negligible, 10% or less. The proportion of cases with at least one dissenting opinion has also risen, according to figures reported in the "Compendium": since the early 1940s, the proportion has fluctuated from 50% to over 80%. (Particularly "bad" years, recently, were 1979, with a dissent proportion of .745 and 1986, with a dissent proportion of .693. The proportion for 2001 was .623, a figure which certainly suggests no decline in the rate of dissent on the contemporary bench.)*[33] The first dramatic rises in the rates of separate opinion issuance can be roughly correlated with leadership changes on the U.S. Supreme Court: the first dramatic rise in concurring opinions corresponds (more or less) with the beginning of the Burger chief justiceship, and the first dramatic rise in dissenting opinions corresponds (more or less) with the beginning of the Stone chief justiceship.

Continuing and subsequent to the work of Murphy, Danelski, and J. Woodford Howard, judicial scholars examining the role of leadership strategies on the U.S. Supreme Court would observe that Chief Justice Stone's tenure inaugurated a significant rise in the occurrence of both concurrence and dissent.*[34] This led to an examination of the impact of institutional norms and judicial role orientations and the interaction between them on the collective output of the Supreme Court, including its separate opinion output. More recent studies have noted the dramatic rise in the issuance of concurring opinions on the modern Court, or,

[27] *Ibid*., p. 1.

[28] *Ibid*., p. 57.

[29] *Ibid*., p. 90.

[30] *Ibid*., p. 80.

[31] *Ibid*., pp. 199–200. An opinion, in *Craig v. Hecht* (1923), which, by the way, preceded Taft's subsequent and successful lobbying of President Coolidge for a pardon for the plaintiff in the case, because of the arbitrary action of the judge in the affair.

[32] J. W. Howard. On the Fluidity of Judicial Choice. – American Political Science Review, 1968, No. 62, p. 43.

[33] L. Epstein, J. A. Segal, H. J. Spaeth, Th. Walker. The Supreme Court Compendium. Washington, DC: Congressional Quarterly Press, 2003, Tables 3-3 and 3-2.

[34] See the discussion in D. M. O'Brien (Note 13), pp. 97–104.

at least, beginning with the Burger Court.*[35] Some would attribute this to the ineffectual leadership abilities of Chief Justice Burger, following to some extent the thesis applied to the Stone chief justiceship.*[36] Conversely, one contemporary study argues that Chief Justice Hughes precipitated the first shift in the behavioral expectations among the justices, a shift that was consolidated in the transformation of the consensus norm under the leadership of Chief Justice Stone.*[37]

Whose ever leadership is to "blame", the point is that judicial process scholars increasingly converged around the position that leadership factors, interacting with and affecting institutional norms, were responsible for the phenomenon of separate opinion writing, particularly concurring opinion writing. The unstated or understated assumption was that this marked a flaw — a flaw in leadership, a flaw in the modern Court. Yet in the Rehnquist era, a chief justiceship few would identify as lacking in leadership, the trend toward concurring opinion issuance has continued unabated. Some commentators — mostly journalistic or legal but not exclusively — identify this fragmentation of the current Court as a problem, or indicative of one. But the real question is, what "problem" is concurring behavior indicative of? One recent longitudinal study of rates of separate opinion issuance identifies the culprit as declining or at least fluctuating consensual norms, with the effects of those consensual norms varying in the long term under different Chief Justices.*[38]

Why this might be a "problem" — and where consensual norms (or their lack) might come from — is generally left to the historical institutional scholars of judicial decision making. Among those influenced by Robert McCloskey, who understand the U.S. Supreme Court and its decision making as part of a political regime, Levinson gives voice to the concern that the current, fragmented Court "as is often its wont, offers fact-intensive analyses that make it difficult to figure out what its conclusions would be in different contexts".*[39] The criticism here is not that the Court is nakedly attitudinal but stellarly muddled; one can only assume that its fragmentary pronouncements reflect the uncertainties and insecurities of the political regime of which it is a part. David O'Brien as much as says this when he identifies "the ascendance and incoherence of liberal legalism brought about by the New Deal justices [as] better explain[ing] […] the increase in individual opinions."*[40] Clearly, for O'Brien, the "norm of individual expression" which resulted on the modern Supreme Court has indeed been a problem, producing rulings which "appear more fragmented, uncertain, less stable, and **less predictable** [emphasis added]."*[41] Whatever his evaluative stance, his construction of the intellectual source of consensual norms — or their lack — finds resonance in Ronald Kahn's assertion of a "constitutive approach to judicial decision making".*[42] According to this approach to the politics of the judicial process, "justices make their decisions in an institutional context which informs the choices they make," where institutions "are a source of distinctive political purposes, goals, and preferences."*[43] Kahn and other historical institutionalists would contrast this "acting constitutively" perspective on the judicial process with the "acting instrumentally" perspective of the strategic model of judicial behavior. Kahn is less disposed than O'Brien or Sanford Levinson to see any danger lurking in dissensus on the bench as the result of such constitutive decision making, and comments that the U.S. Supreme Court "has changed its internal process very little in its history."*[44] By this he seems to mean that the Court does and always has operated by the exchange of principled positions — including, most characteristically, those positions offered in separate opinions.*[45]

Kahn's account reminds one, somewhat perversely, of Scalia's "pleasure" in speaking for oneself — or, perhaps put more charitably, it draws attention to the possible utility (for the institution) and potential appeal (for its justices) of judicial procedural conventions which foreground judicial "debate". O'Brien, in his above-cited work, relies on the same Scalia piece quoted by Baum and discussed at the outset of this article; however, O'Brien chooses a different segment of it from which to quote. In speaking of the importance and, by implication, the motivation of separate opinion writing, Scalia asserts, "the Court itself is not just the

[35] L. Epstein, Th. Walker, W. Dixon (Note 16); J. Segal, H. J. Spaeth (Note 9).

[36] D. M. O'Brien. Storm Center: the Supreme Court in American Politics. New York: Norton, 1996.

[37] S. L. Haynie (Note 14); but see L. Epstein, J. A. Segal, H. J. Spaeth. The Norm of Consensus on the U.S. Supreme Court. – American Journal of Political Science, 2001, No. 45, pp. 362–377.

[38] G. A. Caldeira, Ch. J. W. Zorn (Note 14).

[39] S. Levinson. Coda. – R. McCloskey (ed.). The American Supreme Court. 3rd ed. (rev'd by S. Levinson). Chicago, IL: University of Chicago Press, 2000, p. 238.

[40] D. M. O'Brien (Note 13), pp. 103–104.

[41] *Ibid*., p. 111.

[42] R. Kahn. Institutional Norms and Supreme Court Decision Making: the Rehnquist Court on Privacy and Religion. – H. Gillman, C. Clayton (eds.). Supreme Court Decision Making: New Institutionalist Approaches. Chicago, IL: University of Chicago Press, 1999, p. 175.

[43] *Ibid*., p. 176.

[44] *Ibid*., p. 197.

[45] J. P. Kelsh. The Opinion Delivery Practices of the United States Supreme Court. – Washington University Law Quarterly, 1999, No. 77, pp. 137–181.

central organ of legal **judgment**; it is center stage for significant legal **debate**.'"[*46] By this statement, Scalia seems to be challenging the assumptions of both the strategic and historical institutionalist approaches that the objective of concurrence is, ultimately, consensus — *i.e*. the construction of a new majoritarian opinion coalition in the future. By his citation of this Scalia statement, O'Brien locates "a very different view of the role of the Court" for and on the contemporary bench.[*47] Scalia does seem to be celebrating judicial debate through separate opinion writing for its own sake (for its "keep[ing] the Court in the forefront of the intellectual development of the law"), and is arguably giving voice to a new role orientation for and among the Justices.[*48] (Or, perhaps, Scalia's academic robe is showing from underneath his judicial one.) Such a role orientation, as one of Kahn's "constitutive institutions", might well have the power to shape if not account for judicial behavior. That this — or some related — role orientation figures in the coalition formation process (or lack thereof) on the Supreme Court fits with the findings of Gerber and Park, who observe that U.S. Supreme Court Justices become less consensual as justices than they were as lower court judges (controlling for relevant institutional differences between court levels).[*49] They surmise that this behavior change is due to the modern Supreme Court being unique within the American judicial system: a court on which the members feel it is desirable, necessary, and possible to express policy disagreements with the majority via separate opinions and votes.

3. Unexplained (or overexplained) concurring behavior? And why care?

Rather than failing to explain concurrence, the study of judicial behavior seems, instead, to copiously and multiply explain the phenomenon. Are all the aforementioned explanations valid, or are there so many and so many unfalsifiable explanations as to render judicial scholars' account of concurrence fairly useless, scientifically?

Bracketing for the moment any discussion of what a "scientific" explanation of judicial behavior might be, I focus on what the several, competing analyses of separate and concurring opinion writing reveal about the study of law and courts, generally speaking. Firstly, some of the analyses, when applied to concurrence, do not appear to be fully satisfying, even to the analysts who apply them. In other words, sometimes attitudinal factors explain the variance in concurring opinion issuance, sometimes historical institutional factors explain it, sometimes strategic decision making factors explain it — let a thousand flowers bloom.[*50] Secondly, while there is clearly evidence of some borrowing of institutional variables by attitudinal models and *vice versa*, incommensurable worldviews of judging remain in the judicial process literature. This is hardly surprising; this is the current state of the judicial field in American political science. There is no reason to suppose that the analysis of concurrence would be the occasion for an ecumenical embrace. But I would argue that the analysis of concurrence should be just such an occasion, because sectarian scholarship of concurring behavior has yielded, collectively, muddled and inconclusive results. Ironically, the studies replicate the very fragmented and conflictual responses of the separate opinion writing phenomena they address.

The good in this, so sage commentators like Justice Scalia tell us, is the generation of debate. Indeed, studies of concurrence do constitute, as a body, a genuine and intellectually-open debate, partly because no one study or model has invested a tremendous stake in really **caring** about explaining concurrence, *per se*. While not quite epiphenomenal, and certainly not infrequent, concurring opinions are still viewed by judicial scholars as somewhat peripheral to the Big Picture, judicially speaking. But because there has been less invested in their explanation, concurring opinions and their issuance make for a good testing ground for the development of a unified model of judicial decision making.

This perhaps returns the American judicial field to its mid-twentieth century, attitudinal origins in focusing on the explanation of judicial **disagreement**, but in conceptualizing that disagreement — and the factors

[46] A. Scalia. The Dissenting Opinion. – Journal of Supreme Court History, 1994, quoted in D. M. O'Brien (Note 13), p. 112.

[47] D. M. O'Brien (Note 13), p. 112.

[48] J. Laffranque (Note 3) similarly asserts that open judicial dialogue and its generation of legal debate is perhaps also a good in conditions of democratic consolidation, for separate, dissenting opinions can serve "as an expression of the principle of democracy and publicity and freedom of speech of the judge".

[49] S. D. Gerber, K. Park. The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices. – American Political Science Review, 1997, No. 91, pp. 390–408.

[50] This statement is an irreverent reference to the call in Pritchett (C. H. Pritchett. Public Law and Judicial Behavior. – M. D. Irish (ed.). Political Science: Advance of the Discipline. New York: Prentice-Hall, 1968, p. 219) to the judicial studies field to pursue diverse research topics and utilize diverse research methodologies. Initially, this call fell on somewhat deaf ears. See N. Maveety (Note 17).

responsible for it — somewhat differently. Recall Segal and Spaeth's 1993 comment, as to whether there is something about judicial conservatives … or **these** judicial conservatives — the Rehnquist Justices … that causes them to "haggle over the details" of conservatively-decided decisions. What would a policy-oriented model of judicial decision making look like that foregrounded this instability of majority opinion coalitions as the signal characteristic of the modern judicial process on the U.S. Supreme Court?

If we accept Baum's assertion that Supreme Court justices pursue legal and policy goals in making their decisions, we are obligated to spell out the substantive meaning of "goals" in each instance.[*51] Baum identifies these meanings, respectively, as legal clarity and legal accuracy, and case outcome and promulgation of legal doctrine or rule.[*52] He also admits that it is difficult to infer the relative importance of legal *versus* policy goals from patterns of judicial behavior. He offers some intriguing, possible explanations as to why. First, he notes that the substantive effect of legal goals cannot be detected from voting differences among the justices.[*53] Later, he observes that the unusual content of the U.S. Supreme Court's agenda — the fact that it is a policy court that selects close cases where the weight of legal considerations does not lie overwhelmingly on one side — reduces the relevance of one legal goal, legal accuracy, to the justices' choices in deciding the case merits.[*54] It would seem, then, that the reservoir of unexplained voting variance between justices must be accounted for by individual policy goals. Yet the (attitudinal) assumption with respect to a judicial bloc — an ideological bloc that votes together out of shared preferences for case outcomes which yield a particular structural or substantive policy position[*55] — is that bloc members are motivated by comparable policy goals. Moreover, Baum argues that judicial policy goals — presuming an individual unit of analysis — are twofold: case outcome **and** promulgation of a doctrinal rule, which extends beyond the individual case and thus has a broader potential impact on societal policymaking. It is these, at-times competing policy goals which divide majority coalitions from majority **opinion** coalitions. And it is presumably over the realization of the second goal, promulgation of doctrinal rule, that Segal and Spaeth's Rehnquist Court judicial conservatives are "haggling".

While making "good law", or constructing "correct" legal doctrine, might be thought of as a judicial legal goal and thus part and parcel of a legal model of judicial decision making, Baum and other adherents of the policy-oriented approach to the study of judicial behavior would remind us that opinions and their (doctrinal) language are the tools of **judicial** policy makers.[*56] Are ideological factors of help in determining judicial predilections for certain doctrinal rules? It depends, of course, how we define ideology, or ideological preferences[*57] but, clearly, standard dimensions of liberalism-conservatism are of little help if our objective is to explain the dissensus within a **conservative**, majority opinion coalition.[*58] Now, there are two options here, explanation-wise. One is to say that "these conservatives" are *sui generis*: the Rehnquist Court justices are simply more affected by declining consensual norms on the institution and are somewhat shortsighted in succumbing to doctrinal divisiveness, as rationally instrumentalist policy makers. Another option would be to admit that, yes, judicial legal and policy goals are pursued within an institutional matrix which includes consensus norms or their lack; but **even so**, the concurrence rates on the modern, conservative-bloc-dominated Supreme Court are an overt indicator of a less apparent, developing phenomenon in the judicial decision making process. That phenomenon is that declining consensus norms have bifurcated judicial policy goal-seeking into two, at times mutually exclusive dimensions: policy in case outcomes, and policy in doctrinal rules.

Substantive ideological preferences still largely govern the former policy goal-seeking behavior — case dispositional voting, but the choice dimension of doctrinal rule preference is not so clearly "attitudinal", in the same sense. Of course, we might say, along with some studies, that preference for certain doctrinal rules

[51] L. Baum (Note 2), p. 57.

[52] *Ibid*., p. 58.

[53] *Ibid*., p. 71.

[54] *Ibid*., pp. 82, 88.

[55] L. Baum (Note 2) notes in his chapter discussing "Law and Policy" that judicial behavior scholars have found that judges' attitudes toward structural policy, such as principles of federalism or judicial restraint, are subordinate to their attitudes toward substantive policy, or their preferences on substantive issues such as labor relations (p. 72). Such findings, Baum concludes, provide additional evidence of the heavy weight of substantive policy preferences in judicial choices as to voting, though they do not reveal anything directly about the weight of legal considerations in those choices. *Ibid.*

[56] And scholars such as D. Weiden might remind us that Supreme Court law clerks are instrumental in shaping judicial opinions and their doctrinal language content. The relationship between "the clerk factor" and the issuance of separate opinions, including concurring opinions, awaits further, systematic investigation. D. Weiden. Bringing the Clerks. – Law Clerks, Ideology, and Opinion-writingat the U.S. Supreme Court. Paper to be presented to the annual meeting of the American Political Science Association, Boston, MA, 29 August 2002. For an anecdotal discussion of this relationship, see E. Lazarus. Closed Chambers: the Rise, Fall, and Future of the Modern Supreme Court. New York: Penguin Books, 1999, pp. 271–275.

[57] See Note 56.

[58] On this, see K. Sullivan. The Justices of Rules and the Justices of Standards. – Harvard Law Review, 1992, No. 106, pp. 24–123 on "justices of rules" and "justices of standards".

or approaches is equivalent to supporting/not supporting precedent, and thus operationalizable as "conservative" or "liberal" (depending on the direction of the precedent).*[59] Alternatively, we might maintain, along with other studies, that preferences for certain doctrinal rules are subsumable under legal goal-seeking, and thus testable against the pursuit of ideological policy positions.*[60] But such a retreat into legal factor-based modeling of judicial decision making flies in the face of another recent study asserting the possibility of "heresthetic maneuvering" on the Supreme Court.*[61] Such maneuvering is defined by the study's authors as "restructur[ing] choice situations to [the actors'] advantage"; they discuss an example of such restructuring which describes judicial maneuvering within and across the two dimensions of judicial policy goals: case outcome **and** promulgated doctrinal rule.*[62]

What does all this have to do with explaining concurring behavior, and, with explaining it as potentially central to an understanding of the nature of the judicial process of American appellate courts? Only that a model of judicial decision making must attend to the politics of opinion **writing**. Judges say they care about opinion writing, and they spend an inordinate amount of time on behaviors suggesting that they do care about opinion content — about the nature of and the way that opinions communicate the policy position the judicial vote expresses. But the choice as to content of an opinion — the nature and description of its doctrinal rule — is as much a matter of policy goal-seeking as is the choice as to vote over case outcome. However, the choices may not driven by the same kind of policy preferences.

Maltzman, Spriggs and Wahlbeck attempt to answer the question of why justices choose to respond negatively to majority opinion drafts.*[63] In suggesting that the politics of opinion writing is a collegial game, they locate themselves squarely within the strategic approach to the study of judicial behavior. They employ a fairly complex, multivariate model to test coalitional conditions as influences constraining judges' choices designed to shape the law in a manner consistent with their policy goals. They summarize their findings about why judges "respond negatively" in this way: judges' choice of tactics for shaping the Court's final opinions — including the choice to file a concurring opinion — reflect a number of ideological, strategic, and contextual forces, but vary in a systematic and predictable way.*[64] The adjective the authors of this study use most noticeably to describe the opinion-writing process is "dynamic". They effectively validate one attitudinalist's earlier observation that "opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate".*[65] The variables explaining judicial choice — including the choice to write separately — which the study's authors highlight are, of course, strategic calculation factors. Still, the authors are quite modest in admitting that they "have not made the final step [of] explaining the actual content of Court opinions,"*[66] confessing that they "do not systematically test the extent to which the decisions and actions of the justices are shaped by legal considerations".*[67] But, notice, what assumption is present throughout this fine, systematic, and ecumenical study: that judges choose tactics **for shaping the Court's majority opinion**.*[68]

Yet what if the judicial policy goal of promulgation of doctrinal rule were reconfigured such that this goal could be/was being pursued/satisfied/satisficed by writing a concurrence that (*pace* Scalia) stirred "significant legal debate" and placed the Court/the Court member "in the forefront of the intellectual development of the law"? What if judges' policy goals were somehow dichotomous, such that the policy-goal-in-case-outcome was actualized through preference-based voting (for majority dispositions, presumably), but the policy-goal-in-doctrinal-promulgation was expressed through "inform[ing] […] the bar, about the state of the Court's collective mind"? If the latter objective could be actualized — if not maximized — by the issuance of a concurring opinion, and if no norm of consensus effectively constrained this, and if no sanction for such noncooperative judicial behavior operated*[69], then would concurring behavior require a modified explanation in the study of judicial decision making?

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[59] See L. Baum (Note 2), pp. 73–74; J. A. Segal, H. J. Spaeth. Norms, Dragons, and Stare Decisis: A Response. – American Journal of Political Science, 1996, No. 40, pp. 1064–1082.

[60] J. B. Gates, G. A. Phelps. Intentionalism in Constitutional Opinions. – Political Research Quarterly, 1996, No. 49, pp. 245–261.

[61] L. Epstein, O. Schvetsova. Heresthetical Maneuvering on the U.S. Supreme Court. – Journal of Theoretical Politics, 2002, No. 14, pp. 93–122.

[62] J. Laffranque (Note 3).

[63] F. Maltzman, J. F. II Spriggs, P. J. Wahlbeck (Note 10); J. F. Spriggs, F. Maltzman, P. Wahlbeck. Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts. – Journal of Politics, 1999, No. 61, pp. 485–506.

[64] F. Maltzman, J. F. Spriggs, P. J. Wahlbeck (Note 10), p. 93.

[65] H. J. Spaeth. The Attitudinal Model. – L. Epstein (ed.). Contemplating Courts. Washington, DC: Congressional Quarterly Press, 1995, p. 314, quoted in F. Maltzman, J. F. Spriggs, P. J. Wahlbeck (Note 10), p. 151.

[66] F. Maltzman, J. F. Spriggs, P. J. Wahlbeck (Note 10), p. 154.

[67] *Ibid*., p. 153; see M. Richards, H. M. Kritzer. Jurisprudential Regimes in Supreme Court Decision Making. – American Political Science Review, 2002, No. 96, pp. 305–320.

[68] F. Maltzman, J. F. Spriggs, P. J. Wahlbeck (Note 10), p. 27.

[69] See F. Maltzman, J. F. Spriggs, P. J. Wahlbeck (Note 10) findings on cooperation hypothesis, pp. 117–118, 120–121.

It might. Baum's 1999 investigation of the relationship between judicial recruitment and judicial motivations suggests, rather radically, that "constraints on individualism in the Court [may] have been exaggerated".*[70] He goes on to posit that patterns in recruitment/selection may have resulted in certain, significant effects on the orientations of people who reach the Supreme Court — one of these being, taking a great deal of "satisfaction" in ruling on issues of legal policy.*[71] Baum closes with this portentous thought: "the sorts of people who reach the Court today may have attitudes and perspectives that cause them to give **the Court's outputs** [emphasis added] a very heavy priority — and a higher priority than did the cohorts of justices who served in past eras."*[72] The statement is portentous because of its silence as to how these new "sorts of people" conceptualize both "**the Court's** outputs" and their influence over them. It opens the door to other, radical lines of inquiry. To wit, if a judicial actor could have influence over legal policy without sacrificing to join a majority opinion, would not an instrumental and policy-oriented judge decline to so sacrifice (or "cooperate")? If lawyers pay attention to concurring opinions as just as indicative of the Supreme Court's "collective mind" as opinions of the court, and if case disposition is in the "right" policy direction from the judge's perspective, then why not concur when one's own views are so important to the "legal debate?" Such a view of the judicial policy-goal-in-doctrinal-rule-promulgation would require relaxing or even abandoning the conventional wisdom of the judicial process literature which Giles argued yielded the corroborated hypothesis that opinion coalitions are generally equivalent in size and membership with decision coalitions.*[73] Such a view would also seem to directly conflict with institutional norms like canon 19 of the Canons of Judicial Ethics, which provides that "judges constituting a court of last resort should … promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to **pride of opinion** [emphasis added] … except in cases of conscientious difference of opinion on fundamental principle".*[74]

Mine is, I admit, a very odd and theoretically counter-intuitive suggestion to be making about judges on a policy-making court. It would seem to elevate concurring opinions to a position of distinctiveness with respect to dissenting opinions, in terms of the factors that motivate each. It would also seem to elevate concurring opinions to a position of privilege, legally and institutionally, that they do not deserve and that may not be borne out by empirical analysis. Odd and counter-intuitive nevertheless, my suggestion about concurrence could be a logical extension of what happens on a policy-making court (where policy goals are stipulated as by Baum*[75]) freed from/untethered by the convention of consensus around a single, opinion "of the court". It might be part of a narrative of how the post-Marshall U.S. Supreme Court returns to a seriatim decision-based judicial tribunal. There is nothing inherently "bad" in such a development. Other such policy making courts in the common law tradition function in this way — for example, the English Law Lords and, to a degree, the Australian High Court. In addition, some revisionist accounts of the pre-Marshall U.S. Supreme Court find it to have been institutionally significant, even while using seriatim decisions for its rulings.*[76] One of these accounts goes so far as to suggest that the label of unimportance assigned to the pre-Marshall Court "is probably due to the direct conflict between the modern judicial paradigm of conflict and the early Court's paradigm of support" — in other words, the early Court's objective of "consolidat[ing] the new federal government".*[77] When regime enhancement or support is a primary goal of a new judicial institution, its opinion-writing behaviors — separate opinion-writing behaviors — may be different or be assessed differently than those of an established judicial institution not primarily engaged in consolidating a new regime. The point is to assess concurring opinion writing by judges neutrally and functionally, and within the court context in which it occurs.

O'Brien spoke rather pejoratively of Scalia's gushiness about separate opinion writing and its alleged revelation of "a very different view of the role of the Court, though a view ushered in by the Roosevelt Court".*[78] O'Brien reminds his readers that C. Herman Pritchett's explanation for the increasing rates of disagreement on the New Deal Court was "profound and philosophical", for Pritchett's explanation located the source of that judicial disagreement in the "failure" of American liberalism to "produc[e] any consistent social and economic philosophy", neither interpretively over legal policy questions nor in terms of the judicial role of

[70] L. Baum (Note 15), p. 201.

[71] *Ibid*., pp. 207–208.

[72] *Ibid*., p. 211.

[73] M. W. Giles. Equivalent Versus Minimum Winning Opinion Coalition Size: A Test of Two Hypotheses. – American Journal of Political Science, 1977, No. 21, pp. 405–406.

[74] Quoted in M. W. Giles (Note 73), pp. 405 note 1; W. F. Murphy (Note 25), p. 62.

[75] Where policy goals are stipulated as by L. Baum (Note 2).

[76] W. R. Castro. The Supreme Court in the Early Republic: the Chief Justiceships of John Jay and Oliver Ellsworth. Columbia, SC: University of South Carolina Press, 1995; S. D. Gerber (ed.). Seriatim: the Supreme Court Before John Marshall. New York: New York University Press, 1998.

[77] W. R. Castro (Note 76), pp. 249, 213.

[78] D. M. O'Brien (Note 13), p. 112.

activism *versus* restraint.*[79] From this, O'Brien deduces that "as a result of their disagreements over the course of liberal legalism and constitutional interpretation, the New Deal justices were inclined to articulate their distinctive views in individual opinions".*[80] Could the same be said of the failure of contemporary American (GOP) conservatism and the Rehnquist justices who espouse it?

Profundity aside, Pritchett's view of the judicial process did not include anything like the above ruminations on concurrence and the emergence of a new decision making convention on the contemporary American Supreme Court. Still, his intimations about concurrence suggest that rather than accounting for concurring opinion writing as a breakdown — of ideological blocs, in strategic maneuvering, in norms of consensus, the study of judicial behavior may want to entertain new ways of conceptualizing what concurrence is and what its impact has been, and may be, on the judicial institution in which it occurs. Doing so may be the occasion for a revised or syncretic policy-oriented model of judicial decision making, taking into account that "institutional arrangements and cultural contexts […] give […] shape, direction, and meaning" to political behavior.*[81]

4. Conclusions: studying that uncherished part of the common law tradition

The reason concurring opinion writing has not been fully explained, even by models and research designs that focus on explaining the politics of opinion writing, is that judicial scholarship has heretofore limited itself to viewing the phenomenon in terms of extant theories of judicial behavior. Concurrence becomes a product of "attitudes", "strategy", "consensual norms", but is not necessarily a phenomenon viewed as something constructive of, or constitutive to, the judicial institution (or the larger polity, for that matter). It is always something partial, a "partial victory"*[82] or a "partial loss"*[83], if not downright bad — not to be cherished. Even among those who, for perverse reasons of their own, see concurring behavior as at times an effective strategy of inter-judicial influence*[84], concurring opinions are always the step-sibling of real influence: authoring (or shaping) majority opinions.

A program for suggested research directions follows upon the above observation. Concurrence is not infrequent, or it has risen in frequency on the modern U.S. Supreme Court; this we know.*[85] But have concurring opinions assumed the role of parity with majority opinions, such that a revival of seriatim decision making is underway on the contemporary Court? Leaving aside whether this is a good or a bad thing, does the empirical evidence suggest that the answer to the previous question is yes? To test for "parity", and for the potential for a pervasiveness that thereby alters the institutional norms of the court, a study of concurring-opinion writing must examine these opinions' impact in judicial policy making. A start, in such testing, would be to investigate whether, when, and how frequently lawyers (Scalia's audience of "the bar") direct the arguments in their briefs toward the doctrinal rules announced in judges' concurring opinions. Under what conditions do lawyers argue to "a court of one", and is such a litigation tactic successful, in terms of producing desired case outcomes and court rulings? One would still presume that such attention to concurring opinions from the bar is "successful" in the *eventual* conversion of the concurring doctrinal rule (its

[79] C. H. Pritchett. The Roosevelt Court. New York: Macmillan Publishers, 1948, p. 265.

[80] D. M. O'Brien (Note 13), 1999, p. 162.

[81] H. Gillman, C. W. Clayton. Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision Making. – H. Gillman, C. Clayton (eds.). Supreme Court Decision Making: New Institutionalist Approaches. Chicago, IL: University of Chicago Press, 1999, p. 3.

[82] L. Epstein, O. Schvetsova (Note 61); J. Laffranque (Note 3).

[83] See J. A. Segal, H. J. Spaeth (Note 9), p. 293.

[84] N. Maveety. Justice Sandra Day O'Connor: Strategist on the Supreme Court. Lanham, MD: Rowman and Littlefield Publishers, 1996.

[85] It is not my intention with this statement to elide careful investigation of the frequency question. Indeed, judicial scholars are still debating the frequency, and therefore the import — to the nature of the judicial process and for its study, of the phenomenon first identified by J. W. Howard (Note 32) as the "fluidity of judicial choice". How often judges' votes change between conference and final decision on the merits, what factors account for such change, and what the existence of those factors indicate about the judicial process, has consumed almost thirty-five years of scholarship on the U.S. Supreme Court. One recent follow-up to Howard's thesis has been Maltzman and Wahlbeck. F. Maltzman, P. J. Wahlbeck. Strategic Policy Considerations and Voting Fluidity on the Burger Court. – American Political Science Review, 1996, No. 90, pp. 581–592. Brenner has long disputed that the phenomenon is frequent enough to merit serious theoretical attention. See S. Brenner. Fluidity on the United States Supreme Court: a Reexamination. – American Journal of Political Science, 1980, No. 24, pp. 526–535; S. Brenner. Fluidity on the Supreme Court: 1956–1967. – American Journal of Political Science, 1982, No. 26, pp. 388–390; S. Brenner. Fluidity of the Supreme Court: a Reconsideration. – S. Goldman, A. Sarat (eds.). American Court Systems. New York: Longman, 1989; S. Brenner. Fluidity in Voting on the U.S. Supreme Court: A Bibliographic Overview of the Studies. – Law Library Journal, 1995, No. 87, pp. 380–386.

policy) into "the law". (Of course, the decisional mechanism by which rules are converted into "the law" may be/have been radically altered, too).

A parallel, or second question, emerges from an inquiry into the parity and impact of concurring opinions in legal policy making. Have judicial policy-oriented actors internalized this parity function and, therefore, write such concurring opinions with this expectation of their reception? Such an individual behavior question could be probed through intensive and targeted case-study analysis, relying heavily on what might be available in archival collections of judicial papers; still, such research would not likely confirm the presence of an aggregate pattern across time with respect to concurring behavior. The question of who uses concurrence, when, and how on the U.S. Supreme Court, could also be investigated using the data in the recently-available Justice-Centered Rehnquist and Burger Court Database, prepared by Sara Benesh and Harold Spaeth. The virtue of this database, which uses justice vote as the unit of analysis, is to allow for a research focus on individual justice behavior and on qualitative disagreements among the justices.*[86] Obviously, concurring opinions bracketing an opinion of the court have not yet become the norm — even in highly salient cases in divisive issue areas like affirmative action, abortion, or capital punishment. However, it may be the case that certain justices use concurrence in certain issue areas only, or that certain justices use regular but not special concurrence as their policy device. Moreover, the "deviation variables" specified in the dataset allow for the observation of separate opinion authors' deviation from the court as to legal basis and authority for the decision as well as the framing of the subject matter of the controversy.*[87] Presumably, such deviation, and the rate with and conditions under which such deviation occurs, is indicative of judicial use of concurrence to influence legal policy debate. The Benesh-Spaeth Database has the utility of allowing for a more longitudinal investigation of the use of concurrence, and the case, issue, and decision-coalition characteristics that correlate with its usage. Such findings, taken together with findings as to the legal policy impact of concurring opinions, could be very suggestive.

Another research direction of possible utility in explaining concurring-opinion writing would be to reopen the examination of the effects of judicial role orientation on judicial behavior. There is a sizeable, extant literature investigating the role concept in judicial research. A typology, developed by Glick and Vines and generated from judicial interview data and subsequently tied by Howard to patterns in judicial voting behavior, identified a classification of judges as law makers/innovators, law interpreters, and pragmatists/realists.*[88] It bears reiteration here that this classification of judicial role orientation, like many of the analytical tools employed by the American political science of law and courts, was generated from and generally applied to the study of courts in the U.S. context. Comparative-application limitations aside, role theory analysis was supplanted by more sophisticated and systematic attitudinal and later strategic approaches to the study of judicial behavior.*[89] Moreover, role theory analysis was criticized substantively by O'Brien who deflated claims about the recent emergence of a more expansive, "imperial judiciary" role concept as animating contemporary judicial decision making.*[90] Despite this, both Baum and Scalia seem to be pointing to a potential role-based explanation for certain opinion-writing behaviors.*[91] Other, historical institutionalist scholars likewise claim that institutional structures "motivate[e] and giv[e] direction to judicial behavior through conditioning the judicial mind to a sense of what is appropriate for a judge [or] proper for a court."*[92]

What judicial role orientation is, how it might be identified and measured, and its presence tested against observable manifestations, requires a research design which addresses the problems identified by Gibson.*[93] Gibson's own study presented a measure based on a conceptualization of role orientations as judicial beliefs about the legitimacy of relying on certain criteria in making decisions; the measurement dimension represented the degree of judicial willingness to move beyond (for any purpose) strictly legal criteria in making decisions. Gibson's findings suggest that his measure was strongly predictive of the sentencing behavior of trial court judges.*[94] But he acknowledged that his decisional role orientation might not identify all of the

[86] S. Benesh. Becoming an Intelligent User of the Spaeth Supreme Court Databases, paper presented to the annual meeting of the Southwestern Political Science Association, New Orleans, LA, 2002.

[87] S. C. Benesh, H. J. Spaeth. The Rehnquist Court Justice-Centered Judicial Database (1986–1998 Terms): Documentation. Program for Law and Judicial Politics, Michigan State University, February 2001, pp. 5–25.

[88] H. R. Glick, K. N. Vines. Law Making in the State Judiciary: A Comparative Study of the Judicial Role in Four States. – Polity, 1969, No. 2, pp. 142–159; J. W. Howard. Courts of Appeals in the Federal Judicial System. Princeton, NJ: Princeton University Press, 1981; S. Goldman, A. Sarat (eds.). American Court Systems: Readings in Judicial Process and Behavior. White Plains, NY: Longman, 1989, p. 438.

[89] Certain theoretical and data-availability assumptions of these approaches would seem to limit their application to the non-U.S. court context. See J. Laffranque (Note 3).

[90] D. M. O'Brien. 'The Imperial Judiciary': Of Paper Tigers and Socio-Legal Indicators. – Journal of Law and Politics, 1995, 2:1, p. 56.

[91] L. Baum (Note 15); A. Scalia (Note 46).

[92] C. Clayton, H. Gillman. Introduction. – H. Gillman, C. Clayton (eds.). The Supreme Court in American Politics: New Institutionalist Interpretations. Lawrence, KS: University Press of Kansas, 1999, p. 5.

[93] J. L. Gibson. The Role Concept in Judicial Research. – Law and Policy Quarterly, 1981, No. 3, pp. 291–308.

[94] J. L. Gibson. Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model. – American Political Science Review, 1978, No. 72, pp. 911–924.

criteria that compose judicial belief about what is proper for a judge with respect to the **process** of judicial decision making. Indeed, his measure regarding decisional stimuli to which a judge might respond does not seem terribly pertinent to an explanation of concurring-opinion writing and its coalitional context. Still, in suggesting that role is operative on judicial behavior, and in critically assessing the operationalization of the concept of role, Gibson's twenty-plus-year-old article offers a possible theoretical direction for research into judicial expression of the judicial policy goal of promulgating doctrinal rules.*[95]

Judges have policy preferences, judges care how those policy preferences are expressed in legal rules, judges' choices over both occur in an interdependent and institutionally-defined choice setting. These maxims about judicial behavior are applied to explain judicial decision making on the U.S. Supreme Court since the beginning of John Marshall's chief justiceship. Chief Justice Marshall is also the jurist most credited with converting the Supreme Court into a coequal and policy-making branch of the federal government; for many court historians it was his instillation of the norm of an opinion for the court which most effectuated this conversion.*[96] The decline, or death and substitution, of this norm may be premature in forecasting. The largely mid-twentieth century and early twenty-first century pattern of increased separate opinion writing on the U.S. Supreme Court may presage nothing dramatic in terms of institutional transformation. Or it may presage much.

[95] Indeed, a follow-up to his own work explored the influence of self-esteem on judicial decision making. J. L. Gibson. Personality and Elite Political Behavior: the Influence of Self Esteem on Judicial Decision Making. – Journal of Politics, 1981, pp. 104–125. While this analysis relied on self-reports of behavior correlated with role orientations, Gibson did conclude that judges measuring high in self-esteem were more likely to form role orientations less affected by individually-external expectations. "Self-esteem" would seem to partially capture what Baum (Note 15) is attributing to justices like Scalia, whose remarks (Note 46) surely exhibit it.

[96] See S. D. Gerber. Introduction: the Supreme Court Before John Marshall. – Seriatim: the Supreme Court Before John Marshall. S. Gerber (ed.). New York: New York University Press, 1998, pp. 1–3, 7–9, for a review of the literature that has contributed to, in his words, the "apotheosis" (7) of Chief Justice Marshall.