States of agreement: A new look at law clerks and consensual norms in state supreme courts

by

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Introduction

On November 3, 1995, David Morales was arrested outside a Los Angeles Police Station for being under the influence of and in possession of PCP. His wife had brought him to the police station asking for help. Morales was convicted and sentenced to twenty years to life in prison for the crime. This case was appealed all the way to the California Supreme Court on the basis of prosecutorial misconduct. During his summation, the prosecutor told the jury to consider, when deciding on the possession charge, that Morales was under the influence of PCP. Though the jury was informed that intoxication alone is not sufficient evidence to convict someone of possession, the prosecutor asked them how someone could become under the influence of a controlled substance without possessing it.

The seven justices of the California Supreme Court wrote three opinions in People vs. Morales\(^1\). The controversy in the case was over whether the prosecutor had presented a case which was “legally incorrect” (7). The appellate defense attorney argued that the prosecutor had mislead the jury about the law governing PCP possession. In the majority opinion, Justice Mosk stated that while the prosecutor may have misstated the law, the court did present correct legal theory to the jury. According to Justice Mosk, it was the defense attorney’s responsibility to point out this misconduct to the court. Since counsel made no objection, the claim was waived. Justice Mosk went on to interpret the prosecutor’s summation not to be misleading. Justice Mosk noted, however, that the decision was a close call.

\(^1\) See People vs. Morales S059461.
Concurring in part and dissenting in part, Justice Kennard wrote that by constantly suggesting that the defendant could not become intoxicated without being guilty of possession, the prosecutor clearly did commit prosecutorial misconduct. Justice Kennard agreed with the majority, however, that to overturn the conviction, the defense attorney would have had to make an objection during the trial. The dissenting opinion by Justice Brown stated that the prosecutor used erroneous legal theory in his summation, and it is impossible for the reviewing court to determine whether the jury came to the guilty verdict on erroneous theory, and thus the decision must be reversed.

It is rare to see three opinions in a state supreme court. Nevertheless, while there is little disconsensus on state supreme courts, there is some disconsensus. Herein, I examine disconsensus on state supreme courts. During my study I found California to be among the states with the least amount of consensus on the state supreme court. I also found that California employed more law clerks than any other state in my study. It is my contention that California enjoyed so many disconsensus because of the amount of law clerks employed by the Court. I hypothesize that justices engage in dissent based on the amount of resources available. When justices have more clerks they are able to write more opinions because there are more clerks to assist with opinion writing duties.

The Tradition of Dissent

This nation has a very strong tradition of dissent. In the judiciary, dissent has severed an important role, and led to significant ends. In the landmark 1896 U.S. Supreme Court case Plessy v. Ferguson (163 U.S. 537) the Court upheld “separate but equal” segregation as constitutional. In a 7-1 decision, Justice Harlan wrote a powerful dissent that would go down
in history. In his dissent, Justice Harlan correctly projected that “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.” He also wrote that the Louisiana statute which prohibited African Americans from riding in the same railroad cars as whites was written to keep blacks out of white cars and not the other way around. Because of the underlying intent of the law, Harlan finds it to be in violation of the 14th Amendment.

Justice Harlan’s dissent provided the foundation for Chief Justice Warren’s majority opinion in Brown v. Board of Education (347 U.S. 483) 58 years later. Knowing how disconsensus can affect the power of an opinion the Warren Court worked very hard to reach a strong consensus, so that the decision would be less likely to be reversed in the future.

In light of this, it seems relevant that there were two dissenting\(^2\) opinions written in the Morales case in California. David Morales was sentenced to serve twenty years to life in prison. These two opinions could one day be a strong basis for a future appeal. Had Morales been convicted in a state with a stronger consensual tradition he likely would have a smaller chance at having his conviction overturned one day.

Chief Justice Charles Evans Hughes once said, “We are under the Constitution, but the Constitution is what the judges say it is” (Peretti 1999, 3). This is a profound statement. Since it is up to judges to determine what the law means, they are in a unique position to change law as they see fit. They may change the law because they believe it is not in line with the original intent of the constitution, or possibly because it seems inconsistent with the direction of the country. Alternatively, justices may make decisions based on their own policy preferences. The media coverage of Chief Justice Roberts and Justice Alito’s recent

\(^2\) Here, and throughout I use dissent in reference to both dissenting and concurring opinions.
senate confirmation hearings make it clear that it is widely accepted that the policy preferences of individual justices matter. However, we do not see as much of this sort of controversy surrounding judicial appointments in state courts. Is this simply because people pay less attention to state government than federal, or are people generally less concerned with the politics of lower court justices?

Perhaps personal policy preference is a less important criterion for state supreme court justices. The controversy may also be mitigated by the assumption that their policy preferences are more in line with those of the citizens of the states. Scott D. Gerber and Keeok Park argued that the United States Supreme Court issues larger numbers of dissenting opinions because of the unique institutional context of the Court (1997, 390). If the amount of disconsensus on the U.S. Supreme Court is unique, it may suggest something about the overall role of judicial decision-making. Do justices on lower courts reach more consensuses? If they reach more consensuses, the important question is why they behave so differently from the high court.

Bradley Best accredits disconsensus in the Supreme Court to the addition of more law clerks and support personnel. In Law Clerks, Support Personnel and the Decline of Consensual Norms on the United States Supreme Court (2001), he contends that as the size of the staff increased, the justices have less personal interaction with each other. Because there is less interaction, there are fewer consensuses. Prior to Professor Best’s book, several scholars had suggested, but not tested, that something about structure of the Court caused the decline in consensual norms. Best provides an in-depth study of the “law clerk” effect,

3 It is probably worth noting that Professor Best was my advisor and professor while I was an undergraduate at Buena Vista University.
showing very strong evidence that the size of the staff is correlated with the independence among the justices.

Herein, I intend to apply this theory to state supreme courts. While there have been studies on both the institutional setting of state supreme courts and studies on dissensus in these courts, no one has ever studied the effect of larger staffs on state supreme courts. As Professor Best found a positive correlation between law clerks, support staff and a decline of consensual norms on the Supreme Court, I predict I will find a similar correlation between law clerks and consensual norms on state supreme courts. My goal is not only to look at the empirical and highly quantitative question of whether or not this effect exists in these courts, but also the normative question of whether consensual norms are good or bad. In the end I hope to be able to provide prescriptive theory pertaining to how a court should function at the institutional level.

Law Clerks and the United States Supreme Court

Best explored the Court as a small legislative body. The role of law clerks on the Court had become increasingly influential on opinion writing (Best 2002, 2-4). This approach comes from Eugene Rostow, who advocates that scholars should look at judicial behavior as a set of multi-causal phenomena. Rather than the psychometric treatment of judicial decision making, scholars should use inclusive models and pay attention to the intuitional and structure features of the legal system (Rostow 1967, 57).

Best explains the concept of “neo-institutionalism” as the discipline’s reconsideration of institutional factors as shapers of individual behavior (2002, 11). This has been applied to state courts by Paul Brace and Melinda Gann Hall. I discuss their work later, in my section
on state courts. Prior to Best, however, neo-institutionalism had not been widely used by those who study the U.S. Supreme Court. Scholars did not entirely ignore the institutional setting in explaining dissensus on the Court. The trend has been to credit consensus or dissensus to the chief justice, turnover on the court, inexperienced justices, the caseload, substantive changes to the docket and ideological differences among the justices. Chief Justice Hughes encouraged disagreement on his Court and his Court produced more dissents than previous Courts. Scholars have seen this as evidence that the chief justice is responsible for consensual norms on the Court (Best 2002, 14).

According to Best, law clerks on the Supreme Court participate in such important roles as case selection and opinion writing. He points out that during the time prior to 1886, law clerks were not employed by the Supreme Court. The ever growing workload became too much for the justices to bear on their own and in 1886, Congress passed the Sundry Civil Act, which allowed each justice a stenographic clerk; it was not until the early twentieth century that law clerks would become part of each justice’s chambers. Over time, the institutional role of these clerks has changed. They have gone from simply helping justices prepare for oral argument and doing research to their current role of helping select cases to be heard and drafting opinions (Best 2002, 35-36).

In his study, Best tests two general hypotheses:

H1. As the number of law clerks and support personnel assigned to the United States Supreme Court during the period of 1935 to 1995 has increased, the justices’ opinion writing behaviors have become increasingly nonconsensual
H2. Increases in the number of nonconsensual opinions written by the justices during the period 1935-1995 is related to the increasing presence of law clerk and support personnel on the Court when controlling for changes in the ideological composition of the Court, changes in the composition of the Court’s docket of cases granted plenary review, changes in the degree of inexperience on the Court, the frequency of turnover in the Court’s
membership, changes in the leadership style of Chief Justices, and changes in the size of the Court’s caseload (2002, 55-56).

To test the first hypothesis, Professor Best uses quantitative statistics. He tests five dependent variables: the total number of opinions written by justices, the number of opinions for the Court, the number of separate opinions written by the justices, the number of dissenting opinions written by the justices and the number of concurring opinions written by the justices; and two independent variables: the number of law clerks assigned to the Court and the number of support personnel assigned to the Court. To test the second hypothesis, Best limits the range of dependent variables to measure of dissenting, concurring and separate opinions. This allows him to compare his data directly to previous research vis-à-vis several multiple regression models, using as independent variable the number of law clerks, support personnel, and competing explanations of dissensus.

Ultimately, Best concludes that the presence of law clerks on the Court has altered the justices’ tolerance for consensus seeking behavior. He does not find a statistically significant relationship between the numbers of support personnel and number of concurring opinions; however, he does find a statistically significant relationship between the numbers of support personnel and the number of dissenting opinions. Overall, staff size is related to the number of different opinions written, so Best is confident in saying that the number of support staff is linked to the broad patterns of disagreement that prevent the Court from building strong majority opinion collations.
**Reductionist Models of Supreme Court Behavior**

Though it is very important to pay attention to the institutional setting of a court, it is equally important not to forget reductionist models, as they help explain individual voting behavior. Reductionist models are models which reduce many cases down to a few simple variables to create a clear, parsimonious way to compare across many different cases. The attitudinal and rational choice models are two such reductionist models and are particularly important to this study. These models also give us a better understanding of the individuals who make up each court, by showing what causes them to vote a certain way.

In *The Supreme Court and the Attitudinal Model Revisited*, Jeffrey Segal and Harold Spaeth outlines the attitudinal model of Supreme Court behavior. The attitudinal model is a reaction to the legal model of Supreme Court behavior, which holds that the Supreme Court looks at the facts in light of precedent, plain meaning and original intent, and decides based on these alone. The attitudinal model holds that the Court looks at the facts in light of the ideological attitudes and values of the justices. Conservative justices cast votes that further a conservative ideology. Liberal justices cast votes that further a liberal ideology (Segal and Spaeth 2002, 86).

This model borrows from the legal realists of the 1920s as well as concepts of political science, psychology and economics. According to Segal and Spaeth, the legal realists, led by Karl Llewellyn and Jerome Frank, questioned the motivations of the conservative jurisprudence of the time. The legal realists saw that the law was not socially neutral. Other legal scholars of the time insisted that a judge’s private views did not come into play and that the law is autonomous; judging was the act of finding the law, not making it. Legal realists hold that judging is inevitably lawmaking, because the results of legal
judgment ultimately determine what the law is. This, according to the legal realists, is not because judges attempt to seek power for themselves, but rather that “judicial creation” is an inevitable effect of an ever-changing society (Segal and Spaeth 2002, 87).

If justices, indeed, are political actors, rational choice theory might help to explain how they make decisions. Rational choice theory seems to have invaded every area of political science. William Riker describes two elements of the rational choice model:

1. Actors are able to order their alternative goals, values, tastes, and strategies. This means that the revelation of preference is transitive…
2. Actors choose from available alternatives so as to maximize their satisfaction (Riker 1990, 172).

Since rational choice analysis assumes actors are experts, it assumes that actors will, indeed, make value maximizing decisions. This has been criticized in many fields, such as international relations, because actors do not have perfect knowledge, and often make decisions which do not produce the best outcome.

When studying judicial decisions, the model seems to fit the requirements of rational choice much better. The events of the Court are defined so clearly that the cases are actually called ‘cases’. The players are certainly experts. The actors are considered dispassionate (though if you buy into the attitudinal model they may not be so dispassionate.) The game has clear rules. Looking at the Court through the rational choice model, we can easily plug in the addition of law clerks and see how that would affect which decision is value maximizing. As Best writes, the addition of law clerks to the Supreme Court decreased interaction between the individual justices. I explore how rational choice analysis can enhance our understanding of Best’s law clerk theory.
Segal and Spaeth divide rational choice analysis in the Supreme Court into two camps. The internal camp focuses on interaction between justices. The external camp focuses on constraints imposed on the court by external political actors (Segal and Spaeth 2002, 100). For the purposes of this research, I am more interested in the internal camp. The reason for this is that when looking at the law clerk effect on consensual norms, it is more important to explore internal behavior. Admittedly, though, since external pressure may affect voting behavior, it may also affect consensual norms to an extent.

Walter Murphy is perhaps the most important scholar in the internal camp. In *Elements of Judicial Strategy*, Murphy explains the strategies a justice must take on in order to achieve his or her policy goals. Murphy says that a Supreme Court justice must behave like any leader in politics. When furthering a policy goal, the justice must strategically act to gain the endorsements of his or her peers, but also take steps to ensure that subordinates (lower courts) will accept and apply the policy decision. A strategic minded justice should use the same strategy when influencing lower courts as when persuading his or her associates (Murphy 1964, 91-92). In this, Murphy looks at the entire judicial structure as a bureaucracy. This is relevant to my research because Murphy views the Court in light of the group behavior, which is essentially what I am doing.

Murphy also explores the ethics of judicial strategy. It seems almost like a loaded question to ask if strategic interaction is ethical, since we are trained to think that the judiciary is, and should be, completely independent of politics. Murphy believes this stemmed from the fact that justices have to be the impartial voice of the law while at the same time writing opinions which are supposed to provide justice to the people. The obvious question is whether a justice is acting ethically when pursuing specific policy interests.
Murphy points out that justices are inevitably policy makers, since they must ultimately either uphold or strike down legislation (Murphy 1964, 176-178).

Another important text in judicial strategic interaction is *The Choices Justices Make* by Lee Epstein and Jack Knight. In *Choices*, Epstein and Knight attempt to lend more systematic evidence to Murphy’s theories. Their strategic account of judicial decision making comprises three main ideas: “justices’ actions are directed toward the attainment of goals; justices are strategic; and institutions structure justices’ interaction” (Epstein and Knight 1998, 10-11). The first idea is not much of a departure from the attitudinal model. It also follows very closely to rational choice theory. When making a decision, a political actor will choose the option believed to best promote his or her own policy preferences. This assumes that the actor can rank alternatives in terms of predictable outcomes. Epstein and Knight point to examples of Supreme Court justices voting against certain policy preferences which they hold in order to better further policy goals which they value more. In this sense justices are behaving strategically. The third assumption is very important. Epstein and Knight claim that the institutional setting of the Supreme Court determines the interaction between justices. When justices write opinions, they have to write them so that other justices will sign on to them and when they hand down decision, they have to be written so that other institutions will see them as binding (Epstein and Knight 1998, 10-13).

These rational choice and strategic interaction studies have primarily been used on the U.S. Supreme Court. Scholars such as Murphy, Epstein, and Knight have done much to show how U.S. Supreme Court justices behave as strategic actors. This would only contribute to my theory about the effect of law clerks on dissenting opinion writing if I found the same strategic behavior in state courts.
The strategic interaction model fits in very well with the Best’s law clerk theory. If justices behave strategically, it would seem more likely that the addition or subtraction of law clerks would affect dissent. In other words, a non-strategic justice, who is a blind arbiter of the law, would not make strategic calculations about prioritizing their resources. A strategic justice will assign clerks to work on cases which he or she believes they will be most effective. If state supreme court justices behave the same way as U.S. Supreme Court justices, the model should also work in the state courts. All judges and justices make choices when deciding cases. Ultimately, their job is to make decisions that affect policy. Whether the justice is a blind arbiter of the law or a strategic actor, he or she must make a decision.

State Supreme Courts

There has been some scholarly work on state supreme court behavior and structure, but not nearly as much as the U.S. Supreme Court. Therefore, most of the models I use are adapted from work on the U.S. Supreme Court. There exists, however, some very relevant and interesting studies on states supreme courts. Above, I mentioned Brace and Hull’s work. In “Integrated Models of Dissent,” they look at integrated models of judicial dissent at the individual level. They approach this from a neo-institutional perspective, taking into account the attitudinal, jurisprudential, and contextual approaches (Brace and Hull 1993, 916-917). They find that justices choose to dissent, not merely on attitudinal differences, case facts or contextual forces, but also on all of these interacting with the institutional setting (Brace and Hull 1993, 930).

Another piece by Brace and Hull entitled ‘‘Haves’ vs. ‘Have Nots’ in State Supreme Courts: Allowing Docket Space and Wins in Power Asymmetric Cases’’ suggests that factors
other than ideology determine the way state supreme court justices vote. This, of course, furthers their early research suggesting that such contextual and institutional factors determined this behavior. In this article, Brace and Hall examine state supreme court cases in which there are asymmetric power relationships between litigants. They look at how much a court devotes their docket to these cases and what determines how they rule in favor of one group as opposed to the other. They examine 6750 cases in state supreme courts in 1996. In this study they find that contextual factors can shape the agenda and allowing wins for underprivileged advocates. To look at this, scholars must look beyond the attitudinal preferences of the individual justices. Factors such as influencing lower court, professionalism, state population and state public opinion play into whether or not a court will function as a redistributive body (Brace and Hull 2001, 105-108). This suggests that the institutional role of state supreme courts is very different than the U.S. Supreme Court.

Another article by Professor Brace (this time with Laura Langer), “The Florida Supreme Court in the 2000 Presidential Election: Ambiguity, Ideology, and Signaling in a Judicial Hierarchy” looks at the 2000 Bush v. Gore case in the Florida Supreme Court. This study implies that in high profile cases, state court justices may vote along ideological lines. Interestingly enough, the U.S. Supreme Court also decided this case along ideological lines. The more conservative member’s of the court broke the conservative tradition to support the President’s equal protection rights. The liberal block, on the other hand, voted against equal protection, in favor of a candidate who is more in line with their ideological views.

Generally, when it comes to equal protection cases, the court is divided the other way around. Brace and Langer look at the same case in the Florida Supreme Court. They provide one of the few studies where a state court is broken down into the individual ideology of the
justices. Where it is possible that state courts may be tied by the constitution and previous Supreme Court decisions, it appears here that the Florida Supreme Court was also voted along attitudinal lines (Brace and Langer, 648-650). This indicates that within the institutional setting of state supreme courts, justices are able to vote on ideological lines.

Another interesting piece of state supreme court behavior is Neil Roman’s “The Role of State Supreme Courts in Judicial Policy Making.” This is an application of Walter Murphy’s theories to the State courts. Using examples of criminal law, Romans looks at the institutional role of state supreme courts. He focuses on how state supreme courts had reacted to U.S. Supreme Court decisions concerning the admissibility of pre-trial confessions. Romans points to another role of state supreme courts, which is to interpret U.S. Supreme Court decisions within their own states. The U.S. Supreme Court hands down decisions and it is up to lower courts to interpret them correctly. When state supreme courts, serving in their appellate role, hear cases which have been decided on Supreme Court precedent, it is up to the state supreme court to determine whether that case law has been interpreted correctly (Romans 1974, 38-40).

All of this literature has helped to explain the institutional setting of state supreme courts and why state judges vote the way they do. State supreme courts have many roles to play, both as intermediaries between lower courts and the U.S. Supreme Court, and as courts themselves. While they seem to vote strategically at times, these courts are clearly more institutionally limited than their federal counterpart. Still, the evidence implies that there is some strategic voting going on in state supreme courts. Since justices do behave strategically, it is likely that if the presence of law clerks affects dissent on the U.S. Supreme Court, it will similarly affect dissent on state supreme courts.
State Supreme Court Staff

In 2000, National Center for State Courts published *The Work of Appellate Court Legal Staff* by Roger A. Hanson, Carol R. Flango and Randall M. Hansen. This document was the first national account of the operations of appellate court legal staff. Hanson, et. al. systematically surveyed every appellate court in the United States, both state and federal. In the study, they document the basic work areas of the staff and the tasks performed by each group. These groups were identified as law clerks, central staff attorneys and clerks of court (Hanson, et al. 2000, 1-2).

The National Center set out with four objectives: to determine if generalizable work areas could be determined; to develop a comparative view of the relative amount of time each group spends on a broad range of tasks; to gauge the similarities and differences between the nature of the work of each type of legal staff; and to see how the pattern of time commitments made by each type of legal staff holds under different conditions, such as different courts and different size caseloads (Hanson et al. 2000, 3-4).

Hanson, et al., conclude that the work of appellate court legal staff can be divided into nine work areas: assisting justices in opinion preparation, handling cases at procedural events, training staff and court management, prehearing assistance, researching substantive motions and applications for writs, attending decisional conferences, conducting settlement conferences, and preparing memoranda on discretionary petitions. These work areas are generally the domain of one type of legal staff. Law Clerks tend to assist justices in preparing opinions. Clerks of court are generally involved in court management, but law
clerks often play a small role there too. Staff attorneys play much more diverse roles than other staff (Hanson, et. al. 2000, 5).

The study further distinguishes between short term law clerks and career law clerks. Initially, law clerks were appointed exclusively to short term appointments so that they would not create undue influences over justices. This gave way to the appointment of long term clerks when some justices prefers career law clerks with more experience and knowledge of the justices’ personal style. Career clerks required less training and supervision (Hanson et al. 2000, 8-9).

Hanson et al. point out that there is contention among professionals and scholars concerning the desired role of a law clerk. Some considered a law clerk’s input a crucial and advantageous component of a justice’s decision. According to this camp, clerks provide an alternative view for the justice. They also advocate alternatives against a judge’s natural resistance. Another view is that the purpose of a law clerk is not to enhance the capacity for change on the court, but rather to work in a limited role for a limited length of time compared to a justice. While one view allows for law clerks to have a great deal of influence over the court, the other prefers that clerks provide only independent support to a justice. However, whatever task a law clerk is performing, the very nature of the clerk’s position will require the clerk to make some sort of judgment which would be likely to affect the outcome of a case. According to Hanson et al., the question of differences in the roles of short-term and career clerks is still unknown. They suggested, however, that it can be inferred that career clerks have more influence on courts (Hanson et al. 2000, 8-10).

Assisting justices in writing opinions, according to the survey responses of The National Center’s study, was the most similar duty across courts. That is to say, the process
of this task was more similar across courts than the process of other tasks. It also found that across courts, law clerks (both career and short-term) dedicate more of their time to this task than any other type of staff. Generally a clerk would review the record, draft an opinion (usually the facts of the case), consult a justice on an individual case, check footnotes and proof mandates (Hanson, et al. 2000, 39).

Since my study is an exploration of dissent, understanding the duty of assisting justices in writing opinions is paramount. If clerks spend a disproportionate amount of time assisting justices in writing opinions, it would support my theory that the addition of more law clerk to a court causes justices to write more opinions.

**Summary**

In formulating his theory, Professor Best brings the concept of neo-institutionalism, which Brace and Hull apply to state courts, to the U.S. Supreme Court. Essentially, in formulating my theory, I am taking Best’s law clerk theory to state supreme courts, bringing the concept of neo-institutionalism full circle. Best uses quantitative statistics to test whether or not law clerks and support staff affect dissenting opinion writing in the U.S. Supreme Court. I use similar statistics to test this relationship in state supreme courts. I also test the relationship between caseload and dissenting opinions, in order to test my theory that it is actually limited resources which affect dissent.

Segal and Spaeth’s attitudinal model seems to hold up in light of the writings on state supreme courts by Brace and Hull. When combined with Walter Murphy’s writings on judicial strategy this becomes relevant to the law clerk theory. If justices are working to promote policy preferences, and to promote those policy preferences justices must work
strategically within the court, the presence of law clerks is very important. As we have seen, law clerks play a large roll in drafting opinions. If voicing dissent is a necessary step towards social progress, a justice with a larger staff and more law clerks will be better equipped to maneuver within the court to promote certain policy preferences. However, the presence of law clerks may create additional obstacles in judicial strategy. If a justice is attempting to craft an opinion so that more justices will sign on to it, the opinion may have to conform more closely to a neutral opinion if the additional law clerks make colleagues more likely to write dissenting opinions.
Research Design

My research is intended to be an examination of judicial voting behavior in State Supreme Courts. I build on Bradley Best’s research in *Law Clerks, Support Personnel and the Decline of Consensual Norms on the United States Supreme Court*. In *Law Clerks*, Best correlated the rise in dissents and concurrences on the Supreme Court to the rise in law clerks and support personnel employed by the Court. I explore this phenomenon in State Supreme Courts. I predicted that courts with larger staffs should issue more opinions per case than courts with small staffs. Any inconsistencies between my findings and Best’s conclusions may point to something about the institutional setting of the state supreme courts that causes them to behave that way.

I operationalize consensus by counting how many dissenting opinions are written per case in a given state court. I create an OLS regression model using number of opinions as my dependent variable and number of law clerks and caseload as my independent variables. In order to test my theory that limited resources affect dissenting opinion writing I tested two general hypotheses. The first is that courts with more law clerks have more dissent. The second is that courts with larger caseloads have less dissent.

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4 It is likely that there are other factors that would help to explain nonconsensual opinion writing. I looked at six other independent variables: number of justices, number of support staff, state population, political polarity and individual state (for which I used dummy variables). These variables did not fit into the model and all either reduced my $R^2$ or made it more difficult to see the relationship between the variables I used. Of all of them I was mostly surprised to see that political polarity seemed to be irrelevant. It seemed that the level of political controversy in a state would most likely affect my study. I was also surprised that the state dummy variables were insignificant. The only dummy variables which approached significance were California and New Jersey. This is interesting, however, because California and New Jersey were the only states to have more than one case with 3 opinions as well as the only states to have more than two clerks per justices.
Sample Selection and Data Collection

My sample consists of ten state supreme courts. These states were selected in an effort to control for as many variables as I could. I collected information on the number of justices and their election methods from the state supreme court websites. Some states hold partisan elections, others hold non-partisan elections. Some state legislatures appointed justices, other states rely on gubernatorial appointment.

Drawing from the 28 states with seven justices I narrowed my sample to states where justices are appointed by the governor, as this is most similar to the presidential appointment of justices in the United States Supreme Court. The states sampled are: California, Colorado, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Nebraska and New Jersey. The sample includes populous states like California, New Jersey and Massachusetts as well as smaller states like Iowa, Nebraska and Maine. The states are also pretty equally distributed geographically.

Initially, I attempted to collect this data will be by contacting the courts directly. I called each court with a short questionnaire. The questionnaire consisted of the following questions:

1. How large is the total number of support staff of the court? [This should include the administrative assistant to the chief justice, employees of the Clerk of Court’s office, the Marshal (or equivalent), police officers working under supervision of the Marshal, The Reporter of Decisions (or equivalent) and the Reporter’s assistants, the Court Librarians staff, the Court Curator, additional personal staff (excluding law clerks) assigned to each justice, and employees of the Court’s Legal Office.]  
2. How many law clerks does the court employ?  
3. Are law clerks assigned to each justice? If not how are they assigned?  
4. How large is the court’s caseload?

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5 Definition of Support staff is taken from Best’s research design (pg. 62).
5. Has the size of the court's staff or the number of law clerks employed by the court changed significantly in the last five years? While this survey initially seemed successful, it became increasingly difficult to keep a consistent definition of who should be included in the staff, since the structure of each state judiciary was different. In light of the problems of the survey, I instead used the data from the study conducted by the National Center for State Courts. This provided a uniform definition of Law Clerks and Staff across courts. Still, I include the survey because contacting the courts gave me insight into their operations.

For the 2001 session of each of the ten courts, I coded every ten cases published by the courts. In all, I coded 148 cases.
Data Analysis

Table 1: OLS Regression Model Results.

<table>
<thead>
<tr>
<th>OLS Regression Model Results</th>
<th>Coefficient</th>
<th>Std. Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clerks</td>
<td>0.0067**</td>
<td>-0.003</td>
</tr>
<tr>
<td>Caseload</td>
<td>-0.0023*</td>
<td>-0.001</td>
</tr>
<tr>
<td>Constant</td>
<td>1.48</td>
<td>-0.23</td>
</tr>
</tbody>
</table>

N = 148  
Adj R² = 0.1031

**p<.05, *p<.10
Dependent Variable = Number of Opinions

Looking to the table 1, we see a negative relationship between number of opinions and caseload which is consistent with my second hypothesis. The table shows, at the .10 significance level, a relationship of -.0023 between caseload and nonconsensual opinion writing. This may seem small, but opinions per case, the dependent variable, only vary from one to three. The variation is small, but there is variation. The table also illustrates a positive relationship between clerks and number of opinions, which is consistent with my first hypothesis. This relationship, at the .05 level of significance, is .0067. Put together, this suggests that justices write dissenting opinions when they have more resources.
Figure 1 is a graphical representation of the effect law clerks have on opinion writing. It is clear from this graph that states with more law clerks publish more dissenting opinions. While the graph dips down between 14 and 11 clerks the general trend is undeniable, the graph shows that courts with 21 or more clerks write many more opinions.
Similarly, Figure 2 shows a graphical representation of the relationship between caseload and opinion writing. It is clear from the graph that as caseload goes down, consensus goes down. However, the line does slope back up, showing the courts writing three opinions have larger caseloads than those writing only two. This is because of outliers, which I will explain in my analysis.

Looking back to table 1, we can see that, with an adjusted R² of only .1031, the model explains less than 10% of the dependent variable's variance. Again, there are probably factors which I was unable to test that may be able to explain more. Still, I show a negative relationship where I predicted a negative and a positive relationship where I predicted a
positive. My model shows no fire, but there is smoke, and it seems more likely than not that there is a causal relationship between clerks and caseload and opinion writing.

This model helps us to understand dissent. It tells us that not only do courts with more law clerks write more dissenting opinions, but if the court has a lower case load, members will write more non consensual opinions. This reveals that when given more opportunity, justices will write more opinions. I see two possibilities for this. The first is that justices simply do not have time to write opinions and the presence of law clerks with a smaller case load gives them that time. Without enough law clerks and larger caseload, justices will not write opinions, but still disagree. The other possibility is that justices on courts with larger case loads or fewer clerks will simple have more interaction with each other. This would suggest that justices feel social pressure to conform.

The model illustrates a statistically significant relationship between number law clerks and opinion writing (with a p-value less than .05) as well as a relationship which approaches traditional levels of significance between caseload and opinion writing (with a p-value less than .10). This supports my theory that justices write dissenting opinions when they have more resources available.

Within the data there is a lot of interesting things which support my overall theory that limited resources affect dissent. While the model I created demonstrates this phenomenon more parsimoniously, it is also important to break down the data state by state in order to understand how the theory works.

California and New Jersey were the only states with more than three opinions written in any cases. The California Supreme Court employs 68 clerks and in 11 cases surveyed, they wrote 18 opinions. The New Jersey Supreme Court has 21 clerks. In 12 cases, the
justices of the New Jersey Supreme Court wrote 19 opinions. New Jersey employs three clerks per justice. It seems that in terms of law clerks, three is the magic number as courts with only 2 clerks per justice do not produce as many dissents.

Iowa and Kansas both have only one clerk per justice. Both states also enjoy a great deal of consensus. The justices of the Iowa Supreme Court wrote 23 opinions in twenty cases. Similarly, Kansas Supreme Court justices wrote 20 opinions in 18 cases. Again, this is consistent with my hypothesis.

The two outliers are Maine and Massachusetts. Maine has eleven clerks; however, in 17 cases, Maine wrote 17 opinions. There was not one nonconsensual opinion. Maine is the only state with no disconsensus. To this I offer a simple explanation. In my early phone survey I learned that save for two clerks, all other law clerks on the Maine Supreme Judicial Court are appointed to serve only two years. In light of the assertion by Hanson et. al, I believe that the clerks in Maine are less experienced and not familiar enough with the justices to have the same affect on consensual norms as long-term clerks in other states.

Massachusetts also experiences this amount of consensus. On this court there are two clerks per justice. In 19 cases, Massachusetts only wrote 19 opinions. While my model does not explain this, the most likely explanation is that Massachusetts also uses only short-term clerks. I suspect this because the NCSC study explained that justices farm more duties out to long-term clerks. As in Maine, it is probably the absence of long term clerks that cause this phenomenon. Another possibly explanation for this amount of consensus is the large size of Massachusetts’ caseload. Again, there are probably variables outside my model
that would explain the high levels of consensus in both Massachusetts and Maine, but any attempt to solve that problem would be pure speculation.

The other variable which approached traditional levels of significance was the court’s caseload. In my sample, despite being the largest state with the largest staff, California has the third smallest caseload (more cases than only Colorado and Missouri). California fits my model incredibly well; they have a lot of clerks and a small caseload. Justices, therefore, have plenty of time to write non-consensual opinions and plenty of clerks to draft those opinions.

Similarly, Massachusetts has the largest caseload in my sample. While Massachusetts was troubling within my model when looking at law clerks, when looking at caseload it fits very well. It would seem that despite having two clerks per justice, the caseload in Massachusetts is so large that it prevents justices from writing dissenting opinions. This would make perfect sense, except that halfway across the country, with only one short term-clerk per justice and publishing opinions for 7 less cases than Massachusetts, the Iowa Supreme Court published 3 dissenting opinions in twenty cases. While both Iowa and Massachusetts show support for the caseload theory, it seems strange that Iowa would produce more opinions than Massachusetts, since Massachusetts has double the law clerks and a similar caseload.

Maine, as well, is less puzzling when it comes to the relationship between its caseload and opinion writing. Maine had the fifth largest caseload in my sample in 2001. While, it does not have the largest caseload, it did hear more cases than most states with large numbers

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6 Initially I had expected the polarity in Massachusetts to be the cause of this. Al Gore won Massachusetts by over 27%, I predicted that the consensus would be caused by a relatively concurrent liberal view throughout the state. Unfortunately in my OLS regression I did not find polarity to be a helpful variable.
of disconsensus. While is still unclear why Maine enjoys the amount of consensus it does, it is not unusual that the Court should enjoy a certain tradition of consensual norms.

Concerning the caseload theory, Missouri seems to be the most puzzling. Missouri had the smallest caseload in the sample, and did enjoy a reasonable amount of disconsensus publishing 12 opinions in 9 cases. While this suggests there is some tradition of dissent on the Missouri Supreme Court, it does not compare to the disconsensus in California and New Jersey. This is most easily explained by my data analysis which exemplifies that the relationship between clerks and opinions is stronger than the relationship between opinions and caseload. Despite Missouri’s small caseload, the fact that the court has less than three clerks per case prevent it from writing as many non consensual opinions as New Jersey and California. If true, this helps to explain the curve in figure 2.

Another difference which my model does not account for is the differences in these individual cases. Each of these courts hear a different amount of cases in their original jurisdiction. They also hear cases on appeal from different lower tiered courts. The amount of appeals a case must go through to get to the state supreme court would affect the average amount of controversy of cases reaching the court. This could also affect consensual opinion writing.

Summary

My model shows a positive causal relationship between law clerks and opinions as well as a negative causal relationship between caseload and opinion writing. While my model only explains about 10% of the variance in opinion writing, it does show causal relationships.
I cannot show that there are not other factors that may contribute more to nonconsensual opinion writing. In fact my model even denotes that there are outside variables which would explain this variance. Nevertheless, I predicted that courts with more clerks would have fewer consensuses and that states with fewer cases would have fewer consensuses. This is exactly what my model shows.

Based on my analysis, I believe that justices who have fewer resources to write dissenting opinions are more likely to conform to the view of the majority than justices who have more resources such as a larger staff with a smaller caseload. I show that in the ideal situation of a large staff and a small caseload dissenting opinions are abundant. I also show that in a non ideal situation of a large caseload and a small staff, dissenting opinions are almost non existent. In situations between the extremes, I saw varying degrees of opinion writing which cannot be entirely explained by my model. Still the overall findings of my model are consistent across courts.
Normative Question

As I stated above, I am not only interested in determining whether or not the presence of law clerks and support staff on state supreme courts affects opinion writing. I am also interested in addressing the normative question of how Courts ought to be structured in light of my findings. It is my contention that disconsensus in the judiciary is good for democracy and that if, indeed, the addition of law clerks causes courts to produce dissenting opinions, then courts (and the legislature who control their structure) should strive to have enough law clerks and support staff to provide their justices with the tools necessary to produce more opinions. In other words, I would rather a justice write a possibly unnecessary opinion than wish to write an opinion, but be dissuaded due to a lack of time and resources necessary to voice his or her concerns.

An article, appearing in the August 2006 issue of The Atlantic by Stuart Taylor Jr. and Benjamin Wittes, contends that the job of a United States Supreme Court Justice is among the most powerful and cushy jobs in the nation. Taylor and Wittes cite books written by sitting justices as well as the amount of vacations taken by justices. They also assert that Justices are too entangled in public feuds over ideology and leave important legal questions unresolved. Their solution is to eliminate law clerks. This, according to Taylor and Wittes, would force justices to focus on legal issues and spend less time pursuing their own policy preferences.

The elimination of law clerks would also force justices to work harder and probably retire sooner. The Court now employs more clerks than ever before while handling the lightest caseload in modern history. Taylor and Wittes believe this is bad because it causes
justices to have too much time on their hands. Most modern Supreme Court justices delegate
the bulk of or at least much of their opinion writing duties to law clerks. As Taylor and
Wittes point out, Justice Stevens is the only current U.S. Supreme Court justice who drafts
his own opinions. Stevens believes that writing the first draft helps him to understand the
case before him. Taylor and Wittes contend that all justices will behave like Stevens if their
law clerks are cut back from four to one (Taylor and Wittes 2006, 50). While Taylor and
Wittes see increased staff as an obstacle for a healthy judiciary, I believe that giving justices
more time and resources to think through cases and produce more opinions is healthy both
for the judiciary and for democratic tradition. Taylor and Wittes see the U.S. Supreme Court
as an example of what not to do in terms of staffing a court. I, on the other hand, think state
supreme courts would be healthier if they behaved more like the U.S. Supreme Court, in this
respect.

While I disagree with Taylor and Wittes contention that the U.S. Supreme Court
employs too many law clerks, I do believe there could be some merit to their fears. Though I
do not believe the U.S. Supreme Court, or any state supreme courts, have crossed the
threshold, there may be an amount of clerks a court could employ which would be counter
productive. It would probably be unnecessary for any court to employ 100 clerks per
justices. Though I could not possibly find it in my model, there is likely an upper-bound for
the effectiveness of additional law clerks.

In People v. Morales the dissenting opinions may lead to further review of the case. I
do not make a judgment on whether or not David Morales has been denied justice. Nor do I
believe scholars should make a habit of voicing opinions on the guilt or innocence of a
particular plaintiff; however, I believe the presence of dissenting opinions adds to the
democratic tradition.

The judiciary was created as a nonpolitical branch. Writing as Publius in “The
Federalist No. 78,” Alexander Hamilton writes that the judiciary was the least dangerous of
the three branches of government (Hamilton 1788). There is still much debate over the
extent to which the judiciary should be able to function in a political role. The nature of the
judiciary does not allow it to create or enforce laws, but only interpret them. As Hamilton
writes:

... [T]he judiciary, from the nature of its functions, will always be the least dangerous
to the political rights of the Constitution; because it will be least in a capacity to annoy
or injure them... It may truly be said to have neither FORCE nor WILL, but merely
judgment; and must ultimately depend upon the aid of the executive arm even for the
efficacy of its judgments (Hamilton 1788).

Since 1803, the U.S. Supreme Court has been practicing judicial review. Many argue that by
striking down federal laws, the Court has usurped legislative power. Whether one agrees or
disagrees with that interpretation, to take away a justice’s resources to write dissenting
opinions so that courts may reach more consensual opinions would undoubtedly create more
powerful majority opinions. If someone were concerned about courts “legislating from the
bench” it would be wise to allow courts to employ more law clerks in order to weaken these
opinions.

The judiciary behaves more like the judiciary which Hamilton writes about when
dissenting opinions are present. The majority of the court is forced to defend their position
by engaging the dissent. If one were concerned that the addition of clerks would give
justices more resources to craft the law to their own policy preferences, they should
understand that by allowing for more disconsensus on courts, justices are made less capable of affecting radical change in the nation.

The importance of minority opinions is also expressed by John Stuart Mill in his classic work *On Liberty*. Mill writes that in a democratic government in which the majority rules, the majority may wish to oppress a minority. Based on this fear of tyranny of the majority, Mill says that there is a need to limit the amount to which public opinion can interfere with individual liberty. To protect from this tyranny, Mill believes there should be a liberty of thought and discussion. He asserts that minorities should be able to openly disagree with majorities (Mill 1859, 931-938).

Cass Sunstein writes on the importance of dissent in his 2003 work, *Why Societies Need Dissent*. Sunstein argues that conformity, unchecked by dissent, can produce harmful outcomes. A powerful example Sunstein uses is the Bay of Pigs invasion as an example of the dangers of conformity. According to Sunstein, President Kennedy never considered an alternative to invasion because his advisers did not offer an alternative. Arthur Schlesinger, Jr. speculated that it was because they were afraid of appearing soft. All of Kennedy’s senior advisors told him to invade. Had just one told him otherwise, perhaps he would have reacted differently (Sunstein 2003, 1-3).

Sunstein argues that judges are also vulnerable to the influences of their colleagues. Sunstein finds that in a three justice panel a good predictor of how a justice will vote is the party of the President who appointed him. Interestingly, an even better predictor of how a judge will vote is the party of the President who appointed the other two judges on the bench. A Republican appointee sitting with two other Republican appointees is more likely to vote
along stereotypical lines than a Republican appointee sitting with one other Republican appointee and one Democratic appointee (Sunstein 2003, 166-167).

In their 1993 article entitled “The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions”, William Mishler and Richard Sheehan explore empirical evidence on the roll of the Supreme Court as an institution counter to the public majoritarian view. They recognize there is an important question as to how the Court should behave as a countermajoritarian institution. Using a time series analysis, Mishler and Sheehan find a reciprocal and positive relationship between long-term trends in public opinion and U.S. Supreme Court decisions. In 1981, however, they find that relationship either disappears or reverses direction (Mishler and Sheehan 1993, 90-91).

Since 1981, public opinion has grown more liberal while the Court has become more conservative. Mishler and Sheehan point out that it can be easily concluded that prior to 1981 there was a relationship between public mood and attitudes on the Supreme Court, which either reverses or dissipates after the election of Ronald Reagan. They find that since 1956, Courts have been responsive to public opinion, even when there is no change in Court personnel. There is a clear shift from a majoritarian Court to a countermajoritarian Court. This is curious as it seems presidents have always appointed justices who appear to be in line with their own policy preferences. Mishler and Sheehan find that, due to the lag between elections and Supreme Court appointments, justices do not necessarily join the court when their appointer’s ideology is in line with public opinion. Based on this, it is possible for the Supreme Court to act as a countermajoritarian institution (Mishler and Sheehan 1993, 95-98).
Not surprisingly, Sunstein find that justices’ policy preferences matter when voting. His findings are consistent with the attitudinal models as well as Walter Murphy’s theories on strategic interaction. Sunstein calls dissenting justices “potential dissenter-whistleblowers (185).” He writes that a dissenter-whistleblower reduces the likelihood of an opinion that is either incorrect or created on bad legal theory (184-186). In this, Sunstein presents another alternative reason justices may produce dissenting opinions.

Dissent on the courts, like dissent in society, is a necessary tool for progress. It is consistent with American tradition to believe that giving minority opinions a voice is good for democracy. If this is true, why should this tradition not be present in the judiciary? As Sunstein correctly points out, consensus and conformity can often be very dangerous. Just as it is good when leaders are presented with more opinions by their advisors, it is also good for justices to be presented with more opinions, presumably by their law clerks.
Conclusion

Bradley Best proved a causal relationship between law clerks and dissenting opinions on the Supreme Court as well as a causal relationship between support staff and nonconsensual opinion writing on the Supreme Court. Similarly I set out to find this phenomenon in state supreme courts. State supreme courts hold different institutional roles to the US Supreme Court. Their institutional role even varies with each other. Yet, their structure is similar enough to compare across courts. In my study I found results, consistent with Best’s law clerk theory, suggesting that state courts produce more dissenting opinions.

I also looked to writings on strategic interaction. Most, prevalently, Walter Murphy wrote that justices must play a strategic role in order to promote their policy preferences. In my research I found nothing to suggest that judges and justices do not pursue policy preferences. If Murphy’s model is true, then the make up of a court’s staff is very important. Since I find that courts with more law clerks produce more dissenting opinions, law clerks play a very important role in the way a justice must behave in order to pursue those preferences. A justice writing a majority opinion in a court with a small staff has fewer obstacles, as his colleagues are less likely to produce dissenting opinions; therefore, his opinion will meet little opposition and be likely to be followed by lower courts. A dissenting justice on the same court, however, faces a larger obstacle. The justice has little resources to produce an opinion as his staff is bogged down with other duties. Furthermore, his colleagues are less likely to dissent, so the dissenting opinion faces large obstacles.

On a court with a large staff, a justice writing for the majority will face more obstacles. In order to get other justices to sign on to his opinion, he must craft it carefully, if
his colleagues disagree with a small part of the opinion; they are more likely to produce a dissenting opinion. Similarly, a justice who wishes to write a dissent has more resources available to produce an opinion if he disagrees with the majority of the court. Caseload will also affect a justice’s strategical motivations in the same way. A justice writing for the court will have to factor in the caseload, when considering how much he will have to conform his opinion to the center of the court in order to keep members from filing dissenting opinions.

Concerning the ethical question I raise about the presences of dissenting opinions, I conclude that nonconsensual opinion writing is crucial to a healthy judiciary. While there is concern that disconsensus weakens opinions, we have seen that justices are aware of this and in many important decisions, such as Brown they work hard to reach consensus, knowing that dissenting opinions will have an adverse affect on their policy goal.

Further Research Questions

A good study would be to explore the institutional roles of state supreme courts on an individual level and see how this affects consensual norms. I would predict that courts which hear more cases in their original jurisdiction will be skewed towards showing strong tradition of consensual norms, when that may not be the case in their appellate jurisdiction. Their institutional role should also help determine the relevance of the size of their caseload.

Another study that would be worth while would be to do an intensive study of the California Supreme Court across several years dating back to before the court employed so many clerks. If my model holds true, consensus will increase as the number of law clerks decrease. This study should also look deeply at more cases and try and isolate any policy preferences of individual justices on the court. In my study I was unable to find any solid
voting blocks any court, so this may be difficult, however if someone were to conduct that study it would prove very interesting.

In further studies, it would also be usefully to test other variables which might explain the variation in dissenting opinion writing. This research would be greatly amplified if one could control for factors such as polarity and state population.

A study of cases appealed from state supreme courts to the United State Supreme Court could also prove interesting. One should find that cases with dissenting opinions were more likely to see further appeals. If this is not true, it might under mind some of the weight I and previous scholars have given to the importance of dissent.

In Conclusion

David Morales was sentenced to twenty years in prison based, partially, on a summation which two of the seven member of the California Supreme Court considered to be a blatant act of prosecutorial misconduct. The remaining five justices at least signed on to an opinion which stated that while they did not believe the prosecutor committed misconduct, the question was a close call. If David Morales’ misfortune is a result of injustice, these dissenting opinions might help to set that injustice right.

The actions of the judiciary affect real people. At the end of a long process, in all of these states, seven people in funny clothes decide what the law means. While we often try and assume they are working from a sort of divinely inspired objectivity, it is not consistent with what has been written about the judiciary. Judges and justices are fallible human beings with opinions, ideologies and policy preferences. I do not mean to fault justices for having such preferences, nor am I suggesting they should not be allowed to pursue policy
preferences, when justices ultimately must, through either activism or restraint, often play the role of a policy maker. Rather, I contend that if they must be policy makers, than they should be equipped with the best resources available to serve that roll.

If law clerks allow justices to craft more dissenting opinions, I therefore conclude that courts are better served with more law clerks. There could be a dissent which would forever change the face of legal theory, which is never written simply because the justice either did not have time, or was trying to conform to the opinions of his or her colleagues.

While my model also shows that small case loads allow for more dissent, I am timid to advocate for courts to hear fewer cases. If the ultimate goal is so that more opinions are heard, it does not logically follow that justices should hear fewer cases. While there is a danger of courts becoming too bogged down with fewer important cases, there is an even greater danger of important opinions not being written by justices, because the justice never heard the case.

I attempted to create an empirical model to approach a normative question. While normative questions require an analytical response and one could come to a conclusion without looking at empirical data, my model does a great deal to show how this dilemma plays out practically. By approaching this question in this manner, I was able to provide a prescriptive conclusion. If one believes dissent is good for democracy, then it would be best to allow courts to have more law clerks.
Bibliography


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