BEHIND THE VELVET CURTAIN: UNDERSTANDING SUPREME COURT CONFERENCE DISCUSSIONS THROUGH JUSTICES' PERSONAL CONFERENCE NOTES

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I. INTRODUCTION

In late June 2012, Chief Justice Roberts shocked legal and political analysts alike by voting to uphold the constitutionality of the Affordable Care Act.[1] Conservatives, who generally opposed the ACA, were so startled by Roberts's unexpected decision that some even called for his impeachment.[2] Just days later, fuel was added to the fire when longtime Supreme Court reporter Jan Crawford broke the news that the Chief Justice had switched positions in the case. According to Ms. Crawford, who cited "two knowledgeable sources," at the conference vote that followed oral arguments he and the rest of the conservative bloc were prepared to strike down the constitutionality of the so-called individual mandate.[3] However, the Chief Justice eventually switched his vote and sided with the liberal bloc to uphold the ACA, albeit on narrow grounds.

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1. Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001 et seq. (2010); *see also* Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding most components of ACA constitutional).

2. David Horsey, *John Roberts Saves "Obamacare," Enrages Tea Party Conservatives*, LATIMES.COM (June 29, 2012), http://articles.latimes.com/2012/jun/29/nation/la-na-tt-john-roberts-20120628 (referring to "incensed conservatives . . . printing up 'Impeach John Roberts' T-shirts" and "a freshly minted 'Impeach John Roberts' Facebook page").

3. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS.COM (July 2, 2012 9:43 PM EDT), http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/.

While we now have some idea of what transpired behind the scenes in this highly salient case, possessing data of this nature is the exception rather than the rule. Indeed, the rule is that what happens during the Court's conference is usually kept absolutely private, even after a decision is made.[4] As a result, because only the Justices are allowed in the Court's conference room for these discussions, they are among the most secretive of all meetings that take place within the federal government. The system works so well that the Court has seldom experienced information leaks about how it will decide or about what transpires at conference.

Certainly privacy is good for the Justices as it allows them to candidly express and discuss their positions on some of the nation's most important legal and policy issues.[5] What is good for the Court, however, is not always good for those who seek to understand why the Justices decided in a particular way—and how they reached their final decisions. In fact, scholars and Court watchers alike would surely have better understood why the Chief initially joined with his ideological allies to strike the ACA but then changed his vote if they had been privy to that initial conference discussion. More generally, such information would fundamentally alter our understanding of how decisions develop and how the Justices interpret the law because Court opinions are the culmination of a process that begins with debate at conference. As a result, our understanding of where policy ends is necessarily incomplete without knowing the Justices' initial legal and policy positions explicated to their colleagues during conference discussions.

While we do not have access to contemporaneous conference discussions, we can still learn much about how the Court develops law, policy, and legal standards from historical records. Many Justices who retired during the past half-century left their hand-written notes of what transpired during conference. These notes provide insights into how the Chief

4. *How The Court Works—The Justices' Conference*, S. CT. HISTORICAL SOC'Y (n.d.), https://supremecourthistory.org/htcw_justiceconference.html (explaining that "[i]n a capital full of classified matters, and full of leaks, the Court keeps private matters private," and that although "[r]eporters speculate . . . details of discussion are never disclosed, and the vote is revealed only when a decision is announced").

5. Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POLITICAL SCI. 1018, 1024, 1028 (referring to private nature of conference) (1996).

Justice, who speaks first, frames the legal and policy debate, how each associate Justice responds to this frame, and how the discussion about the legal and policy intricacies of a case proceeds.

Here we provide the first step towards understanding what transpires during the Court's private conference discussions. Using a sample of conference notes transcribed by Professor Dickson,[6] we analyze how Justices interact with one another during conference and how such interactions affect the degree to which Justices take part in writing the majority or separate opinions after conference.

We proceed as follows. In the next section we provide a broad overview of how conference discussions transpire at the Court. We then explore the (rather small) literature that has considered conference from a social-scientific perspective. Next, we describe and explore the data that we analyze here. We conclude by describing the broader data we use for our SCOTUS Notes project, how we will analyze these data, and the state of our data-collection efforts.

II. BACKGROUND: THE MECHANICS OF SUPREME COURT CONFERENCE

After hearing oral arguments in each case on the Court's plenary docket, the Justices hold conference to discuss the legal and policy questions of each case and to cast their initial votes. Discussion within conference begins with the Chief Justice, who presents his perspective on the facts of the first listed case.[7] From there he offers his personal view of the case and then casts his vote.[8] When the Chief Justice is done speaking, the associate Justices offer their views and votes in descending order of seniority.[9]

Three features of the Court's conference make it distinctive and important for analysis. First, these proceedings are the first time the Justices take direct action on how to decide cases they

6. *See* DEL DICKSON, THE SUPREME COURT IN CONFERENCE 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed. 2001).

7. LAWRENCE BAUM, THE SUPREME COURT 109 (11th ed. 2013).

8. *Id.*

9. *Id.*

hear.[10] This makes analysis of conference particularly significant because, oftentimes, the first discussion in a decision process is the most critical.[11] Second, conference votes and stated legal or policy positions are non-binding. In fact, we know that at least one Justice changes positions in more than a third of all cases the Court decides.[12] Being able to identify a Justice's initial position in a case, therefore, is key to accurately determining when and why a Justice subsequently joins a coalition or switches positions later in the process. Third, and most important for our long-term project, Justices conduct conferences in private with only the nine Justices allowed in the room for these discussions.[13]

Given the norm of privacy about conference discussions, only the Justices and the law clerks and secretaries they work with know what transpires during these proceedings. However, clerks and secretaries are bound by an oath of secrecy that virtually all take very seriously.[14] As a result, the only source of systematic data about conference is the papers left by retired Justices. These papers allow us to recreate the nature of the discussion that sets the stage for the Justices' ultimate decisions.

Consider Figures 1A and 1B, which together provide an example to demonstrate the richness of information these documents contain. The figures reproduce the two pages of notes taken by Justice Blackmun in the conference for *Texas v. Johnson*,[15] a case involving freedom of speech and the right to burn an American flag. These pages reveal that the Justices

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10. The Justices hold closely to the norm of not discussing cases prior to conference. *See, e.g.*, RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 7–8, 14 (2012) (indicating that the Justices indirectly "discuss" cases through their questioning during oral argument, but that initial votes and dispositive position taking do not happen until conference).

11. *See generally* Kenneth Bettenhausen & J. Keith Murnighan, *The Emergence of Norms in Competitive Decision-Making Groups*, 30 ADMIN. SCI. Q. 350 (1985).

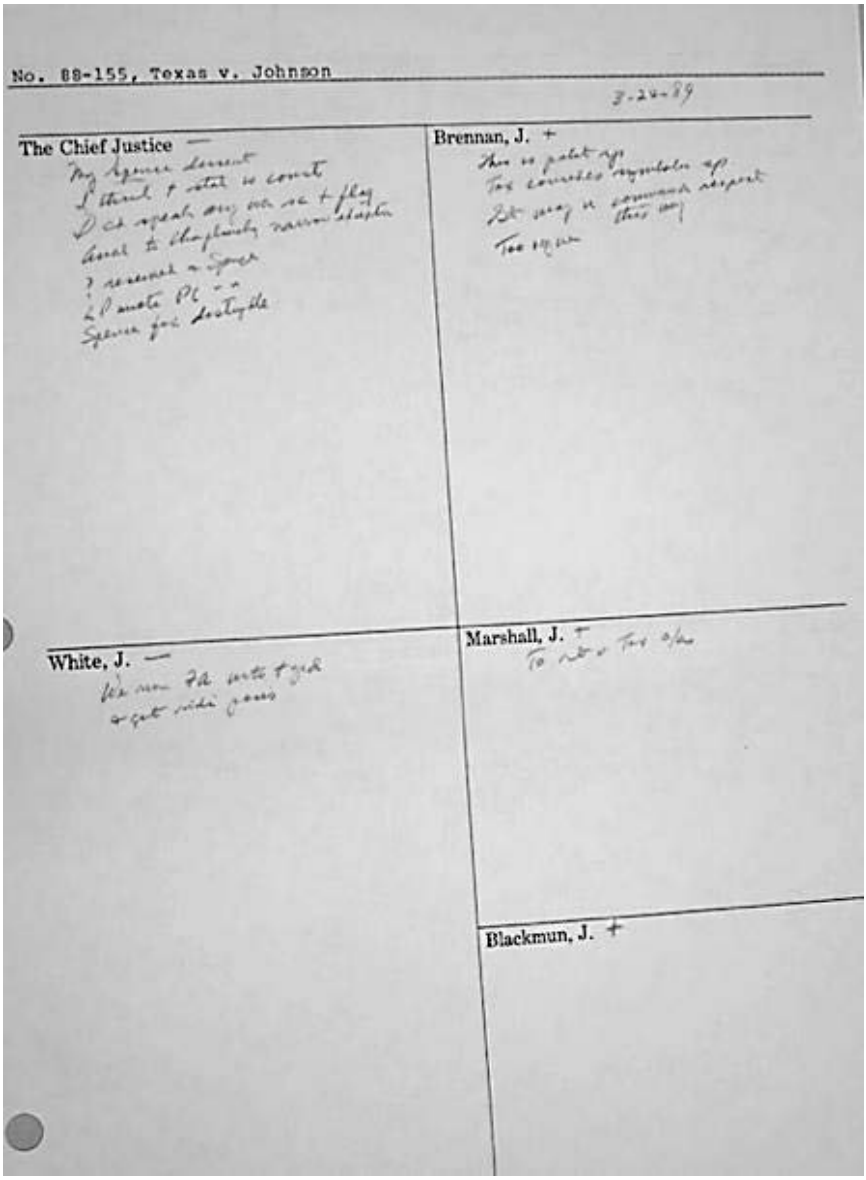
12. Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POLITICAL SCI. REV. 587 (1996) (reporting that "[d]uring the Burger Court, at least one justice changed positions in 36.6% of the cases, while individual justices switched their votes 7.5% of the time").

13. *E.g.*, WILLIAM H. REHNQUIST, THE SUPREME COURT 253 (rev'd & updated ed. 2001).

14. EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT vi–vii (2005) (describing commitment to "absolute secrecy").

15. 491 U.S. 397 (1989).

engaged in a great deal of substantive discussion about protecting an individual's right versus the state's interest in protecting the flag as a symbol of the nation. More generally, these notes provide evidence of how conference unfolds.


No. 88-155, Texas v. Johnson

3-24-89

The Chief Justice —

Brennan, J. +

White, J. —

Marshall, J. +

Blackmun, J. +

Figure 1A: Justice Blackmun's Conference Notes, Page 1
Texas v. Johnson (1989)

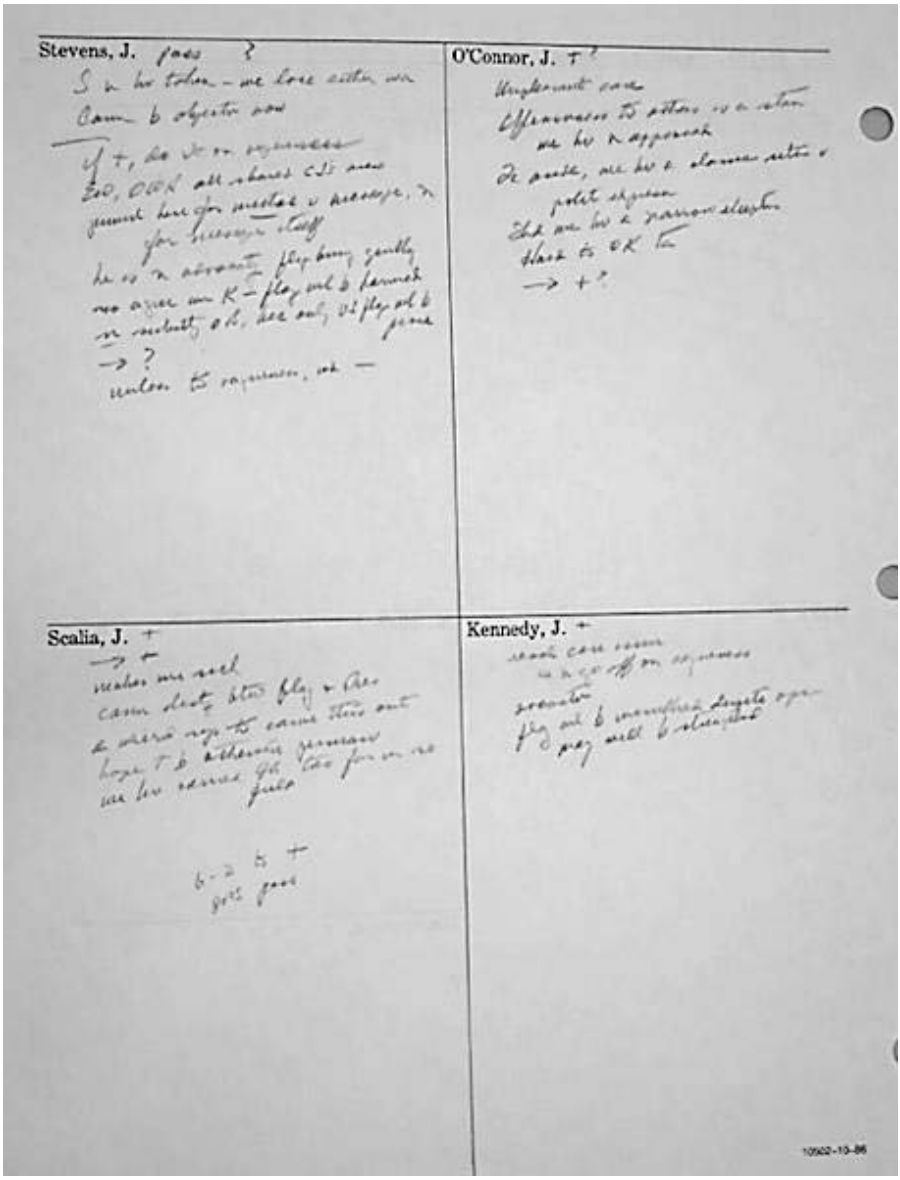


Figure 1B: Justice Blackmun's Conference Notes, Page 2
Texas v. Johnson (1989)

First, Chief Justice Rehnquist presided over, and began, the deliberations. He called the case for discussion, presented his views on the issues involved (Justice Blackmun's notes show that the Chief Justice believed that the "t stat is const"[16]), and ultimately voted to reverse in favor of Texas. From there, the remaining Justices stated their views and voted in order of seniority.

Next, Justices Brennan and White spoke and made their views clear. Justice Blackmun's notes indicate that Justice Brennan suggested that flag burning is political speech, that states may not command respect for the flag, and that the law in question was too vague. Justice White, on the other hand argued that the Court would run FA (the First Amendment) into the ground. Ultimately, Justice Brennan cast a vote for Johnson while Justice White voted for Texas.[17]

According to Justice Blackmun's notes, other Justices had more to say about the statute and issue they faced in *Johnson*. He noted that Justice O'Connor found it to be an "[u]npleasant case," but, as she cast a vote for Johnson,[18] she suggested that offensiveness to others is not a standard the Court has ever approved. Justice Scalia indicated the case "makes me sick" while Justice Stevens thought the Court "S n hv taken—we lose either wa" and that the law is "n substantially OB, bec only US flag wd b protect."[19] Finally, Justice Blackmun noted that Justice Kennedy would vote for Johnson and, in so doing thought that the "flag wd b unscathed despite opin—may well be strengthened."[20]

In such a highly salient case as *Johnson*, it is no wonder the Justices had much to say about how to decide on the merits.[21] Of

16. We keep Justice Blackmun's notes in his shorthand so the reader can know exactly what he wrote. This notation translates to "thinks the statute is constitutional." *See* Figure 1A, *supra* page 227.

17. *Johnson*, 491 U.S. at 399 (indicating that Justice Brennan wrote the Court's opinion holding that the First Amendment protected Johnson's conduct), 421 (indicating that Justice White joined Chief Justice Rehnquist's dissenting opinion).

18. *See* Figure 1B, *supra* page 228.

19. Again, Justice Blackmun used his shorthand, but the translation is clear: "Should not have taken—we lose either way," and "Not substantially overbroad, because only US flag would be protected." *See id.*

20. "Flag would be unscathed despite opinion—may well be strengthened." *See id.*

21. Justice Brennan's notes on this case corroborate what Justice Blackmun saw transpire. *William J. Brennan Papers*, Box I: 813, Manuscript Div., Library of Congress.

course, the level and intensity of discussion varies from case to case. In some (from the thousands of cases we have collected), it appears the Justices have very little to say—the Chief Justice presents his views and the rest simply note their agreement or disagreement with that view. In other cases, like *Johnson*, every Justice speaks about the legal issues and the ultimate decision the Court should make. This variation, although clearly important substantively, has yet to be examined systematically. Nor have scholars analyzed the downstream implications on the Court's decisionmaking process of what transpires during conference. In general, these proceedings stand out as a woefully understudied area of scholarship about how Justices on the nation's highest Court make decisions.

III. CONFERENCE: EXISTING DATA AND KNOWLEDGE

Systematic scholarly accounts exist of almost every aspect of the Court's decisionmaking process—from agenda setting,[22] to briefing[23] and oral arguments,[24] to opinion writing and bargaining,[25] to opinion announcements.[26]

The one part of the process that has been largely ignored, however, is its most secretive part: the Justices' weekly conference at which they vote on agenda setting by voting to grant or deny petitions for certiorari and on the merits of cases that they hear. While studies have focused on conference

22. *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POLITICAL SCI. REV. 1109 (1988); H.W. PERRY, DECIDING TO DECIDE (1991); Ryan C. Black & Christina L. Boyd, *Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process*, 94 SOCIAL SCI. Q. 1124 (2013).

23. *See, e.g.*, Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POLITICAL SCI. 617 (2010).

24. *See, e.g.*, BLACK ET AL., *supra* note 10; Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments before the U.S. Supreme Court*, 100 AM. POLITICAL SCI. REV. 99 (2006).

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

26. *See, e.g.*, Timothy R. Johnson, Ryan Black & Eve Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?* 93 MINN. L. REV. 1560 (2009).

votes,[27] or on discussion in small samples of cases,[28] to date there has not been a full-scale systematic account of what transpires during these proceedings.

A key reason why conference has not yet received the same attention as other parts of the Court's decisionmaking process is that only the Justices take part in these meetings. Nobody else is allowed in the conference room when they discuss cases—no security, no secretaries, and no clerks. This means, at least for the contemporary Court, that we know little about how the wheels of justice work at this stage of the process.

Analyses of conference that do exist conventionally limit their analyses of Supreme Court conference to the Justices' dispositional votes to affirm or reverse a lower court decision.[29] This focus is largely predicated on practical concerns. That is, votes are predominantly dichotomous (i.e., affirm or reverse) and are clearly recorded on "docket sheets," which are a single-page voting records maintained by each Justice for every case the Court decides. Despite these advantages, focusing on votes has a critical drawback—they provide no information or context about why a Justice arrived at a given vote. This is a significant limitation because in the U.S., as in any common law system, the main contribution of any decision by the Court is typically not who won or lost but rather the legal rule contained within the written opinion.[30] Moreover, there are often numerous legal justifications available for each possible disposition. In turn, Justices can and, as evidenced by the rise in concurring opinions, often do disagree about how the Court should go about reaching an agreed-upon dispositional outcome.

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27. *See, e.g.*, Maltzman & Wahlbeck, *supra* note 12, at 581; Jan Palmer & Saul Brenner, *The Law Clerks' Recommendations and the Conference Vote On-the-Merits on the U.S. Supreme Court*, 18 JUST. SYS. J. 185 (1995).

28. *E.g.*, Knight & Epstein, *supra* note 5.

29. *See generally, e.g.*, Saul Brenner & Jan Palmer, *The Law Clerks' Recommendations and Chief Justice Vinson's Vote on Certiorari*, 18 AM. POLITICS Q. 68 (1990); Palmer & Brenner, *supra* note 27; Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POLITICAL SCI. 421 (1996) (using conference votes in analysis of factors affecting Chief Justice's opinion-writing assignments).

30. *E.g.*, THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 1 (2006) (recognizing that "Supreme Court decisions do not just resolve immediate, narrow disputes; they also set broader precedent").

Consider, for example, the 2015 decision in *Zivotofsky ex rel. Zivotofsky v. Kerry*,[31] in which the Court, by a vote of six to three, struck down part of a federal law and held that only the President (and not Congress) has the ability to recognize foreign states. In this case Justices Breyer and Thomas filed opinions that, although supporting the outcome of the majority, took issue with its legal justification. Justice Breyer believed the case to be inappropriate for the Court to adjudicate due to the political-question doctrine.[32] Justice Thomas, by contrast, agreed with the declaration of unconstitutionality but opposed Justice Kennedy's assertion in the Court's opinion that Congress has no power over naturalization laws.[33]

Much as in the 2012 ACA case, it will be some time before the private records of what transpired during the Court's conference discussion in *Zivotofsky* are made public. But, we can conjecture that docket sheets in this case would simply indicate Justice Breyer as voting to affirm. That is, his vote would be, in the parlance of variable measurement, "pooled" with those of the other four Justices who voted, with no additional reservations, to affirm. This case illustrates poignantly the important gap that can exist between Justices' dichotomous votes and their actual scope of preferences over legal policy.

Conference notes, which record both votes and the justification for those votes, offer the only way to fill this gap and to recover the fullness of each Justice's preliminary preferences in a case. In other words, conference notes can uniquely answer the important question of "why?" Despite this promise, practical considerations have prevented scholars from embracing the usefulness of conference notes. Both data collection and coding are resource intensive—especially in the type of empirical studies conducted by many scholars. Because of this barrier, even scholars who study aspects of the Court's decisionmaking process that take place after conference have

31. 576 U.S. ___, 135 S. Ct. 2076 (2015).
32. *Zivotofsky*, 135 S. Ct. at 2096 (Breyer, J., concurring).
33. *Id.* at 2097 (Thomas, J., dissenting).

been forced to ignore the substance of what takes place in conference.[34]

To make our contention about the importance of conference notes clear, we turn to controversial and highly influential research showing that a majority of Justices, in a majority of cases, do not adhere to the norm of stare decisis,[35] and to equally influential research that mined Justice Brennan's conference notes to rebut those claims.[36] We believe that the latter analysis, although limited to nine cases, shows that what transpired during the Court's conference in those cases provides compelling evidence that the Justices believe precedent matters. Indeed, Justice Brennan's notes indicate that fully eighty-three percent of the comments made by the Justices during conference mention precedent. As Professors Knight and Epstein conclude, "[t]he very fact that precedent would be employed as a source of persuasion in their private communications suggests that the Justices believe that it can have an effect on the choices of their colleagues."[37] This conclusion strongly supports our general claim that Justices use conference to discuss issues that warrant serious attention and that are potentially dispositive in particular cases. It also highlights just how much scholars can learn about the Court by peering into the notes of a single Justice in a handful of cases.

Another study conducted after the influential work of Professors Knight and Epstein using conference notes examined

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34. *See, e.g.*, David W. Rohde, *Policy Goals, Strategic, Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 MIDWEST J. POLITICAL SCI. 652 (1972); *see also* MALTZMAN ET AL., *supra* note 25; Clifford Carrubba, Barry Friedman, Andrew D. Martin & Georg Vanberg , *Who Controls the Content of Supreme Court Opinions?* 56 AM. J. POLITICAL SCI. 400 (2012); Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORGANIZATION 276 (2007); Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POLITICAL RESEARCH Q. 551 (2004); Maltzman & Wahlbeck, *supra* note 29; Saul Brenner, *Strategic Choice and Opinion Assignment on the U. S. Supreme Court: A Reexamination*, 35 W. POLITICAL Q. 204 (1982).

35. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (interpreting study results as strong support for the attitudinal model of Supreme Court decisionmaking, which treats Justices' decisions as driven only by their personal ideological preferences). Professors Knight and Epstein conducted the research in Justice Brennan's notes. *See generally* Knight & Epstein, *supra* note 5.

36. The Google Scholar citation counts for the Segal and Spaeth and the Knight and Epstein articles were, as of March 29, 2019, 311 and 294, respectively.

37. Knight & Epstein, *supra* note 5, at 1024–26 (emphasis omitted).

how oral arguments influence the Court's decisionmaking process. Professor Johnson determined in it that issues raised during oral argument were subsequently discussed by the Justices during conference.[38] The key to both of these studies is that they were among the initial salvos in lines of research that resulted in overturning established conventional wisdom regarding law as a constraint on the Justices and the importance of oral argument in the Court's decisionmaking process.[39]

Despite the lacuna of analyses about the Court's conference discussions, we can still learn much about how the Court develops law, policy, and legal standards from historical records. Indeed, as we note in the introduction, many Justices who retired over the past half-century left hand-written notes of what they saw and heard transpire during conferences in which they were participants. These notes provide insights into how the Chief Justice, who speaks first, frames the legal and policy debate, how each associate Justice responds to this frame, and how the discussion about the legal and policy intricacies of a case proceeds. Here we turn to a first cut of these data to provide readers with a glimpse of conference discussions at the Court. In particular, we are interested in exploring the degree to which Justices interact with one another.

IV. A FIRST CUT: ANALYZING THE DICKSON DATA

In an incredible solo effort, Professor Dickson gathered, transcribed, and provided editorial content for conference notes from the papers of eight Justices in just under 300 cases decided between 1940 and 1985.[40] We used those data for a multi-angle assessment of the Justices' conference behavior by treating the Dickson data as primary source material, digitizing the pages that provided his transcription of the notes and restricting our

38. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004) (reporting on research involving examination of conference notes of Justices Powell, Brennan, and Douglas, and oral-argument notes of Justice Powell, in seventy-five civil-liberties cases).

39. *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); JOHNSON, *supra* note 38.

40. DICKSON, *supra* note 6. Dickson's volume is one of the most under-appreciated resources in the area of law and courts. Indeed, he provided an unprecedented glimpse into an environment that was before his work almost impossible for scholars to access.

analysis to the 257 cases decided from the 1946 term onward.[41] We then did some basic processing with the Linguistic Inquiry and Word Count program to count the total number of words spoken and other related quantities.[42]

We begin with how often Justices speak—in the aggregate as well as individually. The conventional wisdom is that each Justice speaks only once and then votes at the end of his or her comments. Figure 2 allows us to assess this wisdom, indicating that, while in the vast majority of cases each Justice speaks only one time (or perhaps not at all), there are cases in which discussion is much longer. Sometimes Justices engage in a prolonged back and forth. At the extreme are several cases in which the total of speaking turns was more than twenty-five. Multiple Justices clearly spoke multiple times during the discussion—a break in the norm that generally controls conference. We explore some of these outlier cases below.

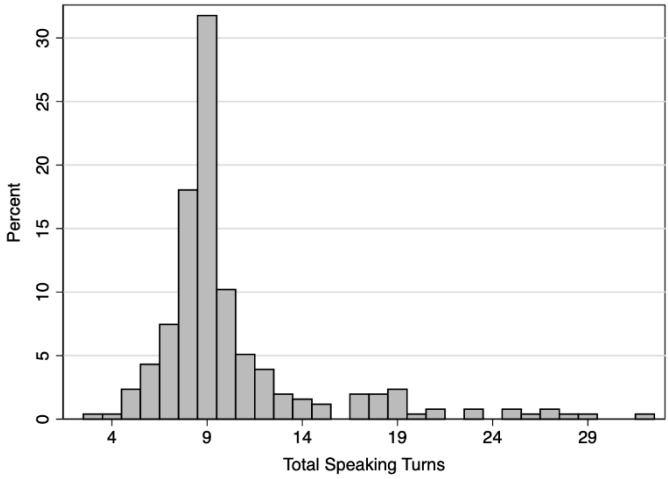

Figure 2: Total Speaking Turns for Justices at Conference, 1946–1985

Certainly it is telling that there are cases—presumably highly salient ones—in which Justices speak more than once. Indeed, this goes against the admonition of former Chief Justice

41. We chose this term because it marks the beginning of the Vinson Court and is the first term included in the Modern version of the Supreme Court Database, which is our source for data on case attributes. *See Supreme Court Database—2018 Release 1*, WASH. UNIV. SCH. OF L., http://scdb.wustl.edu (providing dozens of useful case- and Justice-level variables).

42. We used the 2015 Mac implementation of the program [hereinafter LIWC], which was available in December 2018 at http://liwc.wpengine.com.

Rehnquist, who suggested that conference discussions are hardly conversations because there is not enough time during them to discuss the nuances of every case.[43] What we find, however, is variation in the extent to which Chief Justices allow discussions to go beyond each Justice's first comments. Specifically, consider the data in Figure 3, which depicts the proportion of cases over three Chief-Justice eras in which there were more than nine speaking turns during conference discussions about a given case.

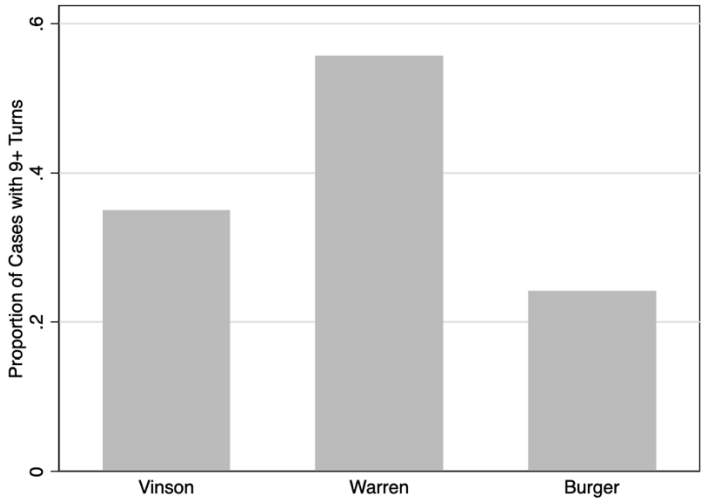

Figure 3: Proportion of Cases with Nine or More Speaking Turns at Conference, 1946–1985

This figure makes clear that there was much more discussion on the Warren Court than there was on the Vinson Court. In fact, over half of all cases from the Warren Court involved at least one Justice speaking multiple times during conference. These freewheeling conferences were cut in half by Chief Justice Burger when he took over the Court in 1969, which is contrary to conventional views of how he ran conference.[44] Despite the unconventional view, it is clear that

43. *See* REHNQUIST, *supra* note 13, at 255 (explaining that each Justice "has done such work as he deems necessary to arrive at his own views before coming into conference," and that conference is "not a bull session in which off-the-cuff reactions are traded, but instead a discussion in which considered views are stated").

44. Indeed, one scholar has stated of Chief Justice Burger that "[h]e imposed little discipline but allowed each Justice to interrupt others and speak as long as he or she

each Chief Justice covered in these data allowed some discussion, in some cases, beyond one comment per Justice.

Understanding aggregate Court behavior is important as we draw a sketch of how Justices interact during conference. However, to have a clearer picture of the discussions it is equally (and perhaps more) important to understand the behavior of individual Justices during these proceedings. We turn in consequence to an assessment of how individual Justices act as they speak about individual cases. Figure 4 provides data on the numbers of words uttered by Justices (according to the notes taken by their colleagues) in the Dickson sample of cases.

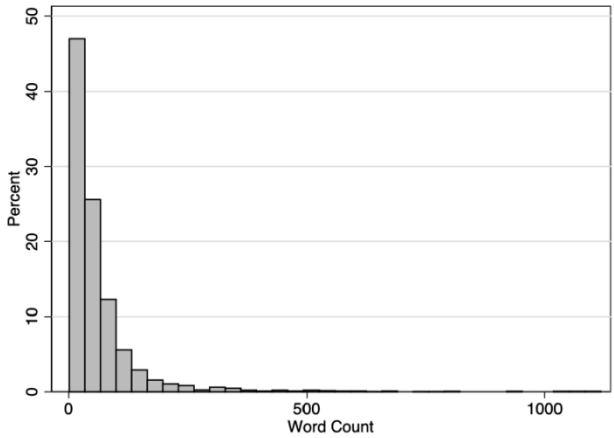

Figure 4: Individual Words Spoken during Conference, 1946–1985

Most Justices are not overly loquacious during conference. Indeed, the median utterance length is just thirty-six words, which is roughly equivalent to a couple of sentences. At sixty-two words, the mean word count is quite a bit higher, which is why we see such a pronounced skew in the figure above. Although the eye cannot help but be drawn to some of the extreme values on the horizontal axis, these are truly outlier values. Ninety percent of the data fall between the values of two and 199 words (i.e., the fifth and ninety-fifth percentiles, respectively). Thus, although the number of speaking turns

wished," and that "[a]s a consequence, senior Justices often spoke multiple times before junior Justices were able to make their initial contribution, and often little was left to be said by the time the end of the queue was reached." Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717, 736 (2011) (footnotes omitted).

suggests more back and forth than the literature would suggest, the speaker-level data show that these exchanges are quite brief.

In general, Justices make their views known and cast their votes—with little fanfare and without extravagant justification. Consider Figure 1A, the first page of Justice Blackmun's notes in *Texas v. Johnson*, which are representative of the findings shown in Figure 3. While the Chief Justice laid out the facts and his views, the other Justices did not add much before casting their votes. Certainly there is variation, and sometimes Justices used hundreds of words, but that is the exception, not the rule.

In some ways, this should not be especially surprising: the Justices have all read the same briefs and heard the same oral argument. Thus, by the time they sit as a collegial body to discuss the case, everyone is equipped with a common language. Furthermore, to the extent Justices are stable in their preferences, the surprises that might require discussion are probably few. Justice Scalia, for instance, was unlikely to reiterate at each conference why he was taking an originalist position in a case involving constitutional issues.

While the preceding figures and discussion bring us closer to understanding participation by each Justice in conference, we are not yet at an individual level. We turn to that level by providing data on median word count by Justice and by seniority during our time period. Consider the former first in Figure 5.

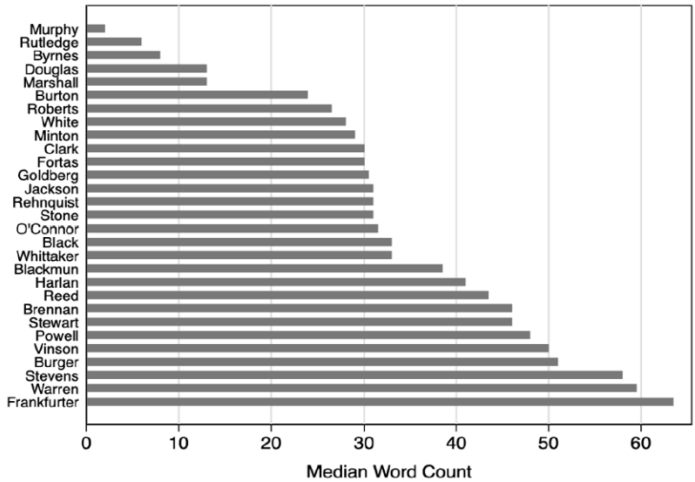

Figure 5: Median Word Count at Conference by Justice, 1946–1985

As with the previous figures, there is clear variation between the Justices' penchants for speaking during conference. Measured in this way, Justice Frankfurter is the most talkative of the Justices. This is in keeping with his reputation as the intellectual of the Court during his tenure.[45] Next come the several Chief Justices, which is intuitive given that Chief Justices speak first, lay out the facts of the cases (as they see them), and then present their views of the issues.

At that point there is little indication that senior associate Justices speak more often than their junior colleagues. Indeed, Justices Stevens and Powell are near the top of the list, but neither is near the most senior during our analysis. Yet Justices Stewart and Brennan are near the top third, which is intuitive as both were near the most senior (and Justice Brennan became the most senior after Justice Douglas left the bench in 1975).

To illustrate the way in which tenure affects the amount each Justice speaks during conference, Figure 6 shows the Justices by seat. Seat 1 is the Chief Justice, while seat nine is the most junior Justice to join the Court.

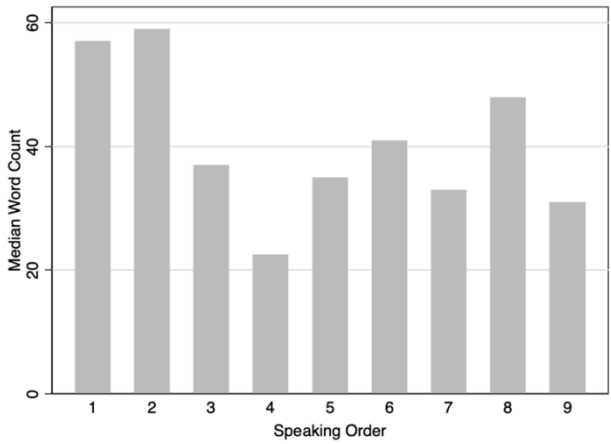

Figure 6: Median Word Count by Speaking Order at Conference, 1946–1985

45. *See, e.g.*, JAMES W. VICE, THE REOPENING OF THE AMERICAN MIND: ON SKEPTICISM AND CONSTITUTIONALISM 148–49 (1998) (reporting that "it was widely assumed that Frankfurter, with his brilliance and scholarship, would greatly influence and dominate the Court," but noting as well that "the Court is not easily dominated," that "Frankfurter remained too professorial toward his peers" and that he "was quite candid about his trait of lecturing his colleagues," referring in his diaries to "speaking in conference 'rather at length,' . . . speaking 'at some length,' . . . speaking 'at length,' . . . and speaking 'somewhat at length'" (internal citations omitted)).

What is immediately evident is that the first two speakers—the Chief Justice and the senior associate Justice—speak the most words at conference. This, as we indicate above, is intuitive. That is, the chief sets out the facts of each case and also presents his views and votes. When the most senior Justice is ideologically distinct from the chief (for example, Justice Douglas and Chief Justice Burger, Justice Brennan and Chief Justice Rehnquist, Justice Ginsburg and Chief Justice Roberts) the senior associate Justice probably lays out the opposite view of the case in a strong manner. From there, it is evident that the remaining associate Justices speak much less than the first two speakers. The fourth Justice to speak, for instance, says roughly one-third of what either the Chief Justice or the senior associate Justice will say. Interestingly, however, the downward trend is not constant over the last half of the Justices. In fact, we see that the fifth and sixth Justices to speak are doing so at a level consistent with the third Justice. And, perhaps most interesting of all, the second-to-last Justice ends up being the third most verbose in terms of median words spoken. In short, although there is clear seniority effect at the very beginning of a case's discussion, we see no clear evidence of a generalized pattern among the seven Justices who speak after the first two.

Finally, we turn back from a Justice view of conference to the case level to give a final view of conference. Consider, first, Table 1, which explicates the top twenty cases in terms of total words spoken by the Justices. The vast majority of these cases are among the most salient (politically and legally) from the twentieth century: *Youngstown Sheet & Tube Co. v. Sawyer*[46] and *Brown v. Board of Education*[47] both make the list, as do *Brown II*,[48] *Roe v. Wade*,[49] *Sweatt v. Painter*,[50] *Baker v. Carr*,[51] and *Buckley v. Valeo*.[52]

46. 343 U.S. 579 (1952) (addressing extent of executive power).

47. 347 U.S. 483 (1954) (addressing legally sanctioned racial segregation in schools).

48. Brown v. Bd. of Educ., 349 U.S. 294 (1955) (same).

49. 410 U.S. 113 (1973) (addressing abortion).

50. 339 U.S. 629 (1950) (addressing racial integration of state-funded law school).

51. 369 U.S. 186 (1962) (addressing state statutes apportioning state legislative districts).

52. 424 U.S. 1 (1976) (addressing limits on political contributions under Federal Election Campaign Act).

Table 1 Top-Twenty Cases: Total Word Count, 1946–1985[53]		
Words	**Case Name**	**Term**
6461	Brown v. Bd. of Educ.	1953
5311	Youngstown Sheet & Tube Co. v. Sawyer	1951
2857	Scales v. U.S.	1960
2822	Garner v. La.	1961
2668	Yates v. U.S.	1956
2654	Brown II	1954
2444	Ariz. v. Cal.	1962
2443	Communist Party v. Subversive Activities Control Bd.	1955
2329	Sweatt v. Painter	1949
2310	Baker v. Carr	1961
2293	Bell v. Md.	1963
2263	Roe v. Wade	1972
2084	Buckley v. Valeo	1975
1619	Miss. Univ. for Women v. Hogan	1981
1559	Nixon v. Fitzgerald	1981
1537	Cox v. La.	1964
1468	Bowsher v. Synar	1985
1432	Maxwell v. Bishop	1969
1425	Davis v. Bandemer	1985
1374	Williams v. Ga.	1954

A similar list emerges in Table 2, where we have the top twenty speaking turns by individual Justices during conference. However, while many of the same cases appear, the pattern here is that, in highly salient cases, several Justices dominate the discussion. Justice Brennan appears quite often, as does Justice Black. Potentially noteworthy is who does not tend to appear on the lists—the Chief Justices. As we saw earlier, a Chief Justice tends to speak more in a typical case than do the other Justices.

53. Full case citations are listed alphabetically in the Appendix. *See infra* page 259.

Yet only four of the top-twenty spots are occupied by Chief Justices, with Chief Justices Vinson and Warren both appearing twice. Chief Justice Burger never once cracks the top twenty. Indeed, one would need to go all the way down to the fifty-fourth spot in our ranking to find him. (He earned that rank by speaking 352 words in *Buckley v. Valeo*.)

Table 2
Top-Twenty Conferences—Individual Word Count, 1946–1985[54]

Words	Justice	Case Name	Term
1117	Vinson	Youngstown Sheet & Tube v. Sawyer	1951
1086	Brennan	Bowsher v. Synar	1985
1084	Brennan	Davis v. Bandemer	1985
1067	Brennan	Nixon v. Fitzgerald	1981
1051	Frankfurter	Youngstown Sheet & Tube v. Sawyer	1951
1041	Minton	Brown v. Bd.	1953
947	Brennan	Grove City College v. Bell	1983
936	Brennan	Firefighters Local v. Stotts	1983
814	Warren	Bell v. Md.	1963
812	Black	Ariz. v. Cal.	1962
767	Black	Youngstown Sheet & Tube v. Sawyer	1951
730	Brennan	Ore. v. Elstad	1984
682	Warren	Yates v. U.S.	1956
675	Black	Sweatt v. Painter	1949
675	Frankfurter	Brown v. Bd.	1953
635	Vinson	Brown v. Bd.	1953
619	Black	Brown II	1954
610	Goldberg	Bell v. Md.	1963
599	Brennan	Boston Firefighters Union Local 718 v. NAACP	1982
581	Brennan	Capital Cities Cable, Inc. v. Crisp	1983

Overall, even these basic descriptive summaries show a good deal of variation in the amount of discussion that takes place at conference and which Justices do the most speaking.

54. Full case citations are listed alphabetically in the Appendix. *See infra* page 259.

These are the first data, so far as we know, to paint a picture of what happens in these most secretive meetings. But to what end? We know that the key to the entire decisionmaking process is the legal and policy output produced in the Court's opinions.[55] In the next section we begin an accounting of how what happens during the conference influences the latter stages of that process.

V. THE IMPACT OF CONFERENCE: LEVEL OF DISCUSSION AND OPINION WRITING

We examine here the degree to which conference affects the Court's opinion-writing process by merging our word-count data with the Supreme Court Database.[56] We turn first to assignment of the majority opinion. Figure 7 shows the results of examining whether a Justice who voted with the majority wrote the majority opinion. The x-axis shows the words spoken by a majority-coalition member during conference.[57] The y-axis shows the probability that a Justice in the majority coalition wrote the Court's opinion.

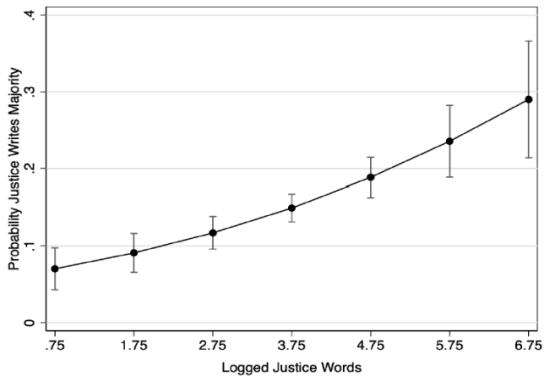

Figure 7: The Probability of Writing the Majority Based on How Much a Justice Speaks at Conference, 1946–1985

55. JOHNSON, *supra* note 38, at 4; LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POLITICAL SCI. REV. 323 (1992).

56. *See* note 41, *supra*.

57. For the x-axis, we transformed the raw measure into the natural logarithm (which for the values 10, 100, and 1000 is 2.3, 4.6, and 6.9, respectively) to account for the skewed nature of the underlying data and reduce the impact of large values. The extreme variation in raw word-count data is shown in Figure 4 on page 237.

As Figure 7 makes clear, there is a positive relationship between how often a Justice speaks and the probability that she writes the majority. Justices who speak the most (logged) words have almost a thirty-percent chance of writing, while those who speak the least have less than a ten-percent chance. This is a significant difference, especially given the Chief Justices' norm of opinion-writing equity.[58] Such a norm should indicate that each Justice writes about eleven percent of all majorities. But being more active at conference can alter this probability, which may affect the policy and law that the Court sets.

Of course, a Justice who speaks more often is also more likely to write a dissent in that case. Figure 8 drives home this point. Just as before, the x-axis shows the level of a Justice's activity at conference. The y-axis now shows the probability that a Justice, conditional on casting a dissenting vote, ends up also writing a dissenting opinion (as opposed to just signing one). Here, too, we find a positive and statistically significant relationship between the two variables. Being active in the initial discussion about a case makes Justices more likely to push back against a majority with which they disagree. In fact, Justices who speak the most have roughly a seventy-five percent chance of writing a dissent. In contrast, those who speak the least have just a fifty-five percent chance of writing a dissent.

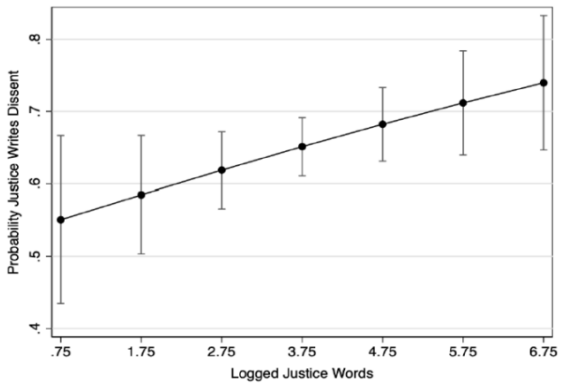

Figure 8: Probability of Writing a Dissent Based on How Much a Justice Speaks at Conference, 1946–1985

58. *E.g.*, MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 25, at 30–31 (describing change by Chief Justice Rehnquist from distributing opinion assignments equally by number to distributing opinion assignments equally by workload, which can take note of "the difficulty of the opinion assigned or the amount of work the 'assignee' may have").

Finally, we expect that when there is more total discussion among the entire Court at conference more total separate opinions will be authored by the Justices. That is, the individual-level phenomenon we identify above will carry over into the aggregate. Figure 9 shows the results of this analysis. The x-axis plots the total number of words spoken at conference and the y-axis shows the overall number of separate opinions filed in a case.

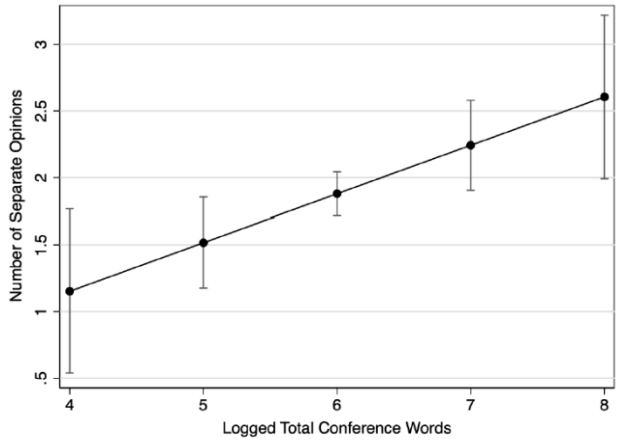

Figure 9: Number of Separate Opinions Based on How Much a Justice Speaks at Conference, 1946–1985

Consistent with the findings in the previous figures, this is indeed the case as well. When the most logged words are spoken at conference, we expect to see, on average, just over two and a half separate opinions written in a case. However, as Justices say less, the number of opinions drops to just over one per case. This may have something to do with the level of controversy in a case, or the fact that the Justices speak much less when they agree more—both at conference and as they decide whether to write separately.

VI. NEXT STEPS: PROJECT SCOTUS NOTES

A. The Dickson Data and Their Limitations

The foregoing demonstrates the value of providing a systematic study of Supreme Court conference. We were only able to do so because of the tremendous and painstaking efforts on the part of Professor Dickson. His data provide the only point

of entry for those who want to systematically examine Supreme Court conference discussions. It is clear that Justices have important discussions during these proceedings and that ample variation exists, both in terms of how much Justices say and the various factors that explain this variation. Why, then, has it taken nearly two decades for someone to shed even the faintest glimmer of light on such a significant data source?

Arriving at a definitive answer is, of course, impossible, but we have some hunches. In particular, we believe that two aspects of the Dickson data have limited their usefulness to empirical studies.

1. Narrow in Scope

Consider, first, the scope of cases included. During the terms Dickson covers (1940 through 1985), the Supreme Court released just under 6100 opinions (either signed or per curiam) in its orally argued cases.[59] All told, however, fewer than five percent were transcribed and included in his volume.[60] The Dickson data are a sample. Of course there is nothing inherently wrong with samples and they often make feasible otherwise impossible analyses. However, the sample must be representative of the underlying population about which we wish to learn. This leads to the second and more significant limitation of the Dickson data—the several ways in which the sample of transcribed cases is unrepresentative. Here we highlight three factors on which meaningful differences exist: subject matter, case divisiveness, and media salience.

59. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 88–89 (6th ed. 2015) (tabulating relevant data in Table 2-8: "Signed Opinions, Cases Disposed of by Signed Opinion, and Cases Disposed of by *Per Curiam* Opinion, 1926–2013 Terms").

60. This was still a tremendous amount of effort on Professor Dickson's part, however, in terms of time required—a fact we appreciate more and more with each day we work on our own ongoing project.

2. Unrepresentative of the Whole

a. Case Subject Matter

During the 1946 to 1985 terms (the Vinson, Warren, and Burger Courts) the Court issued 5777 opinions that appear in the Supreme Court Database with an identified substantive issue area.[61] During these terms, at the population level, fifty-two percent of cases involved civil liberties (First Amendment rights and privacy, for example),[62] twenty-five percent dealt with economic activity or unions; and fourteen percent were about questions of judicial power (issues of comity or justiciability, for example).[63] As for what cases ended up appearing in the Dickson transcription, however, there are significant differences. Civil liberties cases account for an overwhelming eighty-six percent of the Dickson data sample, whereas economics and judicial-power cases combined represent only ten percent. More generally, we can say that a systematic relationship exists between a case's substantive issue area and whether it was selected for inclusion by Professor Dickson.

b. Case Divisiveness

Across the same 5777 decisions, the Court's vote was minimum-winning (a five-to-four vote) about fourteen percent of the time. However, twenty-eight percent of the cases in the Dickson data sample—twice the relative frequency in the population—were decided by a one-vote margin. Cases with a high degree of consensus, which is to say those with majorities of eight or nine, are particularly underrepresented in Professor Dickson's sample. Accounting for forty-three percent of the 5777-case population, they are the modal outcome for the Court.

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61. *Supreme Court Database*, *supra* note 41.

62. We follow existing work and coarsen issue area as follows: civil liberties cases involve criminal procedure, civil rights, First Amendment, due process, privacy, and attorney-representation issues. Economics cases involve unions or economic activity. These mappings come from Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, AM. J. POLITICAL SCI. 66, 70–74 (2000).

63. The other remaining nine percent of cases were in the areas of federalism (five percent), taxation (four percent), and miscellaneous (less than one percent).

However, they represent just twenty-two percent of cases included in the Dickson data.

c. Case Media Salience

Between 1946 and 1985, the *New York Times* provided front-page coverage (the conventional measure of case salience)[64] for thirteen percent of the Court's decisions. Yet sixty-two percent of the cases included in Professor Dickson's sample received front-page treatment by the *Times*.

B. The Dickson Data Behind SCOTUS Notes

To be clear, Professor Dickson was no fool in selecting cases to transcribe. The point of his volume was to uncover what had been said in cases that would be of potential interest to Supreme Court scholars and professors of constitutional law. Each of the areas we identify above as being "unrepresentative," then, is likely the product of an intentional choice, one with which we have no quarrel.[65] Yet, to the extent we are interested in a generalizable accounting of what goes on during conference, the corpus of cases in the Dickson data is limited in its ability to present such a picture.

And, as for how the process of "normal science" is supposed to work, we seek to build on Professor Dickson's work and on our preliminary efforts laid out above. To that end, we are in the late middle stages of a significant project that ultimately seeks to fill the critical void left by Professor Dickson and provide generalizable data on Supreme Court conference. In March 2016 we commenced our work on "Project SCOTUS Notes." With generous financial support from the National

64. *See* Epstein & Segal, *supra* note 62, at 72–81.

65. We can appreciate that choice because our own teaching in constitutional law tends to focus on civil liberties cases, especially those that are controversial (such as cases that are decided by close final merits votes) and highly salient at the time they were decided. And, in that regard, the Dickson volume is an absolute—if tragically underutilized—gem of a resource. Professor Dickson provides an unprecedented glimpse into an environment that was previously inaccessible to scholars. His volume is full of rich anecdotes that we both routinely use in our courses. Most important, he demonstrates that much can be learned from a careful and considered analysis of the Justices' conference notes.

Science Foundation, and significant in-kind assistance from Zooniverse,[66] we will distribute a freely accessible and fully transcribed database of thousands of pages of conferences notes that span nearly half a century of Supreme Court decisionmaking.

Our work has involved (and continues to involve) a number of steps. To make our project tractable, we started by gathering all available conference notes from the archives of Justices who served on the Supreme Court between its 1946 and 1993 terms. We choose 1946 as the starting term as it is the first term for which systematic case-level data are available through the Supreme Court Database.[67] The 1946 term also corresponds to the beginning of Fred M. Vinson's tenure as Chief Justice. This is significant because the Vinson Court bridges the gap between the economic-heavy jurisprudence that characterized the Stone Court (1941 through 1946) and the civil-liberties-focused caseload of the Warren Court (1953 through 1969). We select 1993 as our final term because it corresponds to the last term for which archival data are currently available (in the papers of Justice Blackmun).[68] Across these forty-eight terms the Supreme Court issued a total of nearly 6900 decisions, decrees, or judgments that contained a total of almost forty million words. Our project's goal is to provide scholars with the data necessary to better understand how these words originated.

To accomplish this herculean task, we started by dispatching a number of research assistants to the Library of Congress Manuscript Reading Room in Washington, where they took tens of thousands of digital photographs of the conference notes contained in archives of several Justices.[69] Although the

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66. *See generally* ZOONIVERSE.ORG, https://www.zooniverse.org/about (describing function of what it characterizes as "the world's largest and most popular platform for people-powered research"). We provide a full description of our use of Zooniverse below. *See* text accompanying notes 73–80, *infra*.

67. *Supreme Court Database*, *supra* note 41.

68. Since Justice Blackmun's retirement in 1994, only five other Justices have left the Court. Chief Justice Rehnquist died in 2005, Justice O'Connor retired in 2006, Justice Souter retired in 2009, Justice Stevens retired in 2010, and Justice Kennedy retired in 2018. Our review of the access restrictions on their papers suggests that Blackmun's will be the most current for some time to come.

69. No graduate students were unduly harmed in the collection of these data, so far as we know. Lest you think we kept all the glory for ourselves, it is worth noting that we both spent similar summers as graduate students gathering archival data for our own advisor's

work is not physically laborious (like landscaping work), it is drudgery at its finest: sitting in a windowless room under the glow of fluorescent lights, eight hours a day, six days a week.[70] Digital photographs in hand, our next step was to process, edit, and otherwise prepare these images for transcription. Combined, these first two steps took roughly a year and a half to accomplish.

The third step in our process—and where we, as of spring 2019 currently stand—is to convert digital images of conference notes to readable transcriptions. As the examples shown above in Figures 1A and 1B suggest, all of the conference notes contained in our data were written by hand. The Supreme Court, as an institution, has a penchant for being remarkably slow to embrace technological change.[71] And, although there is relatively recent evidence of the Justices' willingness to individually embrace technology in their day-to-day workflows,[72] we know of no existing evidence that laptop or tablet computers have (yet) made their way into the hallowed conference room. Thankfully, we are not the first researchers to encounter copious quantities of scrawled writings by septuagenarians.

Bridging the gap between raw image and digital text is therefore a daunting task that requires countless hours of human eyes and human hands to decipher and transcribe the handwriting. To make this feasible we partnered with Zooniverse, an NSF-supported online citizen-science

NSF-sponsored research projects. We prefer to think of it as a rite of passage for judicial-politics students.

70. The idealized vision you have in your head of the Library of Congress from the *National Treasure* movies? That Manuscript Reading Room—the one of breathtaking beauty—is across the street in the Thomas Jefferson building. Whatever is left of your soul when you work in Supreme Court records as a graduate student is in the James Madison building, where the more prosaic manuscript reading rooms reside.

71. *See generally, e.g.*, Jerry Goldman, *The U.S. Supreme Court and Information Technology: From Opacity to Transparency in Three Easy Steps*, 88 CHI.-KENT L. REV. 325 (2013).

72. In a 2010 interview with C-SPAN, Justice Kagan remarked that she used a Kindle e-reader to review briefs. She similarly stated that Justice Scalia read briefs on an iPad. Jan Crawford, *Kagan's Kindle vs. Scalia's iPad*, CBS NEWS (Dec. 13, 2010), https://www.cbsnews.com/news/kagans-kindle-vs-scalias-ipad/.

organization founded in 2007.[73] Our SCOTUS Notes project is the first social science or law-related project represented on the platform, but data transcription has been part of the Zooniverse project portfolio since 2011, when it engaged approximately 8000 volunteers to transcribe Greek papyri fragments one character at a time using an online keyboard.[74] We chose the Zooniverse platform because it has demonstrated repeatedly that it can be harnessed with unprecedented success to overcome the previously insurmountable practical barriers to working with large amounts of unprocessed analog documents.[75]

We worked with Zooniverse to create SCOTUS Notes, an interactive website that enables volunteers to transcribe and decode the conference notes data we gathered.[76] This platform was based on an already-existing transcription model that Zooniverse developed for Tate Britain, in which multiple users transcribe a line of text and their responses are automatically compared using a string-matrix algorithm to determine consensus.[77] This algorithm minimizes the degree of editorial intervention, a bottleneck that has been identified as a major

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73. Project development at Zooniverse (CDI-II 0941610) is overseen by a collaborative effort among the University of Minnesota, Oxford University, and Chicago's Adler Planetarium. Zooniverse is the largest academic crowdsourcing organization in operation, with over 400 academic, museum, and library partners around the world. Currently, more than 1.3 million registered volunteers participate in over thirty projects ranging from the sciences to the humanities.

74. *See* www.ancientlives.org.

75. In January 2014, Zooniverse partnered with the United Kingdom's National Archives and the Imperial War Museum in London to transcribe British unit war diaries from World War I. Approximately 11,000 volunteers have processed over 100,000 pages of text, providing the equivalent of more than six years of full-time effort on the project in only eighteen months. *See generally* OPERATION WAR DIARY (n.d.), https://www.operationwardiary.org/). Most recently, in early March 2015, Zooniverse launched a transcription project called "Science Gossip" that, just four months later, had through the work of over 4500 volunteers made roughly 230,000 total classifications. *See generally* SCIENCEGOSSIP (n.d.), https://www.operationwardiary.org/.

76. SCOTUSNOTES: BEHIND THE SCENES AT SUPREME COURT CONFERENCE (n.d.), https://www.zooniverse.org/projects/zooniverse/scotus-notes-behind-the-scenes-at-supreme-court-conference.

77. For each transcribed line, the algorithm compares users' transcriptions and when a predetermined subset of users has produced the same transcription, the system will log this consensus as well as each user's individual transcription. There will, of course, be instances when consensus does not emerge. When this occurs, human editors, including us, our graduate students, and expert volunteers, will arbitrate between various users' transcriptions and produce a final version.

stumbling block to producing good data efficiently in other transcription projects.[78]

The success of these efforts, of course, ultimately depends on our ability to identify, attract, engage, and retain audiences who will volunteer their time. As the numbers cited above make clear, Zooniverse has an excellent track record in this regard. And, at this point in our project we are happy to report that we have been broadly successful in engaging and attracting citizen scientists to collaborate with us on this project. As of early April 2019, roughly 2900 unique users have completed nearly 140,000 coding tasks for Project SCOTUS Notes.[79] Beyond this, we have also, through the Talk Boards, actively engaged with our citizen scientists who are helping us understand Supreme Court conference. In the ten months since we launched Project SCOTUS Notes, there have been almost 1400 postings on our project's boards. These posts provide a key opportunity for us to answer questions and learn from the dedicated individuals whose efforts make this project possible.

Considering only sheer numbers, transcription represents the most challenging aspect of this project. However, we believe it is ultimately the dissemination of these data that is the most important component to ensuring that our data have the biggest and broadest impact possible. As we suggest above, a variety of audiences will be excited to "peek behind the curtain" and see what takes place during these secret conference meetings. Our overarching goal, then, is to provide the data in formats appropriate for such diverse audiences. In that sense, our approach is heavily influenced by the Supreme Court Database's website,[80] which is designed in a way that allows novices, experts, and everyone in between to use it.

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78. Three specific Zooniverse projects (Ancient Lives, Galaxy Zoo, and Snapshot Serengeti) demonstrate that results from identifications made through this consensus algorithm of lay people (including children) are highly accurate. Previous scholarly research in political science has also suggested that it is an appropriate methodology for classifying data like the Justices' conference notes. *See* Kenneth Benoit, Drew Conway, Benjamin E. Lauderdale, Michel Laver, & Slava Mikhaylov, *Crowd-Sourced Text Analysis: Reproducible and Agile Production of Political Data*, 110 AM. POLITICAL SCI. REV. 278 (2016).

79. As of this writing, the transcription is only about ten percent complete. Beginning in early 2019, we will set volunteers to transcribing another 29,800 images. We are confident that we can have this done within a year's time.

80. *See* note 41, *supra*.

Once completed, SCOTUS Notes will allow users to see (and download) the basic digital reproduction of the conference notes as well as the Zooniverse-generated transcriptions of them. It will also be fully searchable, both in terms of accessing a specific case (*Roe v. Wade*, for example) or by the content of what a Justice said during conference ("privacy" or "viable," for example). Because our data will be linked with the Supreme Court Database, users will also be able to further restrict their browsing or searching to any variable in it.[81] Pages for each case will be linked with any other available data about the case, including summaries, briefs, transcripts and audio of oral argument, and, of course, the Court's final opinion.

We suspect the majority of users of our data will interact with them through this format. Researchers and scholars, however, are more likely to want to obtain large quantities of data that they can subsequently analyze on their own. To that end, we will also provide machine-readable text files that contain all transcribed content across the entire collection—or any user-defined subset of it. We envision users invoking a variety of programming languages (such as R or Python) and computer programs (such as LIWC) to parse and analyze the files using any one of a number of methods from computational linguistics.[82] These will be made available for bulk download from the SCOTUS Notes Archive. We will also generate and provide analysis-ready files that contain quantitative data about the conference data for each case (how many lines of notes were present, for example). Users will be able to easily merge these files with other data for their specific research needs.

81. For example, a researcher could look at all conference notes in privacy cases (by using "issueArea = 5" when searching in the Database) or, if searching more specifically, will be able to restrict their searches to privacy cases involving abortion rights (by using "issue = 50020" when searching in the Database). *See Supreme Court Database*, *supra* note 41.

82. *See, e.g.*, Kevin M. Quinn, Burt L. Monroe, Michael Colaresi, Michael H. Crespin, & Dragomir R. Radev, *How to Analyze Political Attention with Minimal Assumptions and Costs*, 54 AM. J. POLITICAL SCI. 209 (2010) (providing a useful overview).

VII. THE FUTURE INTELLECTUAL MERIT OF STUDYING SUPREME COURT CONFERENCE

As to what future research needs might be, we believe our data on Supreme Court conference will enable scholars to make theoretical, empirical, and substantive advances in how we understand the Supreme Court, judicial decisionmaking, and the development of law. The single most valuable aspect of these data is their ability to provide detailed information on a Justice's preliminary legal and policy positions in a case. As we noted above, the only existing systematic data provide information about how each Justice voted in terms of case disposition (reverse or affirm) but say nothing about why a Justice voted in a particular way. This distinction is important because, for the Supreme Court, "law is found primarily in legal opinions, not divined from the outcomes of cases," which means that it is "the opinions that matter most."[83]

Access to the Supreme Court's final written opinions is not, of course, anything new. However, since the behavioral revolution in political science, and the shift away from formalism/traditionalism approaches, scholars have been reluctant to take such documents at face value. The Court's final written opinions do not spring fully formed from the head of Zeus. Rather, they start with the views expressed by Justices during conference and evolve based on their interactions with one another during the opinion-writing process now referred to by political scientists as the "collegial game."[84]

We believe the metaphor is particularly apt. The game truly begins when the Justices, much like poker players, sit around a table and sequentially reveal their hands (their views and preferences) to their colleagues. To date, however, this part of the process has been noticeably neglected by scholars who study opinion writing and bargaining. Instead, existing accounts focus

83. Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POLITICS 261, 266 (2006).

84. MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 25, at 8 (coining the term in noting that "[b]ecause outcomes on the Supreme Court depend on forging a majority coalition that for most cases must consist of at least five justices, there is good reason to expect that final Court opinions will be the product of a collaborative process, what we call the collegial game").

on the role of political (ideology, for example) or contextual (case importance, for example) factors and ignore the role of law and legal discussion. Collecting and systematizing what happens during conference, then, represents a major leap forward in fleshing out how judicial opinions are crafted and what drives the often consequential policies they contain. Making these data widely available will therefore transform our understanding of the Supreme Court as both a political and legal institution.

Beyond breaking new ground, conference data will also allow for fresh and improved insight about a number of broad questions. Indeed, the two existing studies to use conference data demonstrate that this is possible. Professors Knight and Epstein were among the first to contribute to a now ample (and growing) literature about how law constrains Supreme Court decisionmaking.[85] Professor Johnson's study was the first to establish that oral argument is not merely a dog-and-pony show but an important aspect of the Court's decisionmaking process.[86] Like the data behind these ground-breaking studies, we anticipate that our SCOTUS Notes data will help scholars generate new knowledge in several areas.

First, consider the factors that may lead Justices to change votes during their decisionmaking process. Since Professor Howard's initial 1968 study,[87] scholars have sought to understand when and why Justices change their votes after conference but before they publicly announce a decision. However, each of these studies focuses exclusively on changes in dispositional votes.[88] Our data will allow scholars to evaluate this topic in light of something one might call legal fluidity or, more explicitly, changes in Justices' substantive arguments as they work towards a final opinion. In so doing, researchers will be able to dramatically expand upon and potentially reevaluate conventional wisdom that has existed for half a century.

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85. *See* Knight & Epstein, *supra* note 5.

86. *See generally* JOHNSON, *supra* note 38.

87. J. Woodford Howard, Jr., *On the Fluidity of Judicial Choice*, 65 AM. POLITICAL SCI. REV. 43 (Mar. 1968).

88. *See generally, e.g.*, MALTZMAN & WAHLBECK, *supra* note 12; Eve M. Ringsmuth, Amanda C. Bryan, & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POLITICAL RES. Q. 429 (2013).

Opinion writing and, in particular, preemptive accommodation is a second area in which our data will generate new knowledge. Professors Maltzman, Spriggs, and Wahlbeck define this concept as how majority opinion authors attempt to shore up support from Justices in the conference majority by incorporating their positions into initial opinion drafts.[89] To test their account, however, Professor Maltzman and his colleagues rely upon a coarse surrogate: the amount of time between when a majority opinion author receives an opinion assignment and when she circulates the first draft of it to the Court. Though the proxy is certainly plausible, our data will enable a more direct measure by comparing the conference statements of each Justice in the initial majority with the first circulated draft written by the opinion author. This type of analysis will take the field away from its conventional focus on votes and bring it much closer to understanding the role law actually plays in how the Justices decide.

Data resulting from our project will also contribute to important and on-going theoretical debates. Consider the question of who "controls" the Court's majority opinion. For decades scholars followed Professor Black[90] and conceptualized decisionmaking on the Court as taking place in a unidimensional space, where the preferences of the median Justice prevailed. That account has, in recent years, come under increasing empirical and theoretical scrutiny.[91] Professors Bonneau and his colleagues,[92] and Professors Lax and Cameron,[93] through separate theoretical approaches, argue that majority opinion authors exert "agenda control" on opinion content. More

89. MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 25, at 96 (explaining that "if opinion authors know that their colleagues are unlikely to sign an opinion that does not reflect their preferences, authors may try to write an opinion comporting with the discussion of the case at conference and thus satisfy their brethren with the first draft").

90. Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POLITICAL ECON. 23 (1948).

91. *See, e.g.*, Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court's Many Median Justices*, 106 AM. POLITICAL SCI. REV. 847 (2012).

92. Chris W. Bonneau, Thomas H. Hammond, Forrest Maltzman & Paul J. Wahlbeck, *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, AM. J. POLITICAL SCI. 890 (2007).

93. Lax & Cameron, *supra* note 34, at 278–79 (referring to agenda control as a factor in the Chief Justice's assignment of opinions and discussing theories of agenda control by Justices to whom opinions are assigned).

recently, Professor Carrubba and his colleagues[94] suggest it is the median Justice within the majority coalition whose preferences reign supreme.

While the foundation of support for the median-voter model has mostly eroded, uncertainty remains about which new perspective is best suited to take its place. Lack of detailed data is one of the main reasons scholars have not settled on a more definitive answer to this important question because "[d]irect empirical tests of the bargaining model require better or more nuanced data on the policy content and craftsmanship of opinions than are presently available."[95] To state the obvious, the first necessary step in identifying whose views are influential is to measure those views. The data we propose to gather through SCOTUS Notes will allow scholars to accomplish exactly that. In fact, the conference notes will offer evidence of what each Justice spoke about during conference, which will make it possible to determine whose views prevail in the final opinion.

To provide an answer to the question of opinion control is to do much more than merely resolve a theoretical debate among scholars. Rather, this question speaks to how researchers substantively understand and think about the inner workings of the Court. There are profound practical implications for scholars as well. Studies from across the entire spectrum of American politics routinely seek to put the Supreme Court in a policy space where it can be compared to other actors. This includes the federal courts of appeals and federal district courts,[96] state courts,[97] and other political institutions, including Congress,[98] the President,[99] and the federal bureaucracy.[100] Doing so

94. Carrubba et al., *supra* note 34.

95. Lax & Cameron, *supra* note 34, at 297.

96. *E.g.*, Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Scott Comparato, *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POLITICAL SCI. 891 (2010).

97. *E.g.*, Benjamin Kassow, Donald R. Songer & Michael P. Fix, *The Influence of Precedent on State Supreme Courts*, 65 POLITICAL RES. Q. 372 (2012).

98. *E.g.*, Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POLITICAL SCI. REV. 361 (2001).

99. *E.g.*, CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH (2008).

requires knowing where the Court belongs, which is something scholars will be able to better accomplish with the explicit substantive legal and policy data we will gather at SCOTUS Notes.

Finally, at the most basic substantive level, our project will make broadly available information and data previously accessible only to individuals with the resources to travel to an archive. With the exception of the small number of cases transcribed by Professor Dickson,[101] information about the legal positions of Justices in more than 6500 cases are ignored by history and scholars alike. When these notes are made available, researchers will be able to utilize them to provide careful, in-depth analyses of specific cases, Justices, issue areas, and eras of Court decisionmaking.

VIII. CONCLUSION

Much of the work done by the United States Supreme Court is shrouded in absolute secrecy. We propose to pull back the curtain and make public nearly fifty years of previously unexamined discussions among Justices on our nation's highest court. By gathering, transcribing, and coding a half century of Supreme Court conference notes, SCOTUS Notes will enhance scholarly understanding of what takes place during what is arguably the most important step of the Court's decisionmaking process. The conference vote determines the initial disposition of the case which, in turn, determines who has the power to assign the author of the majority opinion. Further, these discussions set the initial agenda—the frame through which the Justices craft their substantive legal and policy arguments in the opinion. Despite the importance of conference, existing scholarship generally ignores the substance of these proceedings. The work we propose will rectify this major shortfall, engage the public in unprecedented ways, and fundamentally transform our understanding of how the nation's highest court decides.

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100. *E.g.*, Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POLITICAL SCI. 341 (2012).

101. DICKSON, *supra* note 6.

APPENDIX

Full Citations—Cases Appearing in Tables 1 and 2
Ariz. v. Cal., 373 U.S. 546 (1963)
Baker v. Carr, 369 U.S. 186 (1962)
Bell v. Md., 378 U.S. 226 (1964)
Bos. Firefighters Union Local 718 v. NAACP, 468 U.S. 1206 (1984)
Bowsher v. Synar, 478 U.S. 714 (1986)
Brown v. Bd. of Educ., 347 U.S. 483 (1954)
Brown v. Bd. of Educ., 349 U.S. 294 (1955) (Brown II)
Buckley v. Valeo, 424 U.S. 1 (1976)
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)
Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961)
Cox v. La., 379 U.S. 536 (1965)
Davis v. Bandemer, 478 U.S. 109 (1986)
Firefighters Local v. Stotts, 467 U.S. 561 (1984)
Garner v. La., 368 U.S. 157 (1961)
Grove City College v. Bell, 465 U.S. 555 (1984)
Maxwell v. Bishop, 398 U.S. 262 (1970)
Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982)
Nixon v. Fitzgerald, 457 U.S. 731 (1982)
Ore. v. Elstad, 470 U.S. 298 (1985)
Roe v. Wade, 410 U.S. 113 (1973)
Scales v. U.S., 367 U.S. 203 (1961)
Sweatt v. Painter, 339 U.S. 629 (1950)
Williams v. Ga., 349 U.S. 375 (1955)
Yates v. U.S., 354 U.S. 298 (1957)
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)