Concurring Opinion Writing on the U.S. Supreme Court

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SUNY PRESS

Published by
State University of New York Press, Albany

Printed in the United States of America

For information, contact State University of New York Press, Albany, NY
www.sunypress.edu

Production by Ryan Morris
Marketing by Anne M. Valentine

Library of Congress Cataloging-in-Publication Data

Corley, Pamela C., 1967–
Concurring opinion writing on the U.S. Supreme Court / Pamela C. Corley.
p. cm. — (SUNY series in American constitutionalism)
Includes bibliographical references and index.
ISBN 978-1-4384-3067-6 (hardcover : alk. paper)
ISBN 978-1-4384-3066-9 (pbk. : alk. paper)
1. United States. Supreme Court. 2. Concurring opinions—United States.
3. Judicial process—United States I. Title.

KF8742.C67 2010
347.73'26—dc22 2009023198

10 9 8 7 6 5 4 3 2 1

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SUNY series in American Constitutionalism

Robert J. Spitzer, editor

To my husband Greg and my daughter Megan

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Acknowledgments

In writing this book I received a great deal of help and I would like to acknowledge those whose support made this project possible. First, I thank Bob Howard. Without his guidance and support I would not have completed this project. He was an incredible mentor when I was a graduate student and he still continues in that role. I also thank Dave Nixon and Scott Graves, both of whom provided a great deal of assistance in the beginning stages of this project.

I am also grateful to a number of scholars for their advice and comments. I am particularly grateful to Larry Baum, Paul Collins, Christian Grose, Suzanne Globetti, Marc Hetherington, Stefanie Lindquist, Kirk Randazzo, Neal Tate, and Chris Zorn. Special thanks to Art Ward for reading the entire manuscript and offering invaluable suggestions. For their research assistance, I thank Camille Burge, Sarah Hinde, Gbemende Johnson, Jennifer Selin, and Jenna Lukasik. I also thank Steve Wermiel, who has always given me support and encouragement.

Early versions of this research were presented at the annual meetings of the Midwest Political Science Association (2004, 2006) and the Southern Political Science Association (2005, 2006). Special thanks go to the many colleagues who offered comments and suggestions. Additionally, an earlier version of Chapter 3 was published as "Bargaining and Accommodation on the United States Supreme Court: Insight from Justice Blackmun" in *Judicature* (90, pp. 157–65, January–February 2007).

Finally, I thank my husband Greg and my daughter Megan, to whom I am grateful for their love and support.

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Introduction

During his introductory remarks at Judge Samuel Alito's Supreme Court confirmation hearings, Senate Judiciary Committee Chairman Arlen Specter referred to Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (1952):

> This hearing comes at a time of great national concern about the balance between civil rights and the president's national security authority. The president's constitutional powers as commander in chief to conduct electronic surveillance appear to conflict with what Congress has said in the Foreign Intelligence Surveillance Act. This conflict involves very major considerations raised by Justice Jackson's historic concurrence in the Youngstown Steel seizure cases . . . where [he] noted, quote, "What is at stake is the equilibrium established in our constitutional system." (Specter 2006)

Jackson's concurrence has been called "the greatest single opinion ever written by a Supreme Court justice" (Levinson 2000), establishing the starting framework for analyzing all future foreign relations and individual liberties problems.

Youngstown involved a labor dispute in the steel industry during the Korean War. President Harry S. Truman issued an executive order directing the secretary of commerce to seize the steel mills and keep them operating. Truman argued this was a necessary action to prevent "a national catastrophe which would inevitably result from a stoppage of steel production" (582). The Court overturned the order, holding that presidential authority "must stem either from an act of Congress or the Constitution itself" (585). According to the Court, the Commander in Chief Clause does not give the president "ultimate power" to "take possession of private property in order to keep labor disputes from stopping production" (587). That power belongs only to Congress.

In his concurrence, Jackson contended that the president's powers "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress" (*Youngstown* 1952, 635). He conceived of three categories:

1. Where the president acts pursuant to express or implied authorization of Congress, in which case his authority is at its maximum;
2. Where the president acts in the absence of either a congressional grant or denial of authority, in which case "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain" (637); and
3. Where the president acts adversely to the express or implied will of Congress, in which case his power is "at its lowest ebb" (637).

Jackson's concurrence has been widely relied on in later decisions (Paulsen 2002). For example, *Dames & Moore v. Regan* (1981) involved Jimmy Carter's response to the taking of American hostages in Iran. The Court relied on Jackson's tripartite framework to uphold President Carter's power to order the transfer of Iranian assets out of the country, to nullify attachments of those assets, and to require that claims would be settled by arbitration rather than by U.S. courts. The Court quoted Jackson's concurrence, stating "[b]ecause the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation'" (674).

The lasting impact of Jackson's concurring opinion underscores the potential importance of concurrences. Why are they written? What systematic impact do these opinions have? A concurring opinion is one written by a judge or justice, in which he or she agrees with the conclusions or results of the majority opinion filed in the case "though he states separately his views of the case or his reasons for so concurring" (Black 1991, 200). When justices write or join a concurring opinion, they demonstrate that they have preferences over legal rules and they are responding to the substance of the majority opinion. Concurrences provide a way for the justices to express their views about the law, and to engage in a dialogue of law with each other, the legal community, the public, and Congress. "[C]oncurring voices produce the legal debate that furthers the intellectual development of the law on the Supreme Court" (Maveety 2005, 139). By studying the process of opinion writing and the formation of legal doctrine through focusing on concurrences, this book provides a richer and more complete portrait of judicial decision making. First, I code concurring opinions into different categories and examine why a justice writes or joins a particular type of concurrence rather than silently joining the majority opinion. Second, I provide a qualitative analysis of the bargaining and accommodation that occurs on the Supreme Court in order

to further understand why concurrences are published. Finally, I assess the impact that concurring opinions have on lower court compliance and on the Supreme Court's interpretation of its own precedent.

Court Opinions Matter

Legal scholars study the opinions of the Court, dissecting the language in an effort to understand the law. Practitioners analyze and study the content of Court opinions in order to provide legal advice to their clients, using cases to predict what courts will do in a specific case that has yet to come before them. It is the rationale used in the past that provides the guidance for the future. Thus, the words used, the reasoning employed, the rationale given, and the tests devised by the Court, are important to understand. Where do they come from? How do judges agree on the language used in opinions?

There has been a long-standing debate about how researchers should study judicial behavior. Attitudinalists[1] argue that the best way to understand how judges make decisions is through a scientific, empirical approach, focusing on case outcomes and specifically on the votes of individual justices (see, e.g., Schubert 1959; Spaeth 1965; Ulmer 1959). Legally oriented scholars suggest that, in order to understand judicial behavior, we must study the language of opinions (see, e.g., Mendelson 1963). Although there continues to be disagreement, many judicial scholars have recognized the real-world importance of the content of Supreme Court opinions.

> The Opinion of the Court is the core of the policy-making power of the Supreme Court. The vote on the merits in conference determines only whether the decisions of the court below will be affirmed or reversed. It is the majority opinion which lays down the broad constitutional and legal principles that govern the decision in the case before the Court, which are theoretically binding on lower courts in all similar cases, and which establish precedents for future decisions of the Court. (Rohde and Spaeth 1976, 172)

Thus, court *opinions* matter, not just the vote on the merits, and understanding how the opinion writing process works is central to explaining the development of the law. How is legal precedent formed? How are Supreme Court opinions developed? These are questions that have become central to judicial scholars.

Previous literature has focused on explaining case outcomes or the behavior of individual justices (see, e.g., Pritchett 1948; Rohde and Spaeth 1976; Schubert 1965; Segal and Cover 1989; Segal and Spaeth 1993, 2002). According to the

attitudinal model, judicial outcomes reflect a combination of legal facts and the policy preferences of individual justices. "Simply put, Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way he did because he [was] extremely liberal" (Segal and Spaeth 1993, 65). In short, ideology matters. However, the empirical evidence is based on the justice's final vote on the merits; thus it does not explain how opinions are crafted. In fact, Spaeth (1995) observed, "opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate" (314).

With this in mind, recent literature has focused on examining the factors that shape Court opinions (see, e.g., Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). These proponents of the strategic model have shown that preferences alone do not account for the choices that justices make. "Instead, their decisions result from the pursuit of their policy preferences within constraints endogenous to the Court. These constraints primarily stem from institutional rules on the Court, which give the Court its collegial character" (Maltzman et al. 2000, 149). In other words, although the justices want to maximize their policy preferences and see those policy preferences reflected in the law, they are *not* unconstrained. "Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act" (Epstein and Knight 1998, 10). For example, the opinion writing process on the Court is affected by the informal rule that Court opinions constitute precedent only when supported by a majority of the justices. This means that the justices, when writing the majority opinion, have to take into account the preferences of their colleagues and cannot write the opinion solely for themselves.

Scholars have studied the assignment of the majority opinion, the writing of the majority opinion, the justices' choice of what bargaining tactics to use, and the decision of each justice to join the majority decision. However, the final goal has not been achieved: "explaining the actual content of Court opinions" (Maltzman et al. 2000, 154). This is the challenge I take up in this book, specifically by focusing on concurring opinions.

Concurrences versus Dissents

After the Court hears oral arguments, it meets in private to discuss the cases and to vote. Under Court norms, if the chief justice is in the majority, he assigns the opinion. If the chief is not in the majority, the senior justice in the majority assigns the opinion. After the opinion is assigned, the majority opinion author writes a first draft, which is then circulated to the other justices.

During the opinion writing process, a justice has various options. First, the justice can join the opinion. This means he agrees with the majority opinion and does not want any changes. Second, the justice can ask the opinion writer to make changes to the opinion, bargaining with the opinion writer over specific language contained in the draft. Third, the justice can write or join a regular concurrence, which is a concurrence agreeing with the result and with the content of the opinion. Fourth, a justice can write or join a special concurrence, which is a concurrence that agrees with the result, but does not agree with the rationale used by the majority opinion writer. Fifth, the justice can write or join a dissent.

In this book, I focus solely on concurrences because concurring opinions raise a theoretical puzzle for scholars of the Supreme Court and provide a unique opportunity to differentiate between voting for the outcome versus voting for the opinion. Because concurring opinion writers agree with who wins the case, yet are still not satisfied with the legal rule announced in the opinion, concurring opinions are more difficult to understand than dissents. Dissents disagree with both the outcome and the legal reasoning of the majority opinion, and previous research shows dissents are primarily the result of ideology, specifically the ideological distance between the justice and the majority opinion writer (see Wahlbeck, Spriggs, and Maltzman 1999). On the other hand, when a justice writes or joins a concurring opinion, one asks: "Why undermine the policy voice of a majority one supports by filing a concurrence?" (Maveety 2005, 138).

Additionally, concurrences have more authority than dissents. In fact, the rules and policies of the case may be less the result of what the majority opinion holds than the interpretation of the opinion by concurring justices (see Maveety 2005). Moreover, a Court opinion is not necessarily "perceived . . . as a discrete resolution of a single matter but as one link in a chain of developing law" (Ray 1990, 830). Thus, the concurrences bracketing the majority opinion may shape the evolution of the law as they limit, expand, clarify, or contradict the Court opinion.

Concurrences and Judicial Signaling

To effectuate the rule of law, one must be able to identify controlling legal principles. Furthermore, because few Supreme Court cases can answer all questions about an issue, lower court judges must interpret the decision in order to apply it. In *Roe v. Wade* (1973), the Court held that the right to privacy included a woman's right to choose whether or not to have an abortion, but did not address spousal consent, parental consent, or Medicaid funding. Thus, lower courts had to interpret *Roe* to apply it to these

situations. Obviously, the majority opinion itself can communicate to the lower courts how to apply the rules, tests, and general principles contained in the opinion, and, in fact, "[p]art of the precedential system is the signaling function to lower courts" (Berkolow 2008, 303).[2] Former Chief Justice Rehnquist argued that "an appellate judge's primary task is to function as a member of a collegial body which must decide important questions of federal law in a way that gives intelligible guidance to the bench" (Rehnquist 1992, 270). However, sometimes the Court deliberately leaves legal questions open, with the intention of resolving them in future cases. Other times, the controlling legal principle is difficult if not impossible to extract from the majority opinion. When justices write or join concurring opinions, they are often revealing their support and understanding of the majority opinion and their preferences regarding the particular legal issue. "[A] concurring author . . . offers an internal commentary on the court's judgment, throwing partial illumination on the otherwise obscure process that creates majorities" (Ray 1990, 783).

Based on the foregoing, I argue that concurrences are a form of judicial signaling, where judges use the signals contained in concurring opinions to interpret the majority opinion and apply it to the case before them.

This idea of judicial signaling is closely tied to the Supreme Court agenda setting literature. Scholars have emphasized the extent to which the work of the justices can be understood as "cues" or "signals" to outside actors as to the Court's interests and the possible direction that it wishes to take the law (see Baird 2007; Pacelle 1991; Perry 1991). Concurrences are the perfect vehicle for sending cues to other actors because concurring opinions are not the product of compromise as are majority opinions. A justice writing or joining a concurrence can explain "with greater precision [his] relationship to a majority opinion or holding" (Ray 1990, 829). A concurring opinion writer may signal to the other justices and the legal community the extent to which he agrees with the rationale of the majority opinion and how much support he may give in the future. For example, in *Morse v. Frederick* (2007), the Court addressed whether a school principal may, consistent with the First Amendment, restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use. In *Morse*, a student was suspended from school for displaying a banner reading "Bong Hits 4 Jesus" across the street from his school during the Olympics torch relay. Chief Justice Roberts, writing for the majority, concluded that the principal did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it. The majority found that Frederick's "Bong Hits" banner was displayed during a school event, which made this a "school speech" case rather than a normal speech case.[3]

Although the Court concluded that the banner's message was "cryptic," it was undeniably a "reference to illegal drugs" and it was reasonable for the principal to believe that it "advocated the use of illegal drugs."

Justice Thomas wrote a concurrence, arguing that students in public schools do not have a right to free speech and that *Tinker v. Des Moines Community School Dist.* (1969), a case in which the Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (506) should be overruled.[4] Basically, Thomas did not believe the majority decision went far enough and signaled his willingness to overrule *Tinker* and his belief that the First Amendment does not protect student speech in public schools. He was quite transparent in his concurrence, specifically stating that he "join[s] the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so" (*Morse* 2007, 2636).

Justice Alito, joined by Justice Kennedy, wrote a concurrence agreeing with the majority opinion, but communicated his understanding that the opinion "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use" and that "it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue" (2636). Thus, Alito and Kennedy signaled the limited holding of the majority opinion, specifically that they would not be willing to extend the reasoning of the case to situations in which the speech could be classified as political or social speech.

In this scenario, the lower courts must interpret the majority opinion, and, in addition to reading and analyzing the majority opinion, they may also rely on the two concurring opinions in order to understand how to apply *Morse* to the case before them. The two concurrences communicate the parameters of the Court's opinion, the desired take on the majority opinion they are joining, and the preferences of the justices. These concurrences highlight the difference between voting for the *result* and voting for the *opinion*. One scholar argues:

> [J]ustices care most about the underlying legal principles in an opinion, rather than just which side wins the case. The justices want legal policy to reflect their policy preferences because they understand that it is those policies that ultimately influence distributional consequences in society. It is the legal rule announced in an opinion (not which party won the case) that ultimately serves as referents for behavior and alters the perceived costs and