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The Norm of Consensus on the U.S. Supreme Court

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For four decades scholars have sought to explain the rise of dissensus on the U.S. Supreme Court. While the specific explanations they offer vary, virtually all rest on a common story: during the nineteenth (and into the twentieth) century, the Supreme Court followed a norm of consensus. That is, the justices may have privately disagreed over the outcomes of cases but masked their disagreement from the public by producing consensual opinions. The problem with this story is that its underlying assumption lacks an empirical basis. Simply put, there is no systematic evidence to show that a norm of consensus ever existed on the Court.

We attempt to provide such evidence by turning to the docket books of Chief Justice Waite (1874–1888) and making the following argument: if a norm of consensus induced unanimity on Courts of by-gone eras, then the norm may have manifested itself through public unanimity in the face of private conference disagreements. Our investigation, which provides systematic support for this argument and thus for the existence of a norm of consensus, raises important questions about publicly unified decision-making bodies, be they courts or other political organizations.

Over the course of four decades, scholars have produced mounds of paper providing explanations for the cause of the dramatic phenomenon depicted in Figure 1: the rise of dissensus on the U.S. Supreme Court (e.g., Caldeira and Zorn 1998; Halpern and Vines 1977; Mason 1956; Murphy 1964; Pritchett 1948; Walker, Epstein, and Dixon 1988).[1] Certainly the specific reasons they offer vary (compare Goldman 1982 and Haynie 1992), but the underlying story contemporary scholars tell does not. During most of the nineteenth (and into the twentieth) century dissent rates remained low, so the story goes, because Supreme Court justices followed a norm of consensus, reflecting their belief that unanimity would "greatly strengthen the authority" of the Court and its rulings (Rehnquist 1996, 58; see also Beveridge 1919; Goebel 1971). That is, the justices may have privately disagreed over the outcomes of cases but they masked their disagreements from the public by producing consensual

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[1]Figure 1 displays the percentage of U.S. Supreme Court decisions with at least one dissenting opinion. But, since a similar pattern emerges for votes (see, e.g., Pritchett 1941, 1948), we use the terms "dissensus" and "rise in dissent" in the same way as do most judicial specialists (e.g., Pritchett 1948; Walker, Epstein, and Dixon 1988): to refer to increases both in the number of dissenting opinions and votes.

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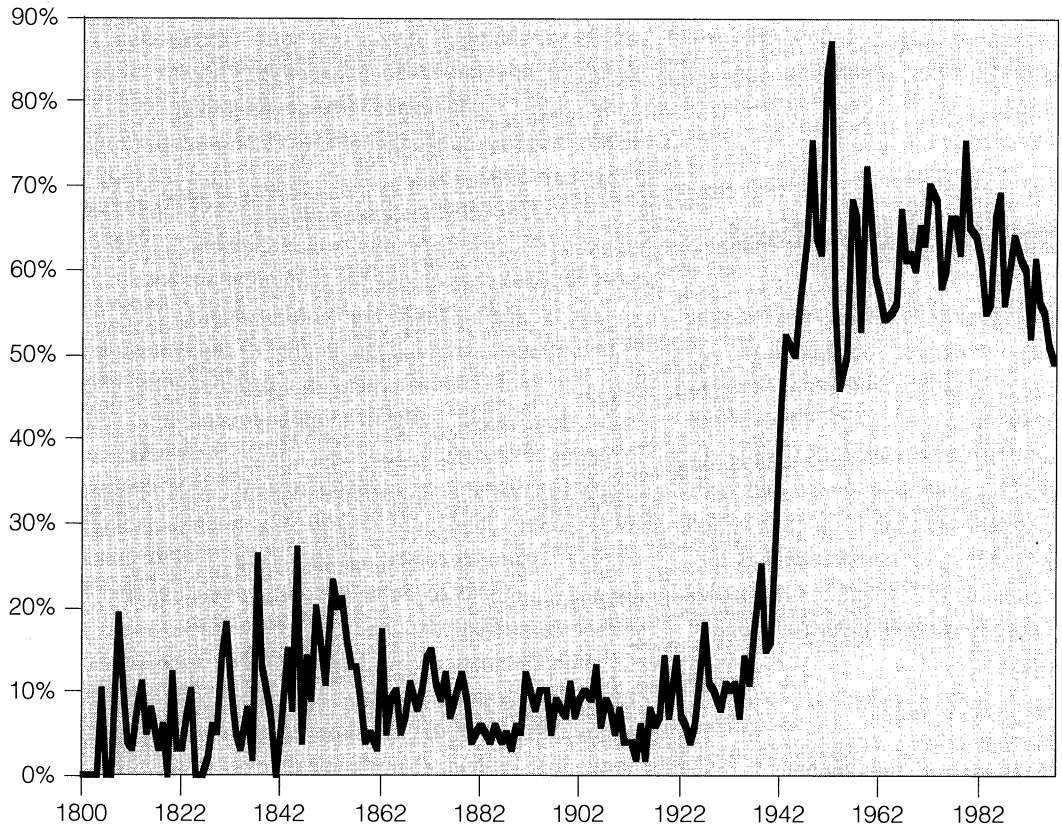
FIGURE 1 Percentage of U.S. Supreme Court Cases with at Least One Dissenting Opinion, 1800–1997 Terms



Sources: Epstein et al. 1996, Tables 3-2; Spaeth 1999.

opinions. Hence, most modern-day research seeking to identify the cause of the rise of dissensus is inevitably aimed, in one way or another, at explaining "[t]he mysterious demise of *consensual norms* on the U.S. Supreme Court" (Walker, Epstein, and Dixon 1988) or "the deterioration of the *consensus norm*" (Haynie 1992, 1158).

The problem with this story is that its key underlying assumption lacks an empirical basis: simply put, there is no systematic evidence to show that a norm of consensus ever, in fact, existed on the Court. Scattered stories about how the justices labored hard to mask their disagreements from the public (e.g., Mason 1956; Seddig 1975) do not, of course, provide such evidence. Nor do low dissent rates, for they may have been produced by a factor other than a norm of consensus; namely, the disputes themselves. As Pritchett (1941, 890) speculated, justices of earlier eras may have been confronted with essentially "easy" cases, those in which the "facts and law are so clear that no opportunity is allowed for the autobiographies of the justices to lead them to opposing conclusions." On Pritchett's account, then, unanimous opinions resulted during the nineteenth and parts of the twentieth centuries, not because of the existence of a norm but because of the sorts of cases that the justices were asked to decide.

Which side has the better case? Did a norm of consensus exist that prevented justices from airing publicly their private disagreements? Or have scholars proffering the "norm" argument simply made an incorrect inference based on a pattern of behavior (low dissent rates) that may have its basis in a factor other than a norm (the relative ease of the cases)? We address these questions by examining data derived from Chief Justice Morrison R. Waite's docket books, which contain the justices' private conference votes during the 1874–1887 terms. Specifically, we argue the following: if a norm of consensus existed on the Court, then we might observe dissensus during the Court's private conferences; but, if a glut of easy cases produced unanimity, then we should find roughly the same levels of disagreement at conference as we do in the published record.

We develop this argument in three steps. First, we consider competing accounts of low levels of dissent, with particular emphasis on Pritchett's "easy-case" story and other scholars' insistence on the existence of a norm

of consensus. Next, we assess those explanations against data drawn from the conference records and published reports of the Waite Court. Finally, we take stock of our results, inventorying the kinds of questions they raise for the study of publicly unified bodies, whether courts or other political organizations.

Consensus on the U.S. Supreme Court

Given the dramatic transformation in dissent practices, it is not surprising that generations of scholars have attempted to identify its cause—be it a change in leadership (e.g., Walker, Epstein, and Dixon 1988) or in some other aspect of the Court's institutional setting (e.g., O'Brien 1999). In this article, we are less concerned with unmasking "the culprit," as Walker and his colleagues (1988) put it, than in considering the assumptions underlying stories scholars have told to explain unanimity on the Supreme Court. Those accounts take two forms: easy case and norm change.

The "Easy-Case" Story of Consensus

The "easy-case" story of consensus, which has its genesis in Pritchett's (1941) work, begins with a simple proposition: the Court's docket always contains some proportion of "easy" cases— disputes in which the "correct" holding is entirely plain to all justices, regardless of their political preferences. Since "easy" disputes dominated the Court's docket during the nineteenth and early part of the twentieth centuries, so the argument goes, unanimous decisions necessarily resulted.

But this claim only raises the question of why—why were the early dockets replete with easy cases? The answer offered by many scholars hinges on jurisdictional changes. For most of the Court's history, the justices were *obliged* to hear many disputes, even those involving the most trivial of matters. This obligation may not have been particularly onerous during the Court's formative years but, by the 1870s, it became such. Owing to an expansion of economic life in the aftermath of the Civil War and to congressional legislation, the Court's docket skyrocketed (Frankfurter and Landis 1928).[2] Not only were the justices overburdened with cases, but they were also overburdened with cases "as to which," according to Stern and his colleagues, "they had no choice but to hear oral argument" (1985, 188). And, since "*a large percentage were of little importance and had been correctly decided by the lower courts*," the Court was "obligated to devote much of its energies to matters which were of relatively minor legal significance" (Stern, Gressman, and Shapiro 1985, 189; our emphasis), those of "no great complexity" (Fairman 1987, 130).

The Circuit Court of Appeals Act of 1891 reduced the Court's case load in the short term,[3] but the obligation of which Stern and his colleagues speak did not end until Congress passed the Judiciary Act of 1925, which substantially expanded the degree of discretion the Court had over its docket such that the justices could decline to hear the "easy," insignificant disputes that the lower courts had correctly decided and focus on those of national importance.[4] "By definition," as Grossman and Wells tell us, "these are the kinds of cases least likely to be decided unanimously. There is no a priori reason to expect...justices to be united on politically contentious issues that divide the country" (1989, 59).

Hence, underlying the easy-case account is an assumption about case stimuli: as the disputes became more difficult to decide (largely because the justices became able to decline particularly easy or trivial ones) divisions increased (e.g., Ulmer 1986). This assumption fits quite compatibly with the attitudinal model (see, e.g., Baum 1992), a prevalent perspective of judicial decisions, holding that the Court decides "disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (Segal and Spaeth 1993, 65).

The "Norm" Story of Consensus

While for years, even decades, the easy-case story dominated disciplinary thinking about unanimity, these days it seems to have disappeared from the annals. In its stead has come the "norm" story of consensus. On this account, the cases were not necessarily easy and the justices did not necessarily agree over their resolution. Rather, a norm of consensus existed under which justices felt obliged to mask their differences from public view by working them out via a single majority opinion. Or, as Caldeira and Zorn explain it, "justices who disagreed with the majority usually suffered in silence" (1998, 875).

[2]In 1860, 310 cases were pending before the Court. By the start of the October 1880 term, that number quadrupled, to 1,212 (Frankfurter and Landis 1928, 60).

[3]The 1891 Act created circuit courts of appeals; it also provided the Court with limited discretionary review.

[4]After passage of the 1925 Act, the Court promulgated a written rule (formerly Rule 38[5], currently Rule 10) governing the case selection process—a rule that stresses (among other factors) the importance of the questions presented in petitions.

It was Chief Justice Marshall who apparently effectuated this norm "as a means of enhancing the authoritativeness of the Court" in the eyes of the public and relevant political communities (Morgan 1956, 168). When Marshall "disregarded the custom of the delivery of opinions by the justices seriatim," as his biographer notes, the new Chief "took the first step in impressing the country with the unity of the highest court of the Nation" (Beveridge 1919).

Surely the politics of the day—what with the threat posed to the Federalist Court by the new Republican President, Thomas Jefferson, and his majority in Congress—partially explain Marshall's interest in promoting consensus. But even after those particular circumstances dissipated the norm lived on, or so many scholars argue. Indeed, various historical accounts suggest that Marshall's successors, through the early decades of the twentieth century, not only followed the norm; they reinforced it as well (see, e.g., Murphy 1964). Even Hughes, the author of the oft-quoted line "a dissent in a court of last resort is an appeal to the brooding spirit of the law..." (1928, 68), sought to present a united Court to the public (see, e.g., Danelski 1980).

Systematically Assessing the Existence of the Norm of Consensus

Why the norm of consensus came to an end is a matter of substantial scholarly debate. But that it did end, as Figure 1 illustrates, is a closed subject: by the 1930s and 1940s, "discussions previously cloaked in the secrecy of the conference room [were] being thrown open to the public" (Ballatine 1945, 113). Also seemingly a closed subject is that a norm did, in fact, exist. We made this point at the onset, and it is one worth reiterating: most contemporary scholars tend to tell the "norm" story, rather than the easy-case one.

We certainly understand why. History seems to support it, as do the markedly low dissent rates across a range of disputes. And, yet, the historical record is scattershot, developed by researchers looking to reinforce the norm account; and low dissent rates could just as easily have been produced by "easy" cases as by a "norm of consensus." To put it another way, using published dissent rates as evidence of the existence of the norm presents a classic problem of behavioral equivalence; that is, the problem emerging when two distinct explanations (here, the easy-case and norm stories of consensus) produce the same prediction (here, low dissent rates).

To overcome this obstacle, researchers must identify forms of behavior that are consistent with one, but not the other, explanation (Knight and Epstein 1996). For our problem, at least one such behavior meets this criterion: casting *votes* with the minority at the Court's private conferences but not reporting those "dissents" in the Court's public record (i.e., *U.S. Reports*).[5] This is precisely the sort of behavior we would expect to find if a norm of consensus operated on the Court: public unanimity masking private disagreements. And it is precisely the sort of behavior we would *not* expect to find if the easy-case explanation is operative; after all, if the disputes are that easy for justices to resolve, they should not be disagreeing over their resolution in conference *or* in the public records (see Magrath 1963, 1965; Roper 1965; Seddig 1975).

Of course, we would not want to claim that this activity exhausts the list of all possible ways to overcome the problem of behavioral equivalence presented by competing explanations of consensus on the Court. But we do contend that it is a form of behavior most likely to be associated with the existence of a norm of consensus, and it is a form of behavior that the easy-case account cannot readily explain. By the same token, we would not want to claim, even if we do find evidence of dissensus at conference, that we have provided proof-positive of the existence of a norm of consensus. For norms "are not directly observable" and, thus, notoriously difficult to document—so much so that the best we can typically do is trace their manifestations (Caldeira and Zorn 1998, 875). Such is surely the case with regard to the norm of consensus. We cannot travel back in time and ask justices of the nineteenth century whether the norm was in effect. What we must do instead is consider what the manifesting behavior would look like if it were. Public unanimity in the face of private disagreements presents one such manifestation and, we believe, a compelling one at that.

The Research Plan

Assessing our basic claims—namely, if a norm of consensus induced unanimity on Courts of by-gone eras, then one way that norm could have manifested itself was

[5]After the justices hear oral arguments in a case, they meet in a private conference to discuss it. That discussion results in a *preliminary* vote (e.g., to affirm or reverse the decision of the court below). We emphasize "preliminary" because justices can change their conference votes, if they so wish, before the decision is published (the "final" vote). Our study compares voting at conference (the preliminary vote) and voting reported in the Court's official public records (the final or published vote).

through public unanimity in the face of private conference disagreements; if the easy-case story aptly explains unanimity, then a tell-tale sign would be the lack of both private and public disagreements over case disposition—requires data from both public documents and private conference records of a Court era in which consensus (at least according to the published records) existed. Fortunately, the Waite Court years (1874–1888) provide such an era. That is because Chief Justice Waite kept comprehensive tallies (docket books) of the Court's conference votes.[6] By matching conference *votes* with the reported *votes*, we can ascertain the level of private disagreement among the justices versus the level of disagreement in the public records.[7]

We pursue this task in two stages. First, we consider dissent at the Court level, comparing unanimously and nonunanimously decided cases at conference and in the published records. If the easy-case explanation of dissent holds, we would expect to find that the Court decided most cases unanimously at conference; if the norm explanation is apt, we would expect to find that the norm did not manifest itself at the conference vote stage. Rather, we should observe disagreement, but disagreement that dissipates by the time of the final vote. This is so even though we recognize that the Waite Court presents a rather severe test of the norm account; after all, there was perhaps no other Court in U.S. history that was as inundated with "easy" cases over which it had less control than the Waite Court.[8] Nonetheless, since scholars telling the norm story have not distinguished this era from others of the nineteenth and early twentieth centuries, we have no reason to suspect that the consensual norm was not as operative for Waite and his colleagues as it (apparently) was for members of the Marshall Court. Even more to the point, given that our reliance on the Waite Court may bias our test toward confirming the easy-case story and disconfirming the norm account, evidence of disagreement at conference followed by consensual public voting would, perhaps, provide the most compelling documentation to date of the existence of the norm.

Next, we explore whether individual justices, if they changed their votes, did so in the direction of the majority. This is a critical question to address for two reasons. One is obvious: macro-level trends can mask underlying micro behavior. The second is less so, though nonetheless important: for a norm to be a "norm," "knowledge of it must be shared by members of the relevant community" and they should act in accord with that knowledge (Knight 1992, 2–3). Hence, if only a few justices followed the behavior suggested by accounts stressing the norm of consensus—minority conference voting followed by majority public voting—it would undermine that account.

Court-Level Results

We begin our analysis at the macro-level, asking whether the Waite Court produced as many unanimous cases at its conference as it did in the published records. Figure 2 provides the answer, and it could not be starker: for every term of the Waite Court era, there were significantly more nonunanimous decisions at conference than denoted in *U.S. Reports*. Of the 2,863 cases in our data set only *9 percent* are reported in the official record as generating one or more dissenting votes; that figure for Court conference votes is *40 percent*.

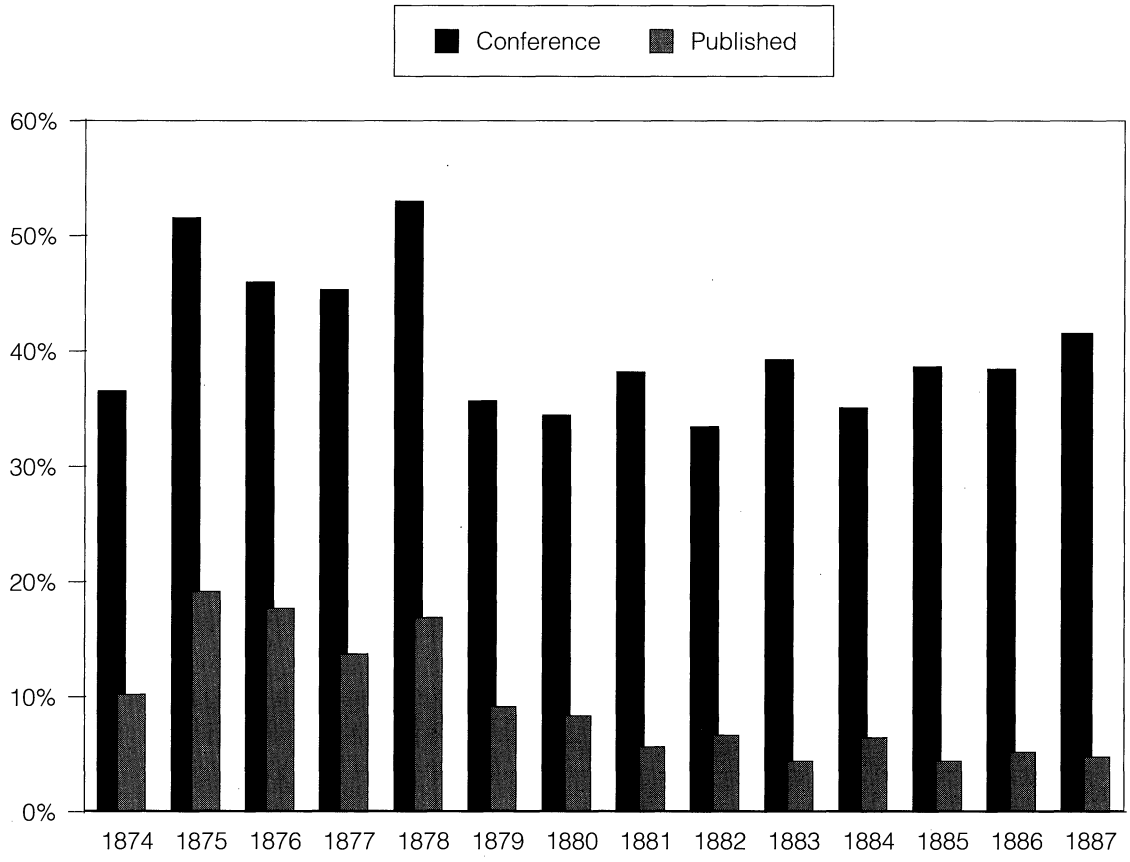
While this pattern is consistent across the entire era, it is also worth noting that the results are not merely the product of one justice changing his mind between conference and the final vote. To the contrary: in 60 percent of the 1,149 nonunanimous conference cases at least two justices disagreed with the majority's conference disposition. By the same token, the findings are not a function of one particular vote distribution moving towards consensus, while others progressed in the opposite direction. As Figure 3 depicts, 98.8 percent of the 1,714 unanimous conference votes remained unanimous at the opinion publication stage. So too, when one (N = 460), two (N = 288), or three (N = 149) justices cast minority votes in private, the public record was more likely to report unanimous votes (89 percent, 82 percent, and 67 percent of the cases, respectively) than it was to reflect conference divisions. This same trends holds when as many as four justices voted with the conference minority. In 53 percent

[6]Waite's docket books are available in the manuscript reading room of the Library of Congress. A handful of scholars have used them for historical analyses of the era or of particular decisions (Fairman 1987; Magrath 1963, 1965; Steamer 1986; Stephenson 1973).

[7]As our emphasis suggests, we examine votes, rather than opinions. Hence, if a justice simply reported his vote, in the *U.S. Reports*, as "Justice Fields dissents," we would code that as a dissent (i.e., as a vote for the minority position). More generally, all data used in this article are from a NSF-funded project designed to be compatible with Spaeth's (1999) U.S. Supreme Court Judicial Data Base and were subject to extensive reliability analyses. In addition to coding the votes of the justices (whether they were in the conference and final vote majorities) we note other case attributes, such as the primary issues at stake.

[8]Prior Courts lacked discretion but did not have severe case load demands; the Fuller Court (1888–1910) benefited from the 1891 Circuit Court of Appeals Act. Only during some years of the White (1910–1921) and Taft (1921–1930) Courts, when the case load began to mount again and the justices had but the limited discretion provided in the 1891 Act, would our test have been equally biased against finding evidence of the existence of a norm of consensus.

FIGURE 2 Percentage of Cases with One or More Dissenting Votes, 1874–1887 Terms



Sources: Docket Books of Morrison R. Waite, Library of Congress, Washington, D.C.; *U.S. Reports*

of those instances, *U.S. Reports* lists no dissents; in 27 percent, the number of final dissensual votes was less than three.

Nor do the results depend on one particular issue area generating a disproportionate share of dissensus; Figure 4 makes this clear. As we can see, in all four major legal areas, the justices disagreed at nontrivial rates at conference but in none of those areas did significant disagreement seep into the public reports. Even civil liberties cases, in which the justices were more likely to stick with their dissenting conference votes than in the other areas, a similar trend emerges: the justices produced nonunanimous conference votes in fifty-eight of the 148 cases but, in 60 percent of those fifty-eight cases, a unanimous report vote resulted.

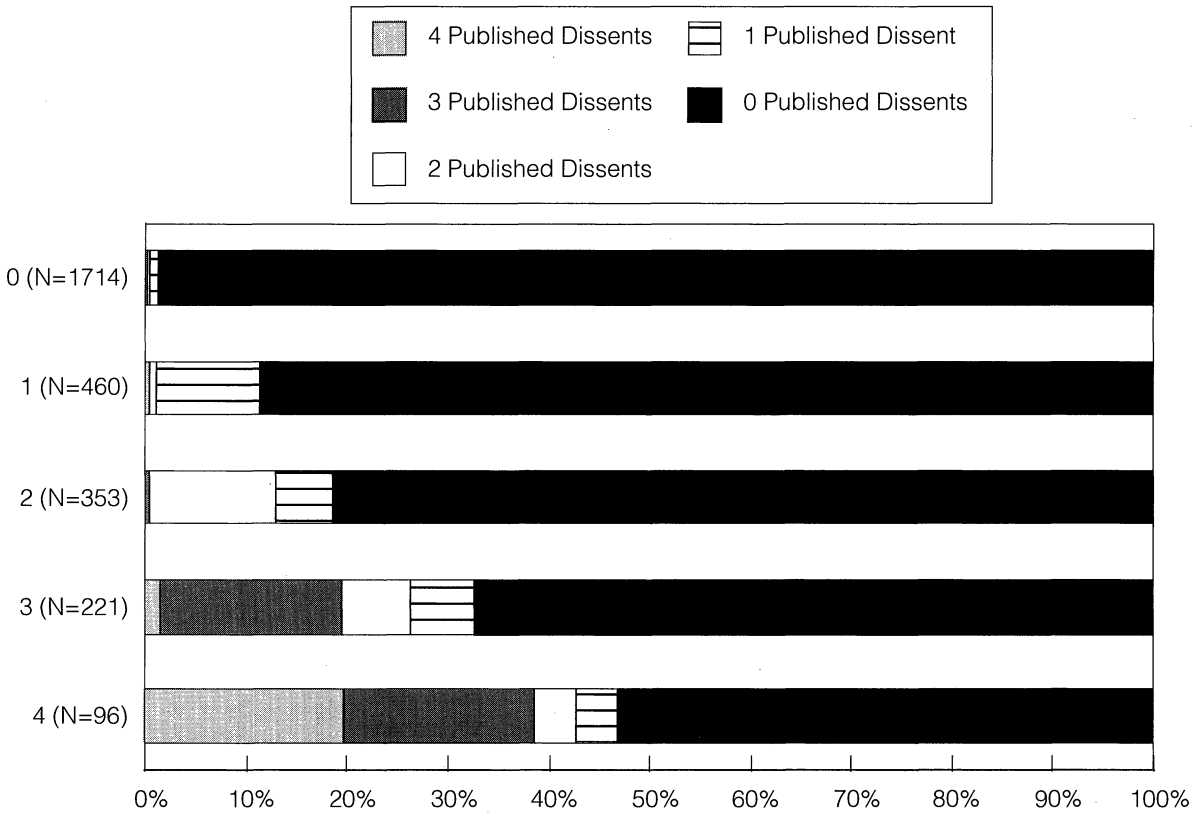
Finally, we should emphasize that our data, if anything, underestimate dissenting behavior during Waite Court conferences. That is because justices, owing to illness or other factors (see Fairman 1987), were occasionally missing from conference but participated in the final vote. So, for example, during the 1878 term, there were fifty-nine cases decided by a nine-person Court but twenty of those disputes were the product of eight-person Court conference votes. Since each of the missing justices could have cast a dissenting conference vote, the nonunanimous percentages may have been higher had all Waite Court members participated in all conference votes.

Yet, even with these missing votes, dissent in private was significantly higher than dissent in public; in fact, as Figure 5 reveals, had all initial votes remained intact, from conference to the published records, the percentage of unanimous cases produced by the Waite Court would not have been markedly different from the percentage produced by today's Rehnquist Court—a Court for which the norm of consensus, by any and all accounts, does not exist.

Justice-Level Results

The data above provide us with every reason to reject the easy-case explanation of unanimous opinions—if the cases were so "easy," why did the justices (privately)

FIGURE 3 Distribution of Vote Switches by Waite Court Justices, 1974–1887 Terms



Note: The Y-axis represents the number of dissenting votes cast during conference and the X-axis, the distribution of dissents in the published record. So, for example, between the 1874 and 1887 terms, one justice disagreed with the disposition reached by the majority at conference in 460 cases. Of those 460 cases, no dissents were reported in the published record in 88.7%, one dissent was reported in 10.2% , two in .7, three in 0% and four in .4%. We exclude 13 cases in which the number of minority conference votes > 4.
Sources: Docket Books of Morrison R. Waite, Library of Congress, Washington, D.C.; *U.S. Reports.*

disagree so often on their resolution?—and with every reason to suspect that a norm of consensus did indeed operate on the Court, and operated across a range of disputes. But did the norm function uniformly across justices? Did all members of the Waite Court, who disagreed with the conference majority, change their votes in the direction of the majority? Or, were there some hold-outs, those who stuck with their dissenting position? If so, this would undermine the assumption of an existence of a norm, to the extent that for a norm to be a "norm" all members of the community should comply with it.

To address these questions, we compare the conference votes of the Waite Court justices with the votes recorded in *U.S. Reports.*[9] Figure 6 displays the key results, the most significant of which concerns the complete uniformity in vote shifts: *in all instances, justices moved from the minority to the majority more often than they stuck with their dissenting votes.* Even Justice Davis, who was more inclined than his colleagues to stay with a minority position, did so in only about 39 percent of the cases; for the balance, he too joined the majority.[10]

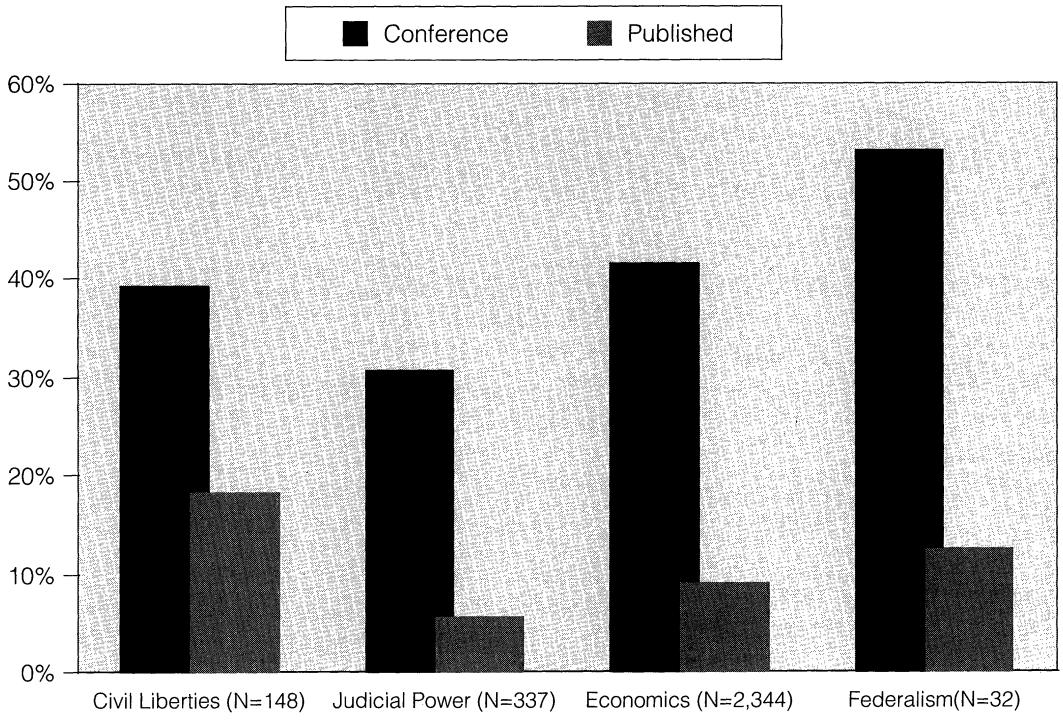
Do these results hold across all issue areas? The answer is a resounding yes: with but one exception, all justices, in all four issue areas, switched their votes from the conference minority to the majority coalition at far greater rates than they stuck with their minority votes.[11] For some justices the behavior was quite extreme; Gray, for example, eventually joined the majority in 87.5 per-

[9]We omit Lamar from the analysis because he participated in only twenty-seven conference votes during the Waite Court era.

[10]Why variation exists in the willingness of Waite Court justices to abandon their conference votes is an interesting question, though one beyond the scope of this study. We commend the challenge to others and welcome them to use our data in attempting to meet it.

[11]The exception is Justice Fields in civil liberties cases. He cast sixteen minority conference votes, switching to the majority in 43.8 percent and sticking with his minority vote in 56.3 percent.

FIGURE 4 Percentage of Cases with One or More Dissenting Votes by Issue Area, 1874–1887 Terms



Note: The issue categories follow the VALUE variable in Spaeth 1999, such that Civil Liberties = values 1–6; Judicial Power = value 9; Economics = values 7–8 and 12; Federalism = values 10–11. We exclude two cases coded as "miscellaneous."
Sources: Docket Books of Morrison R. Waite, Library of Congress, Washington, D.C.; *U.S. Reports.*

cent of the civil liberties cases in which he cast a minority vote at conference, in 80 percent of the judicial power suits, 85 percent of economic disputes, and 75 percent of the federalism cases. But perhaps most interesting of all is Harlan's behavior. Harlan may have gone down in the annals of history as a "Great Dissenter" (e.g., Beth 1955; Latham 1970) but that moniker seems *somewhat* misplaced in light of his strong propensity to move from the conference minority to the reported majority across all four issue areas (in 65 percent of civil liberties cases, 97.1 percent in judicial power; 80.3 percent in economics; 100 percent in federalism).[12]

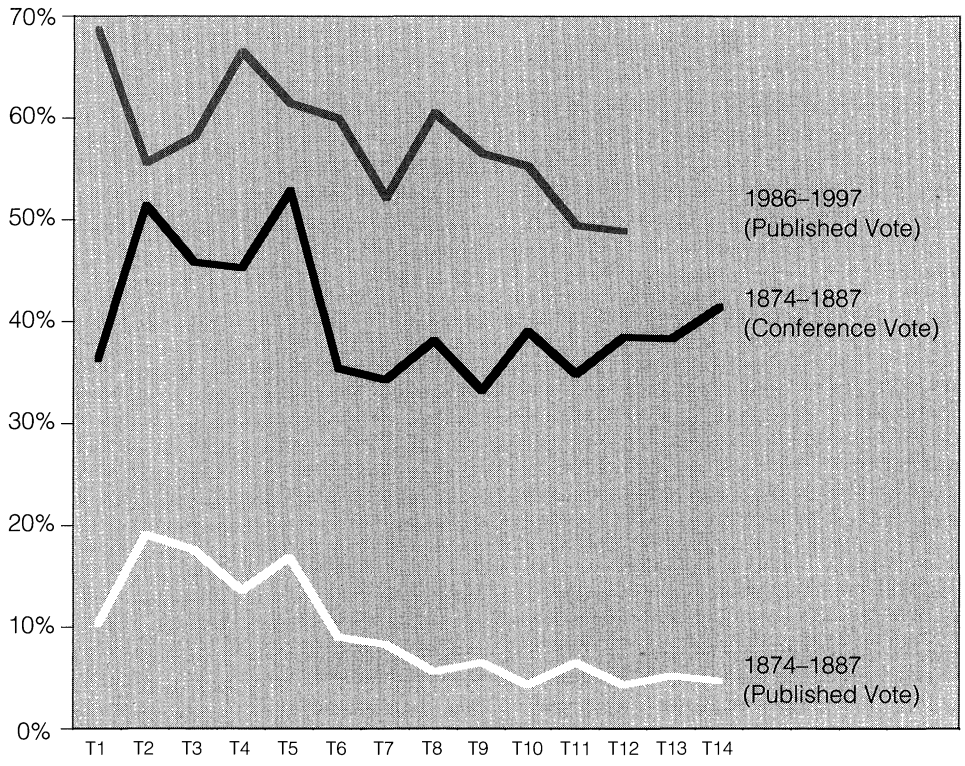
Harlan's patterns are not unusual; in fact, they represent typical judicial behavior during this era. But surely they give us pause for thought about the extent of his willingness to depart from the views of his colleagues and, thus, of the historical treatment of his role on the Court.

[12]We emphasize "somewhat" to acknowledge that Harlan's contemporary reputation probably depends at least as much on the quality and nature of his dissents as on their quantity.

Alternative Explanations of Individual-Level Vote Shifts

The shifts exhibited by Harlan and his colleagues—in the direction of conformity with the conference majority—are, to be sure, consistent with a norm of consensus. Yet, should we attribute all of them to the existence of the norm, or are other factors at work? This is an important question to raise in light of a rather large body of literature suggesting that vote "fluidity" (that is, vote changes between conference and opinion publication) among justices serving on contemporary Courts (that is, those that did or do not follow a norm of consensus) is not random but rather has its roots in institutional, ideological, or other pulls and pushes (e.g., Dorff and Brenner 1992; Hagle and Spaeth 1991; Howard 1968; Maltzman and Wahlbeck 1996b). So, for example, suppose that we could explain a high proportion of vote switching among Waite Court justices on the basis of, say, the institutional factor of workload—that as their docket increased, justices were significantly less likely to switch their votes. Such a result would undermine the norm account to the extent that justices, yes, moved from the conference

FIGURE 5 Percentage of U.S. Supreme Court Decisions with One or More Dissenting Votes, 1874–1887 and 1986–1997 Terms



Note: The X-axis represents Court terms, such that T1 is the first term of the Waite (1874) and Rehnquist (1986) Court eras; T2, the second term; and so on. We do not display data on Rehnquist Court conference votes because they are available only from Justice Thurgood Marshall's docket books, which are of questionable reliability (see Maltzman and Wahlbeck 1996a). Nonetheless, we might speculate that the percentage of non-unanimous conference votes during this period was reasonably close to the final vote figure since the two would diverge significantly only if a rather large portion of *all* cases decided by unanimous final votes were the product of divided conference votes, and *all* members of the minority conference vote coalition switched to the majority. Based on examinations of the Vinson and Warren Court conference votes, this scenario does not occur with the frequency necessary to change significantly the percentages (see, e.g., Nicoll 1999).
Sources: 1874–1888: Docket Books of Morrison R. Waite, Library of Congress, Washington, D.C.; *U.S. Reports.* 1986–1997: Spaeth 1999. To ensure compatibility with the Waite Court data, we used (from Spaeth 1999) ' ' as ANALU and DEC_TYPE = 1, 6, or 7.

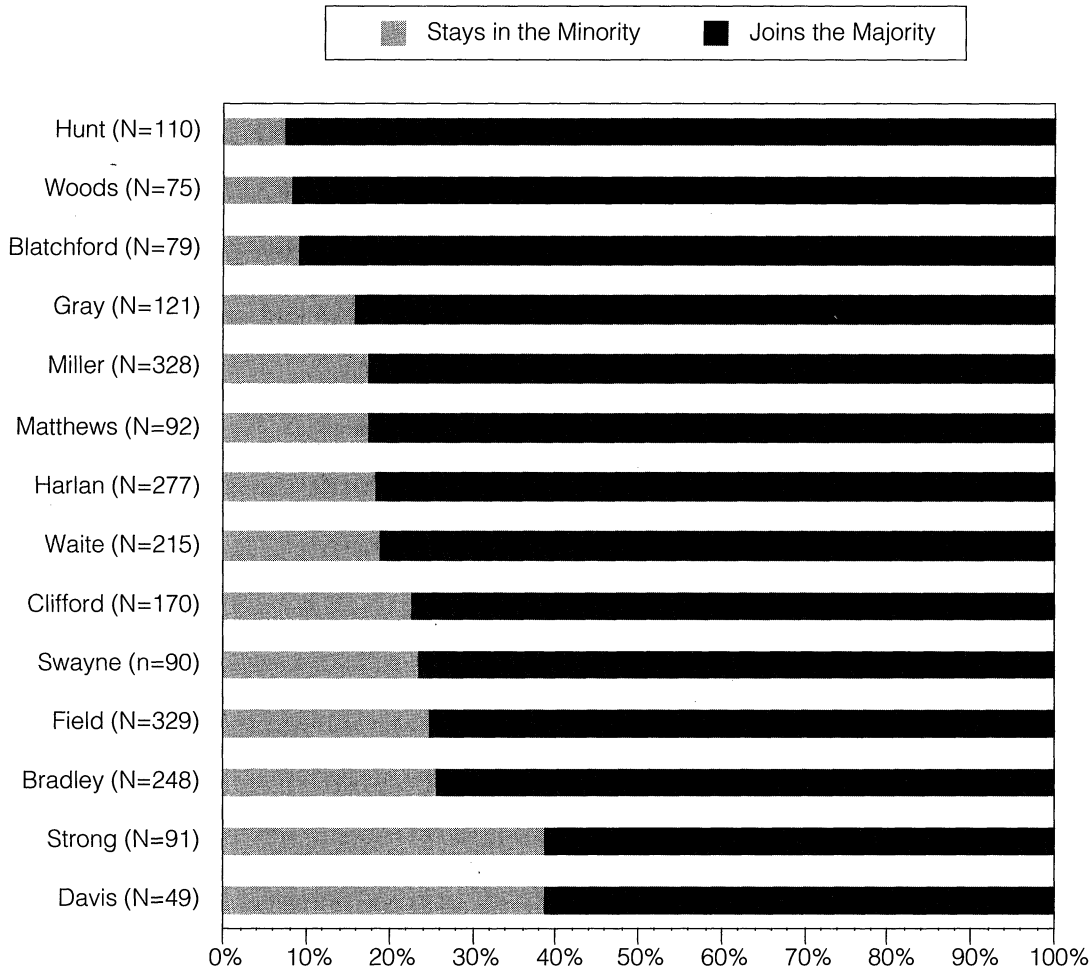
minority to the majority but for reasons quite apart from the existence of a norm.

To assess this possibility, we develop a multivariate model seeking to account for whether a particular justice in a particular case changed his vote (either in the direction of the conference majority or minority) between conference and opinion publication or did not change his vote. Accordingly, individual-level vote switching constitutes our dependent variable and is coded 1 if a justice changed his vote from, say, affirm to reverse or reverse to affirm between the conference and final opinion publication and is coded 0 if he did not change. To construct this VOTE SHIFT variable, we took into account the votes of all justices in all cases (N = 22,183).[13]

As for the explanations of vote switching, the model incorporates five: the two primary ones we have considered thus far—the norm of consensus and easy cases—as well three others that the literature has deemed important—policy considerations, uncertainty, and institutional

[13] This represents the total number of conference and final votes that we could match in the 2,863 cases. For reasons described in Notes 17 and 18, the models we ultimately estimate rely on a smaller number of votes (with N = 17,616 the minimum).

FIGURE 6 Percentage of Cases in which Waite Court Justices Switched Their Conference Votes from the Minority to the Majority, 1874–1887 Terms



Source: Docket Books of Morrison R. Waite, Library of Congress, Washington, D.C.; *U.S. Reports.*

concerns (see, e.g., Maltzman and Wahlbeck 1996b). Let us consider each, along with our operationalizations.

Given our emphasis throughout, we need not say too much more about either the norm or easy-case explanation. The former simply suggests that whatever vote shifts do occur should be unidirectional, from the conference minority to the conference majority. Incorporating this explanation into the vote shift model, thus, presents no great difficulties: we simply include the variable CONFERENCE MINORITY, which takes on the value of 1 if the justice was in the conference minority and 0 if he was not. If the norm explanation provides any leverage on explaining vote shifts, we expect CONFERENCE MINORITY to yield a significant and positive coefficient; that is, justices will be more likely to shift their votes when they are in the conference minority than when they are in the majority. The easy-case explanation, as it pertains to vote shifts, is equally straightforward. If, as the literature suggests, justices are more likely to switch their votes in complex cases (see, e.g., Maltzman and Wahlbeck 1996b), then the converse holds: justices are less likely to exhibit fluidity in easy cases. To measure the notion of easy (complex) cases, scholars have invoked a variety of operational definitions. But, given the time period under analysis here—an era during which the justices were flooded with cases that *the lower courts had decided "correctly"* but that they were forced to hear (Fairman 1987; Frankfurter and Landis 1928; Stern, Gressman, and Shapiro 1985)—one seems particularly apt: easy cases are those that the majority affirmed at conference (AFFIRM).

Given our coding of this variable (1 if the conference majority affirmed the lower court's decision; 0 otherwise), we expect AFFIRM to be negatively related to VOTE SWITCH.

These noted, let us now turn to the three sets of explanations for vote fluidity that have emerged from the study of relatively contemporary courts. The first, policy considerations, suggests that vote shifts come about when justices make an ideological "error" at conference and attempt to correct it before the opinion is made public. On this explanation, then, a liberal (conservative) justice votes with the conservatives (liberals) at conference, realizes his mistake, and shifts his vote in the direction of his usual ideological allies (see, e.g., Hagle and Spaeth 1991), regardless of whether those allies are in the minority or majority.[14]

Incorporating this explanation into our model requires two variables, IDEOLOGICAL DISTANCE and the interaction between IDEOLOGICAL DISTANCE and CONFERENCE MINORITY. These variables capture the insight that the decision to switch a vote (either in the direction of the conference majority or minority) hinges on the ideological direction and distance between a justice and the conference majority. Consider, first, IDEOLOGICAL DISTANCE. Given the inclusion of a variable interacting IDEOLOGICAL DISTANCE and CONFERENCE MINORITY, IDEOLOGICAL DISTANCE alone represents the influence of ideology and distance on *justices in the majority*: the more liberal (conservative) such a justice, the less likely that justice should be to switch from a liberal (conservative) majority to a conservative (liberal) minority, and the more likely he should be to switch from a conservative (liberal) majority to a liberal (conservative) minority.

For liberal conference decisions, we calculate this ideological distance (between a justice and the conference majority) by (1) coding each case on the basis of one of the four Spaeth (1999) value categories depicted in Table 4 (civil liberties, judicial power, economics, and federalism), (2) computing the percentage of liberal conference votes—using the definition of "liberal" provided in Spaeth (1999)—cast by each justice in each of the four value categories; and (3) subtracting that percentage from the mean liberalism percentage of the remaining justices in the conference majority. This means that justices more liberal than a liberal conference majority (i.e., those least likely to shift from the majority) receive negative values, and justices more conservative than the conference majority (i.e., those more likely to shift from the conference majority), positive values. For conservative conference decisions, we similarly calculate how much more (or less) conservative each justice is from the conference majority. Justices more conservative than a conservative conference majority (again, those least likely to shift from the majority) receive negative values, and justices more liberal than the conference majority (again, those more likely to shift from the conference majority), positive values. If the policy hypothesis holds, the coefficient for IDEOLOGICAL DISTANCE should be negative, as those with higher values on the variable should be least likely to shift.

IDEOLOGICAL DISTANCE should work in the opposite direction for justices who were in the minority at conference: the more liberal (conservative) a justice in the conference minority, the more likely he should be to switch to a liberal (conservative) majority. And the more liberal (conservative) a justice in the conference minority, the less likely he should be to switch to a conservative (liberal) majority. To assess this we interact IDEOLOGICAL DISTANCE and CONFERENCE MINORITY, which is the impact of IDEOLOGICAL DISTANCE for those who were in the conference minority. If the policy hypothesis holds, the coefficient for IDEOLOGICAL DISTANCE*CONFERENCE MINORITY should be positive, as those justices with higher values should be more likely to shift.

Uncertainty—or the notion that a "justice did not fully understand the issues involved in a particular case when casting the initial vote," (Maltzman and Wahlbeck 1996b, 584; see also Howard 1968)—is a second explanation offered in the literature for vote shifts. While scholars have offered a number of measures to tap this concept, one has emerged as a particularly potent (and intuitive) predictor: length of service. The general idea is that the longer the tenure on the Court, the less likely the justice is to lack a command of the relevant legal issues, and thus the less likely to switch his vote (see, e.g., Howard 1968). To account for this explanation, we attach to each justice on each case the number of terms he had served at the time the Court was considering the case (TENURE). Given this operationalization, we expect TENURE to yield a significant and negatively signed coefficient: as TENURE increases, the tendency to vote switch should decrease.

Finally, judicial specialists have argued that various aspects of the Court's institutional environment may affect judicial fluidity. Surely the one most relevant to our investigation is workload: given the mounting docket of the Waite Court, coupled with the lack of discretion the justices had over their docket, it is entirely possible that some may have moved from the conference minority to the majority because they lacked the time to dissent.[15] To capture a potential workload effect, we rely on data com-

[14] Why ideological "mistakes" occur is an interesting question, with no shortage of answers—and competing answers at that—in the literature. Compare, e.g., Epstein and Knight (1998) and Hagle and Spaeth (1991).

piled on the Court's annual workload (specifically, the number of cases on its docket) by the Office of the U.S. Attorney General—one of the few, if not only, credible sources for the Waite Court years. Excluding the first three terms of our study (1874–1876) for which reliable workload data are unavailable, the number of cases on the Court's docket ranged from 1,100 to 1,437 cases. Since a one-unit change in docket borders on the trivial, we first divided the annual figures by 100; we then subtracted 11 from these scores, yielding a DOCKET variable that ranges from 0 to 3.37.[16]

In accord with the literature, we expect that the effect of DOCKET is conditional: as the Court's workload increased, justices in the conference minority should have been more likely to move to the majority to avoid having to explain their dissenting views, but justices in the conference majority should have been less likely to move. To assess this possibility, we incorporate DOCKET and the interaction between CONFERENCE MINORITY and DOCKET

Estimation Results

In short, we posit five possible explanations of vote switching (regardless of whether it is in the direction of the minority or majority): the norm of consensus (CONFERENCE MINORITY), easy cases (AFFIRM), policy considerations (IDEOLOGICAL DISTANCE, IDEOLOGICAL DISTANCE*CONFERENCE MINORITY), uncertainty (TENURE), and institutional concerns (DOCKET, DOCKET*CONFERENCE MINORITY). To estimate their effect on vote switching, we use logistic regression with robust (Huber-White) standard errors clustered by the different justices, which takes into account the possibility that justices will have different error variances; and with fixed-effects for the justices, which deals with potentiality that different Court members may have different predispositions toward vote switching. Table 1 presents the results, that is, the estimates of four models (the first two estimated with clustered robust standard errors and the second two, with robust standard errors and fixed effects) housing two variations of the vote shift explanations (one without DOCKET and one with it).[17]

Let us first consider Model 1, an interactive model in which each variable can differentially influence fluidity depending on whether the justice voted with the majority or in the minority at conference.[18] Our expectation is simple enough: if the norm was in effect during the Waite Court years, it should have operated to induce justices in the conference minority to switch their votes regardless of the impact of the other variables.

The results lend support to this proposition. Beginning with justices in the conference majority, we see that TENURE and AFFIRM produce significant coefficients, that is, they do influence whether a justice in the conference majority will change his vote; yet, their actual effects on the likelihood of switching are negligible.[19] So, for example, the probability of a first-year justice (again, in the conference majority) switching his vote is about .002; that figure drops to .0008 for AFFIRM cases. And TENURE is in the wrong direction. Of greater relevance to the norm account are the results for justices who were in the minority at conference: regardless of their length of service (TENURE) or the ease of the case (AFFIRM), these justices—in line with the norm story—changed their votes. When all other variables are set at 0, the log likelihood of switching by a justice in the conference minority is 1.29 (–6.30 + 7.59), which corresponds to a probability of .78. No other explanations incorporated in the model influence this likelihood.[20]

[15] Justice Strong's statement in *Munn v. Illinois* (1876, 154) drives home this possibility: "When the judgment in this case was announced by direction of a majority of the court, it was well known by all my brethren that I did not concur in it. It had been my purpose to prepare a dissenting opinion, but I found no time for the preparation, and I was reluctant to dissent in such a case without stating my reasons. Mr. Justice Field has now stated them as fully as I can, and I concur in what he has said." We thank Jim Speta for bringing this quote to our attention.

[16] Subtracting 11 accomplishes two ends. First, it places the constant within the realm of observed data: Knowing the likelihood of switching votes when the Court's workload is 0 cases per year is meaningless. Second it avoids rather extreme collinearity when we interact DOCKET with the CONFERENCE MINORITY variable. Without this transformation, the correlation between DOCKET*CONFERENCE MINORITY and DOCKET was greater than .99, preventing meaningful analysis. Nonetheless, even with this transformation, the coefficient on DOCKET still represents the change in the likelihood of vote switching given a 100-case increase in the Court's workload.

[17] We estimate models with and without DOCKET because the lack of reliable docket data for first three terms of the study forced us to omit approximately 4,000 votes for the model with DOCKET.

[18] This model drops the 182 votes we could not code in accord with Spaeth's (1999) ideological categories.

[19] Because of the inclusion of the interactive variables, TENURE and AFFIRM represent the impact of those variables on justices in the conference majority only.

[20] To see this, keep in mind that the influence of any substantive variable for those coded 1 on the interaction (i.e., justices in the minority) is the combined effect of that variable plus the interaction for that variable. Thus, in Model 3 the impact of tenure for a justice in the minority on the log-odds ratio is .059 (the TENURE coefficient) – .058 (the TENURE*CONFERENCE MINORITY coefficient) or essentially zero. Similarly, the change in the ratio for AFFIRM is .091 for justices in the conference minority, which has a negligible effect on the baseline probabilities of switching.

TABLE 1 Logistic Regression of Vote Shifts on the Waite Court, 1874–1887 Terms

	Model 1	Model 2	Model 3	Model 4
Conference Minority	7.59**	7.31**	7.75**	7.40**
	(.59)	(.57)	(.36)	(.50)
Affirm	−.81**	−.82**	−.80**	−.83*
	(.25)	(.15)	(.30)	(.35)
Tenure	.06**	.07**	.15**	.02
	(.02)	(.02)	(.02)	(.15)
Ideological Distance	.02	.004	.02	.003
	(.04)	(.029)	(.03)	(.029)
Docket	—	−.04	—	.21
		(.17)		(.47)
Conference Minority*Affirm	.90**	.92**	.92**	.97**
	(.25)	(.16)	(.32)	(.38)
Conference Minority*Tenure	−.06	−.06*	−.06**	−.06**
	(.03)	(.03)	(.02)	(.02)
Conference Minority*Ideological Distance	−.01	.02	−.01	.02
	(.04)	(.04)	(.03)	(.03)
Conference Minority*Docket	—	.38	—	.36*
		(.21)		(.15)
Justice Bradley	—	—	−1.57**	.14
			(.30)	(1.79)
Justice Clifford	—	—	−2.26**	1.46
			(.40)	(3.56)
Justice Davis	—	—	−2.47**	—
			(.41)	
Justice Field	—	—	−2.22**	.54
			(.36)	(2.82)
Justice Gray	—	—	−.21	−.27
			(.34)	(.39)
Justice Harlan	—	—	−.62*	−.06
			(.29)	(.67)
Justice Hunt	—	—	.44	1.70
			(.36)	(1.46)
Justice Lamar	—	—	1.05	.37
			(.58)	(1.08)
Justice Matthews	—	—	−.66*	−.60
			(.33)	(.39)
Justice Miller	—	—	−1.97**	.92
			(.38)	(2.95)
Justice Strong	—	—	−1.70**	.35
			(.37)	(1.87)
Justice Swayne	—	—	−1.87**	.91
			(.40)	(3.00)
Justice Waite	—	—	−.86**	.20
			(.29)	(1.23)
Justice Woods	—	—	.16	.32
			(.33)	(.41)

(continued on next page)

TABLE 1 Logistic Regression of Vote Shifts on the Waite Court, 1874–1887 Terms *(continued)*

	Model 1	Model 2	Model 3	Model 4
Constant	–6.30** (.46)	–6.43** (.47)	–6.21** (.36)	–6.64** (.83)
N	22,001	17,616	22,001	17,616
Wald c^2	53981.23	2722.08	2136.71	1714.81
Pseudo-R^2	.77	.79	.78	.80

Notes: Robust standard errors in parentheses. The dependent variable is whether the justice switched his vote (coded 1)or not (coded 0). We could not estimate a coefficient for Davis in Model 4 because he completed his service on the Court before docket data are available.

Sources: Docket Books of Morrison R. Waite, Library of Congress, Washington, D.C.; *U.S. Reports.*

* p .05

** p .01

Now consider Model 2 (see Table 1), which replicates Model 1 while incorporating DOCKET and the interaction between DOCKET AND CONFERENCE MINORITY. If workload has any effect, it should be negative for those in the majority and positive for those in the minority, for sticking with a minority vote could lead to extra work if the justice chooses to write a dissent. In fact, workload is negative for those in the majority and positive for dissenters, but neither impact is significant and its overall effect, minimal: as DOCKET increases from 0 to 3 (representing a change from the minimum of 1,100 to the maximum of 1,400 cases heard per term), the probability of switching for a dissenting justice with ten years tenure increases from .80 to .85, for cases the conference majority reversed. For a similar justice in the conference majority, the probability of switching is, rounding to the third decimal place, .003 under the highest or lowest caseloads.

In short, including DOCKET does little to change our fundamental results. Again, and as the norm of consensus story suggests, the likelihood of switching is minute for justices in the conference majority and remains so under any conceivable values of the independent variables. Also in accord with the norm account, the likelihood of switching is exceptionally high for justices in the conference minority. This finding holds even after we take into account the full impact of the remaining variables.

But does it hold when rerun the analyses with fixed-effects models? The answer, as Models 3 and 4 indicate, is yes. To be sure, as we observe in Model 3, many justices switch significantly less often than Blatchford, who—by tyranny of alphabetical order—was the excluded Court member. But the coefficient for MINORITY is enormous and positive, and the constant, which reflects the predisposition for those in the majority, is enormous and negative. Model 4, which incorporates variables designed to assess the effect of caseload, presents much the same story. The only difference here is that DOCKET is now significant at the .05 level for justices in the minority. But, even controlling for its effect, being in the minority is, overwhelmingly, what drives our results.[21]

Discussion

Contemporary scholars do not typically include Morrison R. Waite on their lists of truly great justices, but he performed a profound service to the scholarly community. By detailing his and his colleagues' private votes, he left a nearly unparalleled tracing of the decision-making processes of a nineteenth century Supreme Court.

In this article we followed Waite's trail—from the conference to the final vote—with the goal of determining whether it would lead us to, at the very least, plausible and, at the most, compelling evidence of the existence of a norm of consensus. With our search now concluded, we would be loathe to say that we have found concrete evidence of the existence of a norm of consensus. After all, as we noted at the onset, norms are not directly observable; only their manifestations are traceable. But the

[21]In light of these results, we performed one other check on the data: We ran simple OLS regressions of the number of vote switches on docket size for majority-to-minority switchers and minority-to-majority swtichers—even though we recognize that such analyses, by capturing all excluded variables correlated with DOCKET, might overstate its effect. The results indicate that DOCKET is not responsible for vote switching in either direction.

data are suggestive: a full compliment of analyses reveals behavior that is consistent with the story scholars have told about the existence of a consensual norm, that is inconsistent with another tale, and that cannot be erased by considering other explanations. We are thus prepared to say that justices of the nineteenth (and perhaps into the twentieth) century did seem to hide their private disagreements from the public, that a norm of consensus did, in all likelihood, exist.[22]

Social scientists and historians have long suspected as much. And, yet, the extent of the behavior induced by that norm is even greater than they might have anticipated: in fully 40 percent of all cases decided during Waite Court conferences did at least one justice desire a disposition different from the majority's preference; of that 40 percent, only 11 percent were eventually resolved by nonunanimous votes. Underlying this individual-level trend is complete uniformity in vote shifts: all members of the Waite Court moved from the minority to the majority more often than they stuck with their dissenting votes.

These findings are important in their own right, as they provide confirmation of an assumption underlying most contemporary accounts of the demise of consensus on the Supreme Court. At the same time, the fact that a norm of consensus did, in all likelihood, exist during much of the Court's history raises (and, in some instances, reraises) whole sets of intriguing questions. Perhaps the most obvious center on the norm's effect: Did it have the impact its designer (Marshall) and its maintainers (his immediate successors) anticipated? How important was the norm, relative to other factors, in helping the Court to achieve legitimacy in American society?

Other questions, such as the mechanisms Chiefs invoked to ensure compliance with the norm, are equally apparent, and we certainly hope they will (re)capture the imagination of the range of judicial specialists. But there is more. Because (at least empirically) we can identify many other political organizations that reach (or, at some point in their history, reached) unanimous decisions—from the Mexican Congress to the British Cabinet to the Lithuanian Constitutional Court—and do (or did) so in the absence of formal requirements, our study raises a host of questions that transcend the legal literature: why do these bodies reach consensual decisions? If the answer (at least for some) implicates a norm of consensus,[23] then we might ask whether the designers established the norm to meet the same ends Marshall had in mind and whether they were successful. That is, did the norm help the political organization to establish credibility and legitimacy? If so, should societies encourage their representatives and judges to engage in conformity-induced behavior (see, generally, Buchanan and Tullock 1962; Rae 1975)?

Still other questions are easy enough to summons but it is the larger point that should not be missed: documenting the existence of consensual norms, while we believe a worthwhile enterprise, should serve as the beginning, and not the end, of scholarly inquiries into the meaning, importance, and potential effect of decisions reached by publicly unified but privately divided political organizations.

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[22]As this article was going to press, we received a note from Professor Robert Post, who is writing Volume X of the Oliver Wendell Holmes Devise History of the Supreme Court, which covers the period 1921–30 when Taft was Chief Justice. For the volume, Professor Post compared voting in conference and voting in the published records—much as we did in this article. He relayed to us that his study reaches "similar conclusions" as ours.

[23]At the very least a comment Bagehot attributes to Lord Melbourne is suggestive "Now is it to lower the price of corn or isn't it? It is not much matter which we [the British Cabinet] say, but mind, we must all say *the same*" (1961, 13).

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