Graveyard Dissents on the Burger Court

GREG GOELZHAUSER

In *Allis-Chalmers Corp. v. Lueck* (1985), the Supreme Court held that the Labor Management Relations Act preempted a tort claim under state law for improper delay in making disability payments in accordance with a collective-bargaining agreement.[1] Although the Court delivered a unanimous opinion in *Allis-Chalmers*, Justice William H. Rehnquist had concealed his disagreement. Nearly one month after Justice Harry Blackmun first secured a majority coalition for his opinion in *Allis-Chalmers*, Justice Rehnquist wrote to him with copies to the Conference: "You may consider this letter as both a 'graveyard dissent' and a 'join.'"[2] Justice Rehnquist's reference to a "graveyard dissent" meant that he would silently acquiesce to the majority position despite his disagreement.

The origin of the phrase "graveyard dissent" is unclear. Justice Blackmun sometimes associated the phrase with Justice Charles Whittaker. In *Mills v. Rogers*,[3] for example, Blackmun wrote to Justice Lewis F. Powell: "I do not feel strongly enough . . . to write separately and thus shall give you one of Charlie Whittaker's 'graveyard dissents.'"[4] Similarly, in *Summa Corp. v. California ex rel. State Lands Commission*,[5] Blackmun wrote to Rehnquist: "I'll give you one of Charlie Whittaker's 'graveyard dissents' and go along in this case."[6] And in *Irving Independent School District v. Tatro*,[7] Blackmun wrote to Chief Justice Warren Burger: "I can give you a Charlie Whittaker 'graveyard dissent' and join your opinion."[8] Whittaker famously struggled with the Court's workload and opinion-writing responsibilities; he also suffered from debilitating physical and mental conditions that ultimately led to his retirement in 1962 after serving only five years.[9] As a result of these difficulties, it would not be surprising to learn that Whittaker regularly silently acquiesced to majority opinions rather than expending the effort associated with dissenting.

Although Blackmun regularly associated the phrase "graveyard dissent" with Whittaker, it is not even clear that it originated with the Supreme Court. Blackmun's tenure on the

Court began eight years after Whittaker retired, but Blackmun joined the Eighth Circuit about two years after Whittaker left to join the Court. Thus, Blackmun may have associated the practice with Whittaker's behavior on the Eighth Circuit. In *Mills*, Blackmun sent a follow-up note to Justice Powell assuring him that he was not trying to be "funny" by using the phrase "graveyard dissent," adding that it was meant to signal a "reluctant joinder . . . [a]t least, that is what I have assumed for some years to be the definition."[10] This exchange suggests that Powell was not aware of the phrase as late as 1982. Nearly a decade earlier, Justice Potter Stewart gave Justice Thurgood Marshall a "graveyard dissent" and told him that the phrase was employed during Stewart's tenure on the Sixth Circuit from 1954–1958.[11]

Regardless of where or how the phrase "graveyard dissent" originated, the practice of silently acquiescing to the majority judgment and opinion rather than dissenting enjoys a storied history on the Supreme Court. Prior to Chief Justice John Marshall's tenure, Justices often issued seriatim opinions explaining the rationale behind their individual votes.[12] Under Marshall's leadership, however, the Court typically issued unanimous opinions for the Court.[13] But the fact that Justices on the Marshall Court rarely dissented did not necessarily mean that they agreed on a case's proper disposition. Indeed, dissenting opinions issued during Marshall's era sometimes emphasized the prevailing norm of silently acquiescing with the majority despite continuing disagreement. Chief Justice Marshall, for example, prefaced a rare dissent by noting that it was his "custom, when I have the misfortune to differ from this Court, [to] acquiesce silently in its opinion."[14] And Justice Joseph Story once expressed "regret . . . [at] hav[ing] the misfortune to differ from a majority of the Court," adding that "[h]ad this been an ordinary case I should have contented myself with silence."[15]

Even President Thomas Jefferson lamented the delivery of opinions "with the silent acquiescence of lazy or timid associates" during Marshall's tenure.[16]

The norm of silently acquiescing to majority dispositions continued well beyond the Marshall Court. Indeed, scholars studying the Waite[17] and Taft[18] eras have uncovered extensive evidence of this practice. During the mid-twentieth century, however, there was an explosion in the production of dissenting opinions—a trend that continues through the present day.[19] In addition to more regular dissenting opinions, several institutional changes made during the modern era may have resulted in the "death of acquiescence."[20] These changes, which were instituted during the Burger Court's early years, include increases in the number of law clerks allocated to each Justice, introduction of the syllabus, and institution of the norm giving the minority coalition's senior Justice power to assign dissent-writing responsibilities.[21] The increase in dissenting opinions and subsequent institutional changes potentially affecting separate opinion writing raise two fundamental questions about the continued use of graveyard dissents during the modern era. First, do Justices on the modern Supreme Court continue to withhold dissents? Second, if so, why?

This article offers evidence that Justices withheld dissents throughout the Burger Court. Furthermore, archival evidence from the Justices' private papers suggests that dissents are withheld in comparatively unimportant cases, particularly when the opportunity cost of drafting a dissenting opinion is high.[22] As commonly assumed, dissents are often withheld by would-be lone dissenters. However, dissents are also withheld when minority coalitions fall apart. In any event, graveyard dissents regularly lead to unanimous opinions.

This article exclusively focuses on clear graveyard dissents as that phrase is traditionally understood—that is, silent acquiescence

Although frequent dissents and separate opinion writing became the norm on the modern Court, the practice of "graveyard dissents," or having a Justice silently acquiesce to the majority position despite disagreeing with it, continued at least to some extent in the Burger Court era.

to a majority judgment and opinion despite the would-be dissenter's continuing disagreement. As a result, two conceptually related but fundamentally distinct practices are not discussed. First, Justices regularly go along despite disagreeing with opinion authors over issues such as dicta, style, and scope. This type of acquiescence occurs between members of a majority coalition, and is inescapable at times on a collegial court. Second, I do not discuss would-be dissenters joining majority coalitions in exchange for substantial opinion modifications. Although Justice Stanley F. Reed's capitulation in *Brown v. Board of Education*[23] may be the best-known example of acquiescence, for example, it is thought to be the product of considerable compromise with Chief Justice Earl Warren drafting a narrow opinion avoiding discussion of the proper remedy.[24] In the classic graveyard dissent, such as Justice Rehnquist's acquiescence in *Allis-Chalmers*, a Justice simply joins the majority coalition without bargaining for substantial opinion modifications.

This project is important for several reasons. First, it draws from archival records to provide the first sustained qualitative analysis of why Justices on the modern Supreme Court sometimes withhold dissents. Second, it offers the first analysis of the relationship between coalition size and the decision to withhold dissents.[25]

This project also contributes to the literature on judicial decision-making. Collectively, the results presented here suggest that a range of institutional goals motivate Justices. This study also has practical implications for the normative debate surrounding graveyard dissents, and recent increases in consensual decision-making on the contemporary Court.

The Value of Published Dissents

Graveyard dissents are somewhat puzzling in part due to the value of published dissents. Indeed, although "[a]quiescence was a common practice for most of the Court's history,"[26] the Supreme Court's modern era is marked by ubiquitous dissent. Published dissents are valuable for several reasons. First, a published dissent is a vehicle for expressing one's sincere legal or policy preference when that preference conflicts with the majority's position. Given that sincere voting is a key element in the judicial utility function,[27] there is little mystery in the fact that Justices use published dissents to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 6, 1984

Re: No. 82-708, Summa Corp. v. California
Ex rel. State Lands Commission

Dear Bill:

I'll give you one of Charlie Whittaker's "graveyard dissents" and go along in this case.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

As this letter from Harry Blackmun attests, the phrase "graveyard dissent" was associated with Justice Charles E. Whittaker, but the reason why remains a mystery. When Blackmun says he will "go along," he is using a phrase commonly employed by the Justices to indicate that they have reservations about an opinion but are going to suppress their dissent.

note their positions. As Justice Hugo L. Black once put it, "a failure to dissent where there is not agreement would be strange for one who has opinions."[28]

Apart from voting's purely instrumental value, dissenting opinions help establish a Justice's jurisprudential legacy. Justices John Marshall Harlan and Oliver Wendell Holmes, Jr., for example, were both commonly referred to as "the Great Dissenter" due to the influence some of their dissenting opinions had on the law.[29] Importantly, dissenting opinions allow Justices to express their style and positions free from the internal constraints associated with forging majority coalitions on a collegial court. As Justice Antonin Scalia once explained: "To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure."[30] Aside from bringing the Justice personal satisfaction, expressing judicial style is a fundamental component of reputation building.[31]

The value of published dissents extends past the individual. Indeed, a dissenter's greatest hope may be that the opinion ultimately influences the development of law. Forming the foundation for a subsequent overruling opinion is the most obvious way

for this to occur. As Chief Justice Charles Evans Hughes famously noted: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have betrayed."[32] Even if that "future day" never comes, a dissenting opinion might still make a legal impact. Chief Justice Harlan Fiske Stone once noted, for example, that the dissent's "influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law," adding that "[a] considered and well stated dissent sounds a warning note that legal doctrine must not be pushed too far."[33]

Chief Justice Stone argued in those same remarks that "the dissenting opinion is likely to be without any discernible influence in the case in which it is written."[34] But other Justices have noted that a dissenting opinion can help shape and sharpen a majority opinion. Justice William J. Brennan once noted, for example, that a dissent "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[35] And referring to her landmark opinion in *United States v. Virginia* invalidating the Virginia Military Institute's male-only admissions policy under the Fourteenth Amendment's Equal Protection Clause,[36] Justice Ruth Bader Ginsburg noted that "[t]he final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent."[37]

Time Constraints and Case Importance

If published dissents are so valuable and prevalent in the modern era, why would Justices continue to silently acquiesce? The Justices' private papers lend insight into this question. Although Justices do not always formally explain their graveyard dissents, the justifications they do offer often focus on time constraints and case importance. The rest of this section explores these factors as justifications for withholding dissent.

Time is a precious commodity for Justices. And as Justice Ginsburg once noted: "When to acquiesce and when to go it alone" in dissent is "subject to one intensely practical constraint: time."[38] Time constraints are particularly prevalent near term's end, which Justice Louis D. Brandeis said brings about "haste and fatigue."[39] Indeed, social scientists have found that end-of-term pressures influence a variety of decisions.[40] The same seems to be true for the decision to withhold dissent. In *Blum v. Bacon*, the Court held that the Social Security Act preempted the state of New York from refusing aid to recipients of the Aid to Families with Dependent Children provision under the state's federally funded Emergency Assistance Program.[41] The Court heard oral argument in *Blum* on April 28, 1982, and Justice Marshall circulated the first draft of an opinion for the Court one month later on May 28. Marshall secured a majority coalition on June 2, and all but Justice Rehnquist's vote by June 5. On June 7, with the end of the Term nearing, Rehnquist wrote to Marshall with copies to the Conference: "If this were November rather than June, I would prepare a masterfully crafted dissenting opinion exposing the fallacies of your pre-emption discussion. Since it is June, however, I join."[42] The Court released its opinion in *Blum* on June 14, with no indication of Rehnquist's disagreement.

End-of-term pressures may have led to a dissenting coalition falling apart in *DeBartolo Corp. v. NLRB*.[43] In *DeBartolo*, the Court vacated and remanded a case raising a constitutional question concerning a union's ability to distribute handbills asking consumers not to trade with a certain group of employers, with an order to resolve a statutory question concerning whether the handbills were exempted from a prohibition

on secondary boycotts imposed by the National Labor Relations Act. The Court heard oral argument in *DeBartolo* on March 22, 1983. On April 4, Justice Brennan wrote to Justice Marshall indicating that they were together in dissent and that he would draft an opinion. Justice John Paul Stevens circulated his first draft of an opinion for the Court on May 27, and Brennan replied on May 31, indicating to the Conference that he would be circulating a dissent. On June 7, Justice Blackmun indicated to Stevens that he "would like to see what the dissent has to say" before deciding whether to join the majority. As the end of the Term neared on June 21, however, Brennan followed up with a note to Stevens that read: "I give up. The dissent won't write. Please join me."[44] What at a minimum would have been a 7-2 disposition, and possibly 6-3 had the dissent convinced an undecided Blackmun, ultimately resulted in a unanimous opinion.

Although time constraints may be particularly prevalent near the end of term, they can motivate graveyard dissents at any point. In *Roe v. Doe*, the Court considered the validity of a state court injunction to enjoin the publication of a psychiatrist's book that allegedly contained a detailed discussion of the plaintiff's case history from her time as one of the psychiatrist's patients.[45] Ultimately, the Court voted at Conference to dismiss the case as improvidently granted ("DIG"), i.e. that the writ of certiorari should never have been granted and the case never heard by the Court.[46] After reminding Chief Justice Burger that he disagreed with the Court's decision to DIG *Doe* at Conference, Justice Rehnquist informed him on February 10 that "[i]n the interim the pressure of circulating paper overwhelmed me, and I am now content to let the matter go."[47] As a result of Rehnquist's silent acquiescence, the Court disposed of *Doe* with a unanimous one-sentence per curiam opinion.

A similar concern with workload and the opportunity cost of dissenting animated Justice Powell's decision to silently acquiesce in *Huddleston v. United States*.[48] *Huddleston* concerned the narrow statutory question of whether a federal prohibition on knowingly making false statements when acquiring a firearm from a licensed dealer covered redeeming pawned firearms. In an opinion written by Justice Blackmun, the Court concluded that the statutory prohibition on making false statements in connection with the acquisition of firearms also applied to re-acquiring them at a pawnshop. Responding to Blackmun's circulation, Powell wrote: "I still lean towards dissenting. Recording my views in this case, however, has a relatively low priority compared to other issues which I am addressing. I will, therefore, await other circulations, if any."[49] Although Justice Douglas ultimately dissented, his brief opinion simply noted his view that ambiguities of the sort presented in *Huddleston* should be resolved in favor of the accused. Powell, despite his reservation, ultimately joined the majority opinion without separate writing.

As Powell's note in *Huddleston* exemplifies, a case's comparative importance is an important determinant in whether to silently acquiesce or dissent. Explaining Justice Brandeis's regular acquiescence, for example, law clerk Alexander Bickel noted that "at times [Brandeis] suppressed his dissenting views on questions which he considered to be of no great consequence."[50]

Evidence from private papers suggests that Justices on the modern Supreme Court adopted a similar position toward comparatively unimportant cases. In *Burlington Northern, Inc. v. United States*, the Supreme Court reviewed a technical judgment by the D.C. Circuit concerning the Interstate Commerce Commission's (ICC) authority to set and review shipping rates.[51] In a unanimous opinion written by Chief Justice Burger, the Court held that primary authority to regulate shipping rates rested with the ICC rather than the federal courts. Burger's *Burlington*

Northern opinion sought to correct a mistake by the D.C. Circuit and clarify existing precedent with respect to the allocation of authority between the federal courts and ICC rather than create new precedent. As a result, despite disagreeing with the majority position, Powell wrote to Burger: "As a dissent in this case is hardly worthwhile, you may record me as a 'join.'"[52]

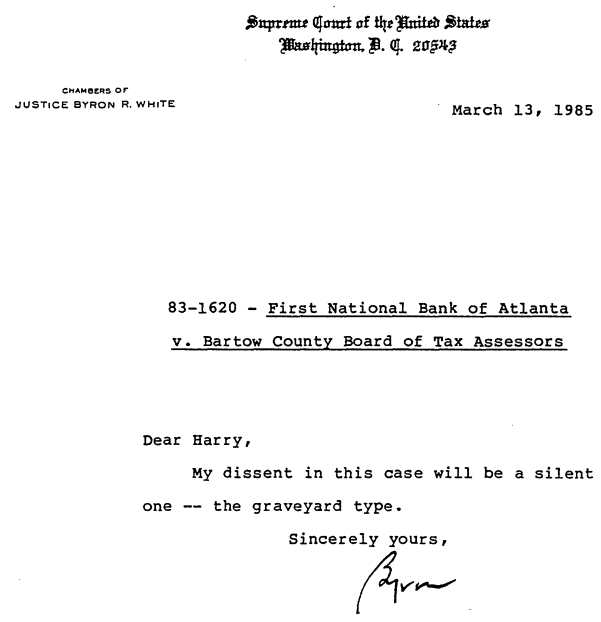
Chief Justice Burger conveyed a similar sentiment in *Carbon Fuel Co. v. United Mine Workers of America*, where the Supreme Court held that an international union that did not encourage or support strikes by local unions could not be held liable for strikes by local unions in violation of a collective-bargaining agreement.[53] As the senior Justice in the majority coalition, Brennan kept the opinion for himself.[54] Less than one week after Brennan circulated a first draft to the Conference, Burger informed Brennan that he was working on a dissent and would soon know whether it was "worthwhile."[55] Four days later, Burger notified Brennan that he would simply go along with the majority rather than continue with his dissent, writing: "This will confirm my 'graveside' acquiescence."[56] The Court released a unanimous opinion in *Carbon Fuel* three days later.

In *Procunier v. Martinez*, the Supreme Court unanimously invalidated administrative regulations enacted by the California Department of Corrections censoring prisoner mail and limiting prisoner access for legal purposes to state-licensed investigators or attorneys.[57] The Court's opinion in *Martinez*, written by Justice Powell, is particularly noteworthy because of the high burden it placed on state regulations concerning prisoner correspondence, and it is widely considered an important contribution to the jurisprudence on prisoners' constitutional rights. Nonetheless, despite apparently disagreeing with the judgment, Justice Rehnquist chose not to dissent. Instead, Rehnquist wrote to Powell: "You have written a good opinion, and I don't think the legal literature would be enriched by my dissenting on the basis of my Conference vote. Please join me."[58]

Justice Stewart expressed a similar sentiment with respect to the value of dissenting in *Federal Maritime Commission v. Seatrain Lines, Inc.*[59] *Seatrain* asked whether the acquisition of a carrier's assets by another carrier such that there were no further obligations between carriers constituted an agreement under the Shipping Act, thereby bringing it under the Federal Maritime Commission's jurisdiction. Writing for the Court, Justice Marshall noted that the case was of "some importance" because any agreement subject to the Commission's jurisdiction and subsequently approved enjoyed immunity from antitrust liability.[60] In a unanimous opinion, the Court held that Congress did not intend to grant the Commission power to shield agreements of this sort from antitrust liability. Although the opinion was unanimous, Stewart had privately suggested that he acquiesced to the majority position only because he considered the case to be comparatively unimportant when he wrote to Marshall that he "concluded that not many souls would be saved by any dissenting opinion I might be able to produce."[61]

Coalition Size

The previous section demonstrates that time constraints and case importance are key determinants in the decision to withhold dissenting opinions. With respect to coalition size and withholding dissent, the most common argument has been that silent acquiescence on the modern Supreme Court is likely to arise when a would-be lone dissenter gives in to the majority position. One explanation for this behavior is that cognitive pressure dictates acquiescence in a group setting. Beginning with Solomon Asch's seminal work on the tendency toward conformity in groups, social psychologists have demonstrated that group members tend to defer to the majority position



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 13, 1985

83-1620 - First National Bank of Atlanta
v. Bartow County Board of Tax Assessors

Dear Harry,

My dissent in this case will be a silent one -- the graveyard type.

Sincerely yours,

Justice Blackmun

Copies to the Conference

This 1985 letter by Byron White indicates a straightforward use of the term "graveyard dissent," with no indication why he chose to silently acquiesce to the majority opinion.

when they find themselves alone in disagreement—even when they know that their own position is correct.[62] Applying this literature to Supreme Court decision-making, Granberg and Bartels find that unanimous opinions are the most overrepresented coalition split, and lone-dissenter opinions the most underrepresented coalition split, among all possible splits from cases decided during the 1953–2001 Terms using a rectangular distribution that assumes an equal probability for each split.[63] Similarly, Wrightsman interprets the underprediction of unanimous opinions and overprediction of lone-dissenter opinions by participants in the Supreme Court Forecasting Project as evidence that "when most justices vote one way, pressures exist on the holdout justice to go along, and often they do."[64]

Scholars have also considered acquiescence through the lens of broader collegial dynamics. Judge Posner, for example, once noted that dissenting is a "source[] of irritation" on a multimember court and thus potentially has deleterious consequences for collegiality.[65] Similarly, Justice Brandeis once noted that the "[g]reat difficulty of all group action . . . is when [and] what concessions to make. Can't always dissent."[66] These collegial dynamics are a popular explanation for "dissent aversion" on circuit courts.[67] Even though Supreme Court Justices may face lower collegiality costs on average than circuit court judges due to differing institutional norms, scholars have suggested that collegiality concerns may nonetheless help explain the production of dissenting opinions.[68]

Doing what is in the institution's best interest is another justification for withholding dissent in light of coalition size. Unanimity is widely considered to have beneficial

institutional consequences.[69] Chief Justice John G. Roberts, for example, regularly emphasizes the institutional value of unanimity and has suggested that issuing more unanimous opinions will help "the Court acquire more legitimacy [and] credibility."[70] Justice Ginsburg expressed a similar sentiment when she suggested that "[c]oncern for the well-being of the court on which one serves . . . may be the most powerful deterrent to writing separately." As a result of the prevailing view concerning unanimity's institutional benefits, Justices may be inclined to silently acquiesce when they would otherwise be alone in dissent.

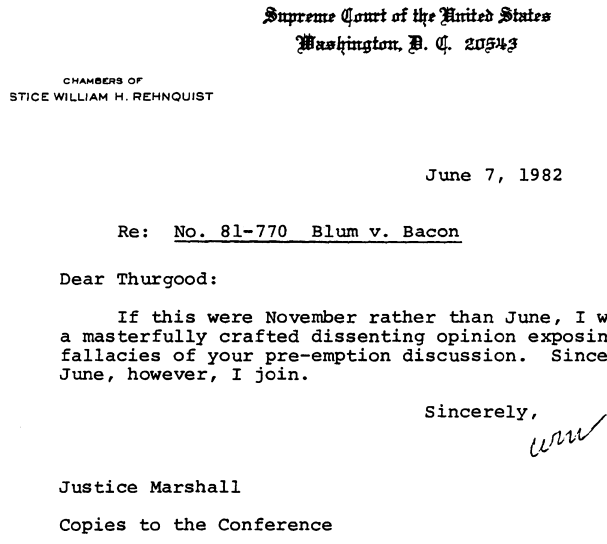
The historical records indicate that would-be lone dissenters are sometimes sensitive to their solitary position, and ultimately decide to silently acquiesce to the majority position. Indicating that a graveyard dissent is conditional on no other Justice publishing a dissent is one manifestation of this sensitivity. In *United States v. Kordel*, the Court upheld the federal government's use of evidence obtained in nearly contemporaneous civil proceedings to help secure criminal convictions in the face of a claim that this practice violated the Fifth Amendment's protection against compulsory self-incrimination.[71] One day after Justice Stewart circulated the first draft of an opinion for the Court, Justice Douglas wrote to him: "I voted the other way. But I have decided not to note my dissent nor to write in dissent, but to acquiesce in the opinion as you have written it. If, however, someone else writes in dissent, I will reconsider the whole question at that time."[72] Ultimately, with no other Justice writing, Douglas adhered to his graveyard dissent and the Court delivered a unanimous opinion.

Two days after Douglas informed Stewart that he would withhold dissent absent another Justice writing in *Kordel*, Stewart returned the favor in a pair of influential standing cases: *Association of Data Processing Service Organizations v. Camp*[73] and *Barlow v. Collins*.[74] The opinions in these cases introduced the "zone of interests" test, which holds that parties have standing when an injury arises that is within the "zone of interests" protected by the relevant statutory or constitutional provision. Stewart wrote an identical note to Douglas for each case that read: "I have decided to acquiesce in your opinion, unless somebody else writes in dissent."[75]

Justice Byron R. White provided another example of a conditional graveyard dissent in *Blackledge v. Allison*.[76] In *Blackledge*, the Court held that a district court erred by summarily dismissing a petition for a writ of habeas corpus by an inmate who had presented substantial evidence that the prosecutor secured a plea bargain with an unkept promise. After Justice Stewart circulated a draft opinion for the majority, White wrote to him: "I shall acquiesce in this case but may reconsider if a dissent is written."[77] Ultimately, no other Justice wrote separately and the Court delivered a unanimous opinion.

Even Justice Rehnquist, whom a former clerk referred to as "the lone dissenter" because he was "not a 'go along to get along' guy" and "had the intellectual confidence to state his views, even if this frequently meant standing alone," sometimes appeared sensitive to being a lone dissenter.[78] In *Torres v. Puerto Rico*, for example, the Court held that the Fourth Amendment's prohibition against unreasonable searches and seizures applied to Puerto Rico. The Court also invalidated a Puerto Rican law allowing authorities to search the luggage of anyone arriving in the territory from the United States without a warrant.[79] Responding to Chief Justice Burger's circulation of a draft opinion for the Court, Rehnquist wrote: "Although I was in dissent in Conference, I would imagine there is little probability of my solitary position prevailing. I therefore join your opinion."[80]

Justice Powell also referenced his status as a prospective lone dissenter when acquiescing to the majority's position in *Thor*



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
STICE WILLIAM H. REHNQUIST

June 7, 1982

Re: No. 81-770 Blum v. Bacon

Dear Thurgood:

If this were November rather than June, I would prepare a masterfully crafted dissenting opinion exposing the fallacies of your pre-emption discussion. Since it is June, however, I join.

Sincerely,

Justice Marshall

Copies to the Conference

Justice Rehnquist's amusing and candid note to Thurgood Marshall is a good example of a common reason why a Justice might withhold dissent: running out of time and energy at the end of the Term.

Power Tool Co. v. Commissioner of Internal Revenue.[81] In *Thor Power Tool*, the Court upheld an Internal Revenue Service decision to disallow a company's claimed offset and deduction for bad debts. After most of the other Justices had joined Justice Blackmun's majority opinion, Powell wrote to Blackmun: "In view of the universal acclaim of your fine opinion . . . I don't want to be a discordant note. Accordingly, I cheerfully join you, despite continuing reservations."[82] Ultimately, the Court issued a unanimous opinion in *Thor Power* without separate writing.

These exchanges demonstrate that Justices sometimes reconsider their positions as would-be lone dissenters. However, the historical evidence also indicates that graveyard dissents sometimes materialize after a prospective dissenting coalition falls apart. This was evident in *DeBartolo Corp.*, discussed previously.[83] Another example occurred in *Golden State Bottling Co. v. National Labor Relations Bd.*, where the Court affirmed a lower court judgment that the National Labor Relations Board could order the purchaser of a business to reinstate an employee who had been discharged by the previous owner when the purchaser had knowledge that an unfair labor practice had occurred.[84] At Conference, Justices Stewart, Powell, and Rehnquist voted to reverse. Shortly after Justice Brennan circulated a draft of the majority opinion, however, Stewart joined, noting in a letter to Brennan with copies to the Conference that he had "concluded . . . that it would be a waste of time and printer's ink to dissent on [a] factual issue."[85] Rehnquist joined Brennan's opinion on the same day, without mentioning his previous inclination to dissent.[86] One day later, apparently not yet having received Rehnquist's join note, Powell wrote to Rehnquist: "As Potter has deserted us, and all others (except the Chief) also have joined Bill Brennan, I am on the verge of surrendering."[87] Then, presumably having learned about Rehnquist's defection in the interim, Powell wrote to Brennan and the Conference: "While I still do not agree with the conclusion you reach, there is much to Potter's view that the issue is factual and there is little point in dissenting on this ground." In exchange for going along with the opinion, Powell requested that Brennan eliminate a footnote touching on the question of where the burden of proof lied in demonstrating a purchasing

corporation's knowledge. Brennan accommodated this minor request, and the Court subsequently delivered a unanimous opinion in *Golden State Bottling* with no remaining trace of the original three-Justice minority coalition.

In *P.C. Pfeiffer Co. v. Ford*, the Supreme Court clarified the meaning of the phrase "maritime employment" for purposes of coverage under the Longshoremen's and Harbor Workers' Compensation Act.[88] After Justice Powell circulated a draft opinion for the Court, Justice Stewart replied: "It seems to me that our function in this case is to give authoritative construction to this miserably written Act so as to resolve the conflicts and minimize future litigation as to its coverage."[89] Stewart continued: "While I hold another view as to the coverage of the Act, I have decided not to write anything in dissent and shall acquiesce in your opinion for the Court unless somebody else circulates an expression of dissenting views."[90] On the same day Stewart circulated his memo, Justice Stevens responded: "My views are the same as Potter's."[91] This left Justice Rehnquist alone in dissent, although he conceded nearly one week later with a note to Powell that read: "I have decided to surrender my dissenting vote in Conference to superior numbers, and hereby join your opinion."[92] The exchanges in *P.C. Pfeiffer* illustrate how a prospective dissenting coalition can unravel into a series of graveyard dissents while further demonstrating the impact of perceived case importance on decisions to acquiesce.

One additional example reinforces these themes. In *First National Bank of Atlanta v. Bartow County Board of Tax Assessors*, the Supreme Court held that a state need not allow a bank to deduct the full value of tax-exempt United States obligations from its net worth.[93] Justice Blackmun circulated a first draft of the Court's opinion on February 4, 1985, and quickly received joins from all but Burger, Powell, and White, who were together in dissent. Although Powell had agreed to draft a dissenting opinion, he subsequently sent a private note to Burger on February 12 observing that he had lost his enthusiasm: "I find Harry's opinion sufficiently convincing that I would rather not take the time to prepare a dissent. I hope you will let me off the hook."[94] Two days later, Powell joined Blackmun's majority opinion, leaving Burger and White alone in dissent. About one month passed before White notified Blackmun of his decision to acquiesce: "My dissent in this case will be a silent one—the graveyard type."[95] On the following day, Burger capitulated as well with a letter to Blackmun that read: "I will join Byron's 'graveyard' dissent so this case can come down next week."[96] Five days later the Court delivered a unanimous opinion in *First National Bank*.

Conclusion

The old consensual norm governing Supreme Court decision-making eroded during the twentieth century. Frequent dissents and separate opinion writing are now the norm. Nonetheless, a vestige of the old norm seems to persist even after the explosion of separate opinion writing through the use of graveyard dissents. Drawing from private memoranda exchanged by Justices during the Burger Court, the historical evidence presented here suggests that the norm of silent acquiesce continued at least to some extent into the modern era. Moreover, this historical evidence yields important insights into Supreme Court decision-making. As an initial matter, time constraints and case importance seem to be critical considerations in deciding whether to withhold dissent. Although graveyard dissents often come from would-be lone dissenters, the evidence presented here suggests that they also arise when prospective dissenting coalitions fall apart.

Understanding why Justices withhold dissent helps inform the normative debate

over this practice's continuation. Justice Stevens has been the norm's most vocal critic. In his memoir, for example, Stevens noted that Justice White regularly issued graveyard dissents and criticized the practice because "the institution and the public are better served by an accurate disclosure of the views of all of the justices in every argued case."[97] This argument may carry less weight, however, if graveyard dissents tend to be issued in comparatively unimportant cases with little public visibility. Moreover, since graveyard dissents typically result in unanimous opinions, any institutional benefits generated by unanimous opinions may outweigh the costs associated with withholding dissent in comparatively unimportant cases. Graveyard dissents may also have positive collegiality effects.

This project also has important implications for our understanding of what motivates Supreme Court decision-making. The conventional wisdom is that Supreme Court Justices are motivated by a desire to implement their legal and/or policy preferences.[98] From these perspectives, one seemingly puzzling aspect of graveyard dissents is that they involve Justices voting contrary to their sincere preferences. Notwithstanding the conventional wisdom about Supreme Court decision-making, however, a recent interdisciplinary stream of research contends that a broad range of institutional goals motivates judicial behavior.[99] By widening our theoretical perspective on Supreme Court decision-making to incorporate a host of institutional goals, it is clear that graveyard dissents are not necessarily evidence of Justices voting against their sincere preferences; rather, graveyard dissents are indicative of the fact that institutionally grounded preferences sometimes trump legal or policy preferences—particularly in comparatively unimportant cases.

Whether Justices on the contemporary Supreme Court continue to issue graveyard dissents is an important remaining question. After all, graveyard dissents are a potential explanation for recently observed increases in consensual decision-making.[100] That consensus on the contemporary Court is typically observed in cases that many would deem comparatively unimportant is consistent with the evidence regarding acquiescence presented here. Nonetheless, publicly available information does not allow us to ascertain whether graveyard dissents are currently in use. This fact raises a separate question about whether the evidence presented here is applicable to other time periods. Although this study specifically focuses on the Burger Court, there is reason to think that the findings may not be time bound. As an initial matter, the evidence presented here demonstrates that graveyard dissents continued even after institutional reforms during the Burger Court could have resulted in the "death of acquiescence."[101] Furthermore, one factor that raises generalizability concerns when focusing specifically on the Burger Court is that it is perceived to have been a Bench marked by deep interpersonal frictions.[102] But, if anything, this fact should have decreased the proclivity to withhold dissent. Indeed, we might even expect to observe a greater inclination to withhold dissent during more collegial periods. In addition, evidence from more recent Terms on voting patterns and coalition splits that is consistent with the issuance of graveyard dissents eases concerns about generalizability.[103] Last, it is worth noting that some of the evidence presented here comes from Justices who served before and after Burger.

ENDNOTES

[1] 471 U.S. 202 (1985).

[2] Docket #83-1748, Letter from Rehnquist to Blackmun (April 9, 1985). The memoranda discussed in this article can be accessed electronically through the Supreme Court Opinion Writing Database's document archive. Paul J. Wahlbeck et. al., The Burger Court Opinion-Writing Database, *available at* http://supremecourtopinions.wustl.edu

[3] 457 U.S. 291 (1982).
[4] Docket #80-1417, Letter from Blackmun to Powell (June 10, 1982).
[5] 466 U.S. 198 (1984).
[6] Docket #82-708, Letter from Blackmun to Rehnquist (April 6, 1984).
[7] 468 U.S. 883 (1984).
[8] Docket #83-558, Letter from Blackmun to Burger (June 13, 1984).
[9] For a description of Justice Whittaker's struggles on the Supreme Court, *see* David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," 67 *U. Chi. L. Rev.* 995 (2000).
[10] Blackmun to Powell, *supra* note 4.
[11] Docket #71-1647, Letter from Stewart to Marshall (May 3, 1973).
[12] John P. Kelsh, "The Opinion Delivery Practices of the United States Supreme Court," 77 *Wash U. L.Q.* 137, 141 (1999).
[13] G. Edward White, **The Marshall Court and Cultural Change, 1815-1835** (1991).
[14] *Bank of United States v. Dandridge*, 25 U.S. 64, 90 (1827).
[15] The Nereide, Bennett, Master, 13 U.S. 388, 455 (1815).
[16] Thomas Jefferson, Letter to Thomas Ritchie (December 25, 1820).
[17] *See* Lee Epstein et al., "The Norm of Consensus on the U.S. Supreme Court," 45 *Am. J. Pol. Sci.* 362 (2001).
[18] *See* Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," 85 *Minn. L. Rev.* 1267 (2001).
[19] *See, e.g.,* Gregory A. Caldeira & Christopher J. W. Zorn, "Of Time and Consensual Norms in the Supreme Court," 42 *Am. J. Pol. Sci.* 874 (1998); Pamela C. Corley et al., "Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus," 38 *J. Sup. Ct. Hist.* 20 (2013); Marcus E. Hendershot et al., "Dissensual Decision Making: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court," 66 *Pol. Res. Q.* 467 (2012); Thomas G. Walker et al., "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," 50 J. Pol. 361 (1988).
[20] Pamela C. Corley et al., **The Puzzle of Unanimity: Consensus on the United States Supreme Court** 86 (2013).
[21] *See id.*
[22] Specifically, I draw from the private papers of Justices Hugo L. Black, William O. Douglas, John Marshall Harlan, William J. Brennan, Thurgood Marshall, Harry Blackmun, Lewis F. Powell, and William H. Rehnquist during their time on the Burger Court (OT 1969 through OT 1985). These documents are available online as part of the Supreme Court Opinion Writing Database. Paul J. Wahlbeck et. al., *supra* note 2.
[23] 347 U.S. 483 (1954).
[24] For a detailed discussion of the Justices' views in *Brown*, *see* Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (2004). S*ee also* Jack M. Balkin, "The History of the Brown Litigation," in **What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision** 34-41 (Jack M. Balkin, ed. 2001) (explaining that Warren drafted a narrow opinion to secure a unanimous coalition). In many subsequent desegregation cases the Court also forged unanimous opinions through extensive bargaining over opinion content. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 420 U.S. 1 (1971), Docket #70-281; Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958," 68 *Geo. L.J.* 1 (1979).
[25] For an empirical analysis demonstrating that graveyard dissents are less likely to occur in constitutional and non-salient cases, *see* Greg Goelzhauser, "Silent Acquiescence on the Supreme Court," 36 *Just. System J.* 3 (2015).
[26] Corley et al., *supra* note 19, at 41
[27] Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," 3 *Sup. Ct. Econ. Rev.* 1 (1993).
[28] Roger K. Newman, **Hugo Black: A Biography** 275 (2d ed. 2003).
[29] Even "the Great Dissenter" Justice Holmes once suggested that he thought "it useless and undesirable, as a rule, to express dissent." *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904).
[30] Antonin Scalia, "The Dissenting Opinion," 19 *J. Sup. Ct. Hist.* 33, 42 (1994) (emphasis omitted).
[31] *See* Richard A. Posner, **Law and Literature** (1988).
[32] Charles Evans Hughes, **The Supreme Court of the United States** 68 (1928).
[33] Harlan F. Stone, "Dissenting Opinions Are Not Without Value," 26 *J. Am. Jud. Soc.* 78, 78 (1942).
[34] *Id*.
[35] William J. Brennan Jr., "In Defense of Dissents," 37 *Hastings L.J.* 427, 430 (1986).
[36] 518 U.S. 515 (1996).
[37] Ruth Bader Ginsburg, "The Role of Dissenting Opinions," 95 *Minn. L. Rev.* 1, 3 (2010).
[38] Ruth Bader Ginsburg, "Remarks on Writing Separately," 65 *Wash. L. Rev.* 133, 141-42 (1990).
[39] Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *Sup. Ct. Rev.* 299, 303 (1985) (quoting Brandeis).

[40] *See, e.g.*, Forrest Maltzman & Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," 40 *Am. J. Pol. Sci.* 421 (1996); James F. Spriggs et al., "Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts," 61 *J. Pol.* 485 (1999).
[41] 457 U.S. 132 (1982).
[42] Docket #81-770, Letter from Rehnquist to Marshall (June 7, 1982).
[43] 463 U.S. 147 (1983).
[44] Docket #81-1985, Letter from Brennan to Stevens (June 21, 1983).
[45] 33 N.Y.2d 902 (1973).
[46] 420 U.S. 307 (1975).
[47] Docket #73-1446, Letter from Rehnquist to Burger (February 10, 1975).
[48] 415 U.S. 814 (1974).
[49] Docket #72-1076, Letter from Powell to Blackmun (March 8, 1974).
[50] Alexander M. Bickel, **The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** 28 (1957).
[51] 459 U.S. 131 (1982).
[52] Docket #81-1008, Letter from Powell to Burger (December 6, 1982).
[53] 444 U.S. 212 (1979).
[54] Docket #78-1183, Letter from Brennan to Burger (November 8, 1979).
[55] Docket #78-1183, Letter from Burger to Brennan (December 3, 1979).
[56] Docket #78-1183, Letter from Burger to Brennan (December 7, 1979).
[57] 416 U.S. 396 (1974).
[58] Docket #72-1465, Letter from Rehnquist to Powell (March 8, 1974).
[59] 411 U.S. 726 (1973).
[60] Id. at 728.
[61] Docket #71-1647, Letter from Stewart to Marshall (May 3, 1973).
[62] *See, e.g.,* Solomon E. Asch, "Opinions and Social Pressure," 193 *Scientific Am.* 31 (1955).
[63] Donald Granberg & Brandon Bartels, "On Being a Lone Dissenter," 35 *J. Applied Soc. Psy.* 1849 (2005).
[64] Lawrence S. Wrightsman, "Persuasion in the Decision Making of U.S. Supreme Court Justices," in **The Psychology of Judicial Decision-Making** 69 (David Klein & Gregory M. Mitchell, eds., 2008). The Supreme Court Forecasting Project involved predictions about cases decided during the Court's 2002 Term.
[65] Richard A. Posner, **How Judges Think** 33 (2008).
[66] Urofsky, *supra* note 39, at 309 (quoting Justice Brandeis).
[67] Lee Epstein et al., **The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice** (2013) [hereinafter **Behavior**]; Posner, *supra* note 65; Lee Epstein et al., "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis," 3 *J. Legal Analysis* 101 (2011) [hereinafter "Dissent"].
[68] Lee Epstein et al., **Behavior**, *supra* note 67; Lee Epstein et al., "Dissent," *supra* note 67.
[69] *But see* Cass R. Sunstein, "Unanimity and Disagreement on the Supreme Court," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466057
[70] Jeffrey Rosen, "Roberts's Rules," *The Atlantic* (2007).
[71] 397 U.S. 1 (1970).
[72] Docket #69-87, Letter from Douglas to Stewart (February 7, 1970).
[73] 397 U.S. 150 (1970).
[74] 397 U.S. 159 (1970).
[75] Docket #69-85, Letter from Stewart to Douglas (February 9, 1970); Docket #69-245, Letter from Stewart to Douglas (February 9, 1970).
[76] 431 U.S. 63 (1977).
[77] Docket #75-1693, Letter from White to Stewart (April 14, 1977).
[78] John M. Nannes, The "Lone Dissenter," 31 *J. Sup. Ct. Hist.* 1, 3 (2006).
[79] 442 U.S. 465 (1979).
[80] Docket #77-1609, Letter from Rehnquist to Burger (May 18, 1979).
[81] 439 U.S. 522 (1979).
[82] Docket #77-920, Letter from Powell to Blackmun (January 10, 1979).
[83] *See supra* notes 43 and 44 and accompanying text.
[84] 414 U.S. 168 (1973).
[85] Docket #72-7202, Letter from Stewart to Brennan (November 15, 1973).
[86] Docket #72-7202, Letter from Rehnquist to Brennan (November 15, 1973).
[87] Docket #72-7202, Letter from Powell to Rehnquist (November 16, 1973).
[88] 444 U.S. 69 (1979).
[89] Docket #78-425, Letter from Stewart to Powell (November 8, 1979).
[90] *Id*.
[91] Docket #78-425, Letter from Stevens to Powell (November 8, 1979).
[92] Docket #78-425, Letter from Rehnquist to Powell (November 13, 1979).
[93] 470 U.S. 583 (1985).
[94] Docket #83-1620, Letter from Powell to Burger (February 12, 1985).
[95] Docket #83-1620, Letter from White to Blackmun (March 13, 1985).
[96] Docket #83-1620, Letter from Burger to Blackmun (March 14, 1985).

[97] John Paul Stevens, Five Chiefs: A Supreme Court Memoir 156 (2011).

[98] *See, e.g.,* Richard L. Pacelle, Jr., **Decision Making by the Modern Supreme Court** (2011); Jeffrey A. Segal & Harold J. Spaeth, **The Supreme Court and the Attitudinal Model Revisited** (2002).

[99] *See, e.g.,* Lee Epstein et al., **Behavior**, *supra* note 67; Lee Epstein & Jack Knight, "Reconsidering Judicial Preferences," 16 *Annual Rev. Pol. Sci.* 11 (2013).

[100] On the recent increase in consensus, *see* Neal K. Katyal, "The Supreme Court's Powerful New Consensus," *New York Times*, June 26, 2014.

[101] Corley et al., *supra* note 20, at 86.

[102] *See, e.g.*, Bob Woodward & Scott Armstrong, **The Brethren: Inside the Supreme Court** (1979).

[103] *See supra* notes 63 and 64 and accompanying text.