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UNANIMITY ON THE REHNQUIST COURT

by

Thomas R. Hensley *

Scott P. Johnson **

I. INTRODUCTION

The unanimous decision making process is an intriguing phenomenon. However, the process of justices with different backgrounds, attitudes, and perceptions uniting on a decision raises many difficult questions for judicial scholars.¹ Despite these challenges, the limited amount of knowledge in the area of unanimous decision making is troubling because such decisions constitute a sizable portion of judicial decisions. For example, nearly one-half of the Court's decisions were unanimous² during the 1996-1997 term.³ Given the Court's penchant for unanimity, it is obvious that research into this area can contribute substantially toward explaining the behavior of the Justices on the Court. Thus, the central question of this article is: What characterizes the unanimous decision making process of the United States Supreme Court? By examining all formally decided cases from the first five terms of the Rehnquist Court (1986-1990), this study aims to provide new insights regarding the determinants of unanimity.⁴

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¹ For a good summary of the inherent difficulties in the study of unanimity, see Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 WIS. L. REV. 186 [hereinafter Goldman, *Judicial Appointments*].

² In this study, a unanimous decision is defined as any case outcome which is decided by a 9-0, 8-0, 7-0, 6-0, or 5-0 vote.

³ See generally UNITED STATES SUPREME COURT REPORTS: LAWYERS' EDITION (1996-1997).

⁴ Data were collected on all formally decided cases for this five year period. This involved a total of 677 cases. A significant portion of the data were gathered from the Harold J. Spaeth data base. HAROLD J. SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-1993 TERMS (1995) (ICPSR study number 9422). The data relating to case importance was taken from a separate source: THOMAS R. HENSLEY ET. AL., THE CHANGING CONSTITUTION: CONSTITUTIONAL RIGHTS AND LIBERTIES 864 (1997). These authors used THE NEW YORK TIMES & UNITED STATES SUPREME COURT REPORTS:

II. IMPORTANCE OF THE PROBLEM

Why is it important to study unanimous decision making? As noted above, unanimity is a relatively frequent occurrence on the Court. The fact that unanimous decisions constitute a significant portion of the Court's output provides the justification for exploring the determinants of unanimity. Table One illustrates how frequently unanimous decisions occurred during the first five terms of the Rehnquist Court from 1986 through 1990.⁵

TABLE 1: UNANIMOUS AND NON-UNANIMOUS DECISIONS ON THE WARREN, BURGER, AND REHNQUIST COURTS (1953-1990 terms)

COURT (YEARS)	UNANIMOUS	NON-UNANIMOUS	TOTAL
Warren (53-69)	7% (709)	63% (1200)	100% (1909)
Burger (70-85)	36% (830)	64% (1467)	100% (2297)
Rehnquist (86-90)	38% (259)	62% (418)	100% (677)
TOTALS	37% (1789)	63% (3085)	100% (4883)

During this time period, thirty-eight percent of all Court decisions were unanimous. It is also important to recognize that the Court's propensity for unanimity is not limited to the Rehnquist Court era. As illustrated by Table 1, the Warren Court (1953-1969) and the Burger Court (1970-1986) displayed levels of unanimity almost identical to the Rehnquist Court.⁶ Hence, unanimous decisions have comprised over one-third of the Court's output during the last forty years. When the frequency of unanimous decisions is coupled with the lack of information currently existing on the subject, it seems imperative for judicial scholars to address this type of decision making. Without scholarly attention to this problem, the legal community is deprived of a key element in order to understand the judicial decision making process.⁷

LAWYERS' EDITION in measuring case importance. *Id.*

⁵ Spaeth, *supra* note 4. These data also were gathered from the Spaeth database.

⁶ *Id.*

⁷ See generally Daniel R. Pinello, A Compendium and Analysis of Empirical Research on the Relationship Between Judges' Political- Party Affiliation and Judicial Ideology in American Courts (1997) (paper presented at the Annual Meeting of the American Political Science Association). Pinello argues that a complete and meaningful picture of judicial activity must include unanimous decisions. *Id.*

III. LITERATURE REVIEW

During the last half century, scholars have debated the factors responsible for unanimity.⁸ Initially, scholars ignored unanimous decisions in their analysis of judicial behavior by assuming that legal factors sufficiently explained unanimity.⁹ More recently scholars have utilized extra-legal¹⁰ factors related to attitudinal and strategic behavior in an attempt to understand the complexities of unanimity.¹¹

A. *The Law and Unanimity*

At the beginning of the twentieth century, the law was considered by scholars as the sole explanation for judicial behavior.¹² However, it was during this time that

⁸ See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* xi-xvi (1948); see also Joel B. Grossman, Note, *Social Backgrounds and Judicial Decisions: Notes for a Theory*, 29 J. POL. 334 (1967) [hereinafter Grossman, *Social Backgrounds*]; Sheldon Goldman, *Backgrounds, Attitudes, and the Voting Behavior of Judges: A Comment on Joel Grossman's "Social Backgrounds and Judicial Decisions,"* 31 J. POL. 214 (1969) [hereinafter Goldman, *Backgrounds, Attitudes*]; Joel B. Grossman, *Further Thoughts on Consensus and Conversion: A Reply to Professor Goldman*, 31 J. POL. 223 (1969) [hereinafter Grossman, *Further Thoughts*].

⁹ PRITCHETT, *supra* note 8, at xi-xii.

¹⁰ For a discussion of the distinction between extra-legal and legal factors in judicial decision making, see Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992). George and Epstein found that both extra-legal and legal factors were significant in determining judicial behavior in capital punishment cases. *Id.* at 333.

¹¹ For examples of studies using the attitudinal model to explain unanimity, see Saul Brenner & Theodore S. Arrington, *Unanimous Decision Making on the U. S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAV. 75 (1987); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

For studies dealing with rational choice and strategic behavior, see Melinda Gann Hall and Paul Brace, *Order in the Courts: A Neo-Institutional Approach to Judicial Consensus*, 42 W. POL. Q. 391 (1989); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10-21 (1998).

¹² See JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 1-10 (1904). The legal model holds the basic assumption that legal doctrines, developed from past cases, explained case outcomes. EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1 (1948). Basically, judges are limited in their decision-making capacity by precedent and the concept of stare decisis. *Id.* at 7. Proponents of the legal model have also focused upon other legal factors such as the plain meaning of the Constitution, *id.*, original intent of the Framers, *id.* at 7, or congressional intent as determinants of judicial behavior. *Id.* at 28.

legal scholars such as Oliver Wendell Holmes,¹³ Roscoe Pound,¹⁴ and Louis D. Brandeis¹⁵ began to question formal legal rules as the basis for judicial decision making. In the 1920s and 1930s, the American legal realists contributed to this debate by recognizing that judges interpret and manipulate legal rules and case facts in deciding cases.¹⁶ In the late 1940s, C. Herman Pritchett's work also intrigued scholars by focusing attention on attitudes as a determinant of non-unanimous decisions.¹⁷ However, even as scholars began their recognition of attitudes as a critical part of judicial action, the law remained fundamental to the unanimous decision making process.

In terms of understanding unanimity, Pritchett assumed that legal factors such as the clarity of law, precedent, or the intent of congressional statutes were responsible for unanimous decisions.¹⁸ While non-unanimous decisions offered policy choices for the justices, Pritchett speculated that the justices voted together in cases where the law acted in a manner that offered no such choices.¹⁹ Pritchett's assumptions about the law and unanimity allowed behaviorally-oriented scholars to ignore unanimous decision making. For many years, studies failed to address whether the law, or other factors, actually influenced unanimity.²⁰

It was not until the debate between Joel B. Grossman and Sheldon Goldman in the late 1960s that scholars began to explore seriously the factors responsible for unanimity.²¹ In the first part of this exchange, Grossman suggested that legal factors

¹³ See generally Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (emphasizing the empirical study of law). Oliver Wendell Holmes served as a justice on the U. S. Supreme Court from 1902-1932.

¹⁴ See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 1-25 (1922) (encouraging judges to use law in order to satisfy the needs of society). Roscoe Pound was the founder of sociological jurisprudence and the dean of Harvard Law School.

¹⁵ See generally Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916) (developing an innovative argument that social science was necessary in legal argumentation). This became known as "the Brandeis brief." *Muller v. Oregon*, 208 U. S. 412 (1908). Brandeis served as a Justice on the U. S. Supreme Court from 1916-1939.

¹⁶ See WILFRED E. RUMBLE, JR. AMERICAN LEGAL REALISM 1-12 (1968). See also K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

¹⁷ PRITCHETT, *supra* note 8, at 25-31 (concluding that the political attitudes of the Justices, as demonstrated from the votes, could be ranked in their support for policies concerning such areas as criminal justice and economic activity).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Pinello, *supra* note 7.

²¹ See Grossman, *Social Backgrounds*, *supra* note 8.

were not entirely accountable for unanimous decisions.²² He added that attitudinal traits did not disappear in unanimous rulings as suggested by Pritchett.²³

In response, Goldman reiterated his support for Pritchett's initial assertion.²⁴ In addition, he provided statistical results from his own work to support this contention.²⁵ Goldman found that attitudes determined non-unanimous cases, but they failed to explain unanimity. As with Pritchett's argument, Goldman assumed that because attitudes did not explain unanimity, the law must be operating as a key factor.²⁶

The exchange between these two scholars ended with Grossman asserting that

²² *Id.* at 334.

²³ *Id.* at 336.

As used in judicial backgrounds studies it [consensus] has a negative role: background experiences are seen as relevant and explored only in those decisions in which courts are divided. Contrasting background experiences are pictured as the major cause of dissensus, while unanimity or consensus are considered evidence of the 'non-operation' of background factors. By treating consensus in this limited way, the potential impact of background factors is severely circumscribed, if not distorted; no provision is made for cases where background experiences could lead to consensus

Id.

²⁴ See Goldman, *Backgrounds, Attitudes*, *supra* note 8, at 217. "Consensual case situations are characterized for the most part (but *not* exclusively) by the institutional/role restraints compelling the subordination of personal values, precluding the manufacture of an ersatz choice when none is 'objectively' present, and thus impelling towards one result."

Id.

²⁵ See Goldman, *Judicial Appointments*, *supra* note 1, at 196-97, 207. Goldman's study of the voting behavior of U.S. courts of appeals judges supported his argument that attitudes defined non-unanimous rulings, but not unanimous decisions.

In regard to this study, Goldman writes in a separate study that "[t]he scores for the dissensual labor cases had a statistically significant correlation of .46 with the liberalism category while the scores for the consensual labor cases had a correlation (not statistically significant) of .05. This suggests that political attitudes/values were of little import for the consensually decided labor cases." See Goldman, *Backgrounds, Attitudes*, *supra* note 8, at 219-220.

²⁶ Goldman, *Backgrounds, Attitudes*, *supra* note 8, at 219.

[m]y model, along the lines of the Pritchett model, suggests that in general a consensually [unanimously] decided case indicates that 'objectively' the case situation (either because of clear-cut precedent, or the straight-forward applicability of the statute, or constitutional provision to the facts of the case) offered little leeway for the judge

Id.

an explanation of judicial behavior involved more complexity than Goldman's basic argument.²⁷ It was not as simple as stating that attitudes defined disagreement and legal factors explained agreement.²⁸ Grossman asserted that Pritchett and Goldman had ignored critical dimensions of the decisional process.²⁹ Grossman concluded that unanimity could be explained by a host of factors, including legal and attitudinal influences.³⁰

More recent studies³¹ have offered limited support for legal factors in the unanimous decision making process. The argument for legal factors continues to rest upon the assumption that the law must explain unanimity because attitudes are not evident in the process.³² Such indirect conclusions are not adequate. Future studies must attempt the difficult task of finding ways to demonstrate how the law influences the unanimous decision making process.³³

B. Attitudes and Unanimity

As mentioned previously, Grossman made the initial assertion that attitudes might play a part in the unanimous decision making process.³⁴ While Grossman

²⁷ Grossman, *Further Thoughts*, *supra* note 8, at 228.

²⁸ *Id.* Grossman was very critical of Goldman's statistical results by arguing that "[T]ests of significance, like paternity tests, can only rule out erroneous interpretations; they cannot independently establish the validity of a relationship." *Id.*

²⁹ *Id.* at 229. Grossman writes that "[C]oncentration on judicial votes and the attitudes that produce them is a concern with but one dimension of a complex and multi-faceted process." *Id.*

³⁰ *Id.* Grossman remarks that "[I]n the rush to apply newly acquired quantitative techniques to judicial research, political scientists naturally focused on relationships between backgrounds variables and decisional output Understandably, they tended to avoid the introduction of other variables which might complicate the situation. . . ." *Id.*

³¹ See Werner F. Grunbaum, *Analytical and Simulation Models for Explaining Judicial Decision Making*, FRONTIERS OF JUDICIAL RESEARCH 307-334 (JOEL B. GROSSMAN & JOSEPH TANENHAUS eds. 1969). Grunbaum's study of the 1962 U. S. Supreme Court term supported Pritchett and Goldman's position. See also Thomas R. Hensley & Karen Dean, *Have We Overlooked Something? An Analysis of Supreme Court Decision Making Using Both Unanimous and Non-unanimous Data* (1984) (paper presented at the Annual Meeting of the American Political Science Association). Hensley and Dean provided some insights into the factors responsible for unanimity, but they emphasized that they could not confirm either attitudes or the law as the critical force behind unanimity. *Id.*

³² See PRITCHETT, *supra* note 8, at 32-45.

³³ For the inherent difficulties in defining and measuring the effect of legal variables, see SEGAL & SPAETH, *supra* note 11, at 33-64.

³⁴ Grossman, *Social Backgrounds*, *supra* note 8.

acknowledged the importance of attitudes in this decisional process, he implored scholars to recognize that attitudes are but one dimension in a complex and multifaceted system.³⁵ He suggested that other factors besides attitudes might contribute as well to unanimity.³⁶ Whatever the case, Grossman placed attitudes for the first time within the context of the unanimous decision making process.³⁷ Hence, he deviated from the traditional assumption that the law explained unanimous decisions.³⁸

A basic problem in establishing a relationship between attitudes and unanimity is demonstrating how liberal and conservative Justices vote together on the Court. Since Grossman's initial arguments about attitudes and unanimity, several studies have explored this research question.³⁹ In one study, Saul Brenner and Theodore Arrington present an interesting argument concerning attitudes as an explanation for unanimity.⁴⁰ In their finding that unanimous decisions were often liberal, these authors concluded that the liberal Justices on the Court were more extreme in their beliefs, and thus they have a more strongly held ideology than more conservative justices.⁴¹ While an extremely liberal Justice would never vote for a conservative outcome, a conservative Justice would sometimes vote with the liberals in a certain

³⁵ *Id.* at 349.

[F]uture research must look toward an understanding of the relationship of background to other factors before presuming to 'explain' decisions in background terms. Attention must be given not only to substantive or doctrinal results, but also to questions of procedure and form, of power and influence, and of consensus and dissensus.

Id.

³⁶ *Id.* For example, Grossman wrote about general institutional pressures toward consensus such as self-restraint or the preservation of integrity and power of the court. *Id.*

³⁷ *Id.*

³⁸ See PRITCHETT, *supra* note 8, at 5-19.

³⁹ See generally Hensley & Dean, *supra* note 31; Donald Feig, *Assessing the Case for Conflictual Supreme Court Decision Making: A Factor Analysis of Unanimous and Non-unanimous Supreme Court Decisions* (1984) (paper presented at the Annual Meeting of the American Political Science Association); Brenner & Arrington, *supra* note 11; Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103 (1989); Harold J. Spaeth, *Consensus in the Unanimous Decisions of the U. S. Supreme Court*, 72 JUDICATURE 274 (1989).

⁴⁰ Brenner and Arrington, *supra* note 11.

⁴¹ *Id.* at 75.

percentage of cases.⁴²

Another possible explanation in arguing for a relationship between unanimity and attitudes is that unanimous decisions result from extremely ideological lower court decisions.⁴³ This suggests that the Court's case selection process might be biased at times toward unanimity.⁴⁴ Finally, some have maintained that unanimous rulings somehow disguise real conflict and important policy disputes.⁴⁵ Whatever the case, it is apparent from a variety of explanations that future research is necessary in order to determine how attitudes influence the unanimous decision making process.

C. Strategic Behavior and Unanimity

The movement toward strategic behavior has been supported recently by numerous law and business school professors.⁴⁶ From their perspective, it is an appropriate framework for the analysis of judicial decision making. Hence, these scholars have recommended that the strategic approach be considered seriously by the legal community.

⁴² *Id.* Brenner and Arrington surveyed the Vinson, Warren, and Burger Courts in their study. *Id.* Interestingly, Hensley and Dean also found a liberal pattern in terms of unanimous decisions in the Burger Court. See Hensley & Dean, *supra* note 31. They argued that no ideological pattern should occur if the legal model was operating in unanimous decision making; however, they also rejected the attitudinal model because the Burger Court should have decided unanimously in the conservative direction. *Id.*

⁴³ See Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837 (1995). These scholars maintain that the liberalism of unanimous decisions by the Rehnquist Court might be attributed to extremely conservative lower court judges who are being reined in by the U. S. Supreme Court. *Id.* at 852. Hence, the Court might be predisposed toward unanimous rulings that are either conservative or liberal based upon the types of cases selected from the lower courts. *Id.*

⁴⁴ *Id.*

⁴⁵ See Spaeth, *supra* note 39, at 105-06.

⁴⁶ Such law and business professors have been promoting what they call positive political theory (PPT), consisting of "non-normative, rational-choice theories of political institutions," as a way to study judicial decision making. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L. J. 457, 461 (1992); EPSTEIN & KNIGHT, *supra* note 7, at xiii; see also William N. Eskridge, *Reneging on History? Playing the Court/Congress/ President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991). For a good review, see Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L. Q. 1 (1994).

Walter F. Murphy provided one of the first insights into the Justices as strategic decision makers.⁴⁷ While Murphy argued that Justices were mainly concerned about their policy goals, he also asserted that they were constrained in their behavior by the preferences of other actors, their expectations of others, and their institutional environment.⁴⁸ For example, a Justice might vote contrary to his preferences in order to be part of the majority, or he might vote against his preferences because he anticipates a reaction from the President or Congress. Murphy utilized landmark cases to demonstrate his point,⁴⁹ but his thesis failed to withstand large-scale studies.

Since Murphy's initial work, relatively few studies have employed strategic behavior as a means toward understanding judicial behavior.⁵⁰ Most recently, however, Lee Epstein and Jack Knight have attempted to build upon Murphy's work.⁵¹ By researching the papers of retired Justices from the Burger Court era,⁵² Epstein and Knight's comprehensive analysis provides support for Murphy's intuition. Several case examples⁵³ are utilized in order to demonstrate that the Justices' actions are based upon their own goals in conjunction with the preferences

⁴⁷ See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 198-210 (1964).

⁴⁸ See *id.* Murphy portrays the Justices as shrewd actors who know or anticipate the responses of other relevant actors and take them into account in their decision making. *Id.* at 201-02.

⁴⁹ *Id.*

⁵⁰ However, judicial scholars have not entirely rejected strategic behavior as a means toward understanding the behavior of justices. See generally Glendon A. Schubert, *The Study of Judicial Decision-Making as An Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958); see also David W. Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court*, 16 MIDW. J. POL. SCI. 208 (1972); Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POL. SCI. 285 (May 1994); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (May 1996); Edward P. Schwartz, *Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision-making*, 8 J. L. ECON. & ORG. 219 (1992); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AMER. POL. SCI. REV. 28 (March 1997).

⁵¹ See EPSTEIN & KNIGHT, *supra* note 11.

⁵² Epstein and Knight use the conference notes, case files, and docket books of four justices from the Burger Court era: Thurgood Marshall, William J. Brennan, Jr., Lewis F. Powell, Jr., and William O. Douglas. EPSTEIN & KNIGHT, *supra* note 11, at xiv-xvi.

⁵³ Among the significant cases utilized by Epstein and Knight are *Craig v. Boren*, 429 U. S. 190 (1976), *Frontiero v. Richardson*, 411 U. S. 677 (1973), *New York v. Quarles*, 467 U. S. 649 (1984), and *INS v. Chadha*, 462 U. S. 919 (1983).

and expectations of other actors and institutions.⁵⁴ Hence, contrary to the attitudinal perspective, judicial behavior is not simply a response to ideological values. Instead, given various constraints and limitations, the Justices behave strategically in order to achieve their goals.

Does strategic behavior account for the unanimous decision making process of the U. S. Supreme Court?⁵⁵ Given the complexities of unanimity and the lack of evidence provided by other alternatives, it is reasonable to suggest that unanimity might result from strategic behavior by the Justices. The following section explores this possibility.

IV. THE CHARACTERISTICS OF UNANIMITY

In an attempt to understand more fully the unanimous decision making process, this section discusses the characteristics of unanimity. According to an analysis of the Rehnquist Court from 1986-1990, U. S. Supreme Court cases with one or more of the following characteristics frequently result in a unanimous decision: 1) cases in which less time is spent by the Justices between oral argument and the decision date; 2) routine or less important cases; 3) cases in which the ideological direction of the decision is liberal; 4) cases involving federal action; and 5) cases

⁵⁴ *Id.* at xiv-xvi.

⁵⁵ While no studies have attempted to link strategic behavior directly with unanimity on the Court, David W. Rohde noted in his study of minimum winning coalitions that the Court might seek unanimity in a strategic manner because of presidential or congressional elections. Rohde, *supra* note 50, at 208, 210-12. At lower levels of the judiciary, scholars have found connections between strategic behavior and unanimity. See Hall & Brace, *supra* note 11, at 392-94; see also Melinda Gann Hall, Note, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1117 (1987) (finding that the electoral incentive was a factor in producing unanimous decisions in highly visible cases before the Louisiana Supreme Court); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 438-40, 444 (1992) (finding that the voting behavior of state supreme court justices in Louisiana, Texas, North Carolina, and Kentucky supported her previous results); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 54 (1990); Paul Brace & Melinda Gann Hall, *Integrated Models of Judicial Dissent*, 55 J. POL. 914, 918, 926, 928 (1993) (finding that institutional rules and practices affected consensus on state supreme courts).

that do not contain civil liberties issues.⁵⁶

Most importantly, it is necessary to consider whether these characteristics correspond with the legal, attitudinal, or strategic perspective of judicial behavior. The legal and attitudinal approaches have been utilized extensively by judicial scholars in an attempt to explain unanimity. Contrary to these more traditional perspectives, strategic behavior has been neglected as a means toward understanding unanimity.

A. Time

During the first five terms of the Rehnquist Court, one of the most powerful indicators of unanimity was the amount of time spent by the Justices on a case. Table 2 reveals that when the Justices spent less than three months between oral argument and the decision date, the Court ruled unanimously in 55% of its decisions. Conversely, when the Justices devoted more than three months to a case, the Court resulted in unanimity only 23% of the time. Hence, it appears that less time spent by the Justices dramatically increases the likelihood for a unanimous decision.

TABLE 2: THE RELATIONSHIP BETWEEN UNANIMITY AND TIME SPENT BETWEEN ORAL ARGUMENT AND THE DECISION DATE (1986-1990 terms)

	LESS THAN 3 MONTHS	MORE THAN 3 MONTHS	TOTAL
UNANIMOUS	178 (55%)	81 (23%)	259 (38%)
NON-UNANIMOUS	151 (45%)	267 (77%)	418 (62%)
TOTALS	329 (100%)	348 (100%)	677 (100%)

As members of the U. S. Supreme Court, the Justices are exposed to severe time

⁵⁶ See *supra* note 4 and accompanying text. While these five characteristics appeared most frequently as part of the unanimous decision making process, other characteristics were tested in this analysis as well. The following is a list of characteristics which were considered to be unrelated to unanimity: adherence to precedent, lower court disagreement, case complexity, the percentage difference in support of amicus briefs, the absolute difference in support of amicus briefs, participation of the Solicitor General, affirmances, ideological composition of the Court, and change in ideological direction of the Court.

constraints.⁵⁷ From the outset of the Court's term in October, the Justices must deal with thousands of certiorari petitions during the case selection process.⁵⁸ Throughout the remainder of the term, the Justices are engaged in oral arguments and conference voting. Finally, they must assign and produce numerous majority, concurring, and dissenting opinions for the nearly 100 cases decided each term.⁵⁹ Given their workload, it should not be surprising that the Justices are affected by time constraints.

It has been recognized that time constraints are a key consideration in the development of strategic behavior.⁶⁰ As stated previously, the proponents of strategic behavior argue that judicial behavior is tempered by various situational contexts.⁶¹ If the Justices spend less time on a case, then it is less likely that they will develop as many dissenting viewpoints. A Justice would strategically concentrate upon writing dissenting opinions in cases where time is available to develop his or her arguments more fully. Legal arguments written hastily might have less impact upon other members of the judiciary and could even harm the reputation of a Justice or the Court as a whole.

B. Routine Cases

Some studies have speculated that unanimous decisions occur in important cases.⁶² However, the results from Table 3 reveal that unanimity occurred most

⁵⁷ In describing the workload on the Court, Justice Souter remarked that his first term on the Court was equivalent to being hit by a tidal wave. Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238, 243 n.52 (1992).

⁵⁸ The U. S. Supreme Court receives an estimated 8,000 petitions for certiorari each term. See generally, DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: VOLUME 2 CIVIL RIGHTS AND CIVIL LIBERTIES 160-181 (2nd ed. 1995).

⁵⁹ In past terms, the Court consistently decided over one hundred cases. However, more recently, the Court has issued less than one hundred decisions per term. For a comprehensive account of the Supreme Court's decision making process, see LAWRENCE BAUM, THE SUPREME COURT 1-35 (1981).

⁶⁰ Herbert A. Simon, *Human Nature In Politics: The Dialogue of Psychology with Political Science*, 79 AM. POL. SCI. REV. 293, 301-02 (1985).

⁶¹ EPSTEIN & KNIGHT, *supra* note 11, at 112-167.

⁶² See S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689, 690 (1971); see also, Robert H. Dorff & Saul Brenner, *Conformity Voting on the United States Supreme Court*, 54 J. POL. 762 (1992); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L. J. 1 (1979). There is a sense among scholars that the Court at times rules unanimously in order to influence Congress, the President, and the lower courts. This is based upon the fact that the

often in routine, or less important decisions.⁶³ While 44% of routine cases were unanimous, the Court achieved unanimity in only 16% of important cases.⁶⁴ It is necessary to consider whether legal, attitudinal, or strategic behavior is responsible for this trend.

TABLE 3: THE RELATIONSHIP BETWEEN UNANIMITY AND ROUTINE CASES (1986-1990 Terms)

	ROUTINE CASES	IMPORTANT CASES	TOTAL
UNANIMOUS	238 (44%)	21 (16%)	259 (38%)
NON-UNANIMOUS	306 (56%)	112 (84%)	418 (62%)
TOTALS	544 (100%)	133 (100%)	677 (100%)

In accordance with the time and resource constraints placed upon the Justices, it is reasonable to assume that the Justices strategically focus their energies upon the most important cases. An important case would increase the possibility that a Justice would spend his or her resources writing a dissenting opinion. The divisions in the Court are defined more clearly in important cases where the Justices view

Court is dependent upon other governmental actors for the implementation and compliance of its decisions.

⁶³ Although most studies equate unanimity with important cases, at least one study has found that routine cases are part of the unanimous decision making process, albeit at the state court level. See Edward N. Beiser, *The Rhode Island Supreme Court: A Well-Integrated Political System*, 8 L. & SOC'Y REV. 167, 175 (1973).

⁶⁴ See HENSLEY, SMITH, & BAUGH *supra* note 4, at 864-865. For the actual definition of case importance, the authors categorized cases in one of three ways: 1) major importance, 2) moderate importance, and 3) routine, or less importance. *Id.* The definitions are based upon two sources which recognized the Court's most important cases each term: 1) New York Times and 2) United States Supreme Court Reports: Lawyer's Edition. *Id.* Hensley, Smith, and Baugh classify a case as being of major importance if both of these sources recognize the case as an important decision. *Id.* A case is classified as being of moderate importance if only one of the sources recognize it as important. *Id.* Finally, a case is classified as routine, or less important, if none of the two sources list it as being important. *Id.* These sources were deemed by the authors to be reliable, consistent over time, current, and legitimate to researchers in the field. *Id.*

For the purposes of this study, the three categories were collapsed into two. Those cases of major and moderate importance were combined into one category as important cases while routine, or less important, cases remained the same.

their opinions as an opportunity to influence a significant aspect of constitutional law. Hence, a Justice's personal goals are more readily served by writing dissents in important cases.

Justices experiencing severe time constraints are less likely to squander resources. A dissenting opinion in a routine case would not gain as much attention nor would it have as much impact upon policy. Therefore, the likelihood for unanimity increases in routine cases because of the Court's situational context. The idea of the Justices collectively reducing their workload by issuing unanimous decisions in routine decisions is compatible with the strategic approach.

C. Ideological Direction of the Decision

Because the Rehnquist Court consisted of a majority of conservative Justices⁶⁵ during its first five terms, it is reasonable to expect more unanimous decisions in the conservative direction.⁶⁶ However, the following results demonstrate a liberal trend in terms of unanimity. Table 4 illustrates that 48% of all liberal decisions during the period of study were unanimous. Surprisingly, the Rehnquist Court ruled unanimously in only 30% of its conservative decisions. These findings would seem to run counter-intuitive to the attitudinal theory.⁶⁷

TABLE 4: THE RELATIONSHIP BETWEEN UNANIMITY AND THE IDEOLOGICAL DIRECTION OF THE DECISION (1986-1990 Terms)

	LIBERAL	CONSERVATIVE	TOTAL
UNANIMOUS	143 (48%)	109 (30%)	252 (37%)
NON-UNANIMOUS	158 (52%)	256 (70%)	414 (63%)
TOTALS	301 (100%)	365 (100%)	666 (100%)

As mentioned above, studies of earlier Court eras have also found that

⁶⁵ From 1986 to 1990, the following U. S. Supreme Court Justices were classified as conservative based upon their voting records: Chief Justice William H. Rehnquist, Lewis F. Powell (retired 1987), Sandra Day O'Connor, Antonin Scalia, Byron White, Anthony Kennedy (appointed in 1988), and David Souter (appointed in 1990). SPAETH, *supra* note 4, at 103. Spaeth lists a variable in his data set which indicates the direction of the individual Justices' votes as either liberal or conservative. *Id.*

⁶⁶ The data use standard definitions for liberal and conservative case decisions used by scholars who apply empirical methods to the study of judicial decision making. *See* SEGAL & SPAETH, *supra* note 11, at 300-301.

⁶⁷ SEGAL & SPAETH, *supra* note 11, at 1-20.
<http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/2>

unanimous decisions have tended to be liberal.⁶⁸ Proponents of the attitudinal perspective have attempted to reconcile this trend toward liberalism and unanimity.⁶⁹ For example, Brenner and Arrington maintain that the liberal Justices on previous Courts were simply more extreme in their beliefs, and thus had a more strongly held ideology than its conservative members.⁷⁰ These two authors would argue similarly that the two liberal Justices on the Court from 1986 to 1990, Thurgood Marshall and William Brennan, are the cause for the relationship between liberalism and unanimity. Marshall and Brennan's extreme liberalism supposedly prevented them from voting for a conservative outcome, and thus reduced unanimous decisions in the conservative direction.

The argument that liberal Justices are more extreme in their beliefs than conservative Justices is not a satisfying explanation for liberal unanimity. While Brennan and Marshall displayed strong liberal views on the Court, conservative Justices such as Antonin Scalia and William Rehnquist were equally forceful in terms of their ideology.⁷¹ It is difficult to imagine these conservative Justices refraining from authoring a dissenting opinion against a liberal majority simply because their ideological beliefs were not strong enough. In addition, the fact that more conservatives than liberals served on the Rehnquist Court provided more opportunity for dissenting opinions when the Court ruled in a liberal direction.

Because the Justices are seemingly not operating according to attitudinal behavior, it is worthwhile to consider whether the legal or strategic perspectives might offer an explanation for liberalism in the unanimous decision making process. In terms of legal behavior, it has been suggested that the Rehnquist Court is simply upholding the liberal precedent from previous Court eras.⁷² While this is plausible, judicial scholars have been unsuccessful in their attempts to test and measure the effect of precedent on judicial behavior.⁷³ Therefore, it remains uncertain whether legal behavior influences unanimity in this manner.

Strategic behavior offers another possibility concerning the relationship between

⁶⁸ See Brenner & Arrington, *supra* note 11, at 75.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ For example, Rehnquist and Scalia voted together with Justices Clarence Thomas and Sandra Day O'Connor in 91 percent of all formally decided cases during the 1993 term. Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 33 (1994). Such a high percentage indicates their commitment to the conservative block on the Court.

⁷² Hensley & Dean, *supra* note 31.

⁷³ SEGAL & SPAETH, *supra* note 11, at 11-30.

liberalism and unanimity. It is conceivable that the Court is serving goals that produce liberal rulings. For example, the Justices might be increasing the power of the Court or the judiciary as a whole with specific decisions.⁷⁴ Any increase in the power of the judicial branch in relation to the executive or legislative branches is categorized as a liberal decision.⁷⁵ A collective strategy of this nature might explain the trend in liberal unanimity during the past fifty years.⁷⁶

While these ideas relating to legal and strategic behavior are interesting, they have not been tested in research studies. In any event, the continuing inadequacy of the attitudinal perspective increases the likelihood that liberal unanimity might result from innovations derived from legal or strategic behavior.

D. Federal Action Cases

Table 5 demonstrates that unanimity occurs frequently in cases dealing with federal action. Nearly one-half of all federal action cases⁷⁷ from 1986 through 1990 were unanimous. Interestingly, the Court ruled unanimously in only 30% of cases that did not involve congressional or presidential action. These results also are compatible with strategic behavior.⁷⁸

TABLE 5: THE RELATIONSHIP BETWEEN UNANIMITY AND FEDERAL ACTION CASES (1986-1990 terms)

	FEDERAL ACTION	NO FEDERAL ACTION	TOTAL
UNANIMOUS	163 (47%)	96 (30%)	259 (38%)
NON-UNANIMOUS	193 (53%)	225 (70%)	418 (62%)
TOTALS	356 (100%)	321 (100%)	677 (100%)

As one of the three branches of government, the U.S. Supreme Court is subject

⁷⁴ See SPAETH, *supra* note 4, at 82. Spaeth defines pro-exercise of judicial power decisions as liberal. *Id.*

⁷⁵ *Id.*

⁷⁶ See Hensley & Dean, *supra* note 31; see also Brenner & Arrington, *supra* note 11, at 75.

⁷⁷ See SPAETH, *supra* note 4. Federal action cases are equivalent to Spaeth's version of cases with federal statutory interpretation which he defines as cases involving the interpretation of a federal statute, treaty, court rule, or executive order. *Id.*

⁷⁸ See EPSTEIN & KNIGHT, *supra* note 11, at 1-21.

to various checks and balances inherent in the separation of powers doctrine.⁷⁹ For instance, the legislative branch can threaten the Court's jurisdiction⁸⁰ and size,⁸¹ or the executive branch simply can refuse to implement a judicial decision.⁸² Hence, the Court must render decisions that are respected by Congress and the President. Because the Justices consider the preferences and expected actions of other government actors, they should behave strategically in cases dealing with Congress or the President.⁸³ Therefore, the Court should desire unanimity because it is necessary to rule assertively in cases involving congressional or presidential action.⁸⁴ Otherwise, judicial decisions might be questioned easily by the other branches if the Court appears uncertain or ambiguous in its ruling. Any division

⁷⁹ The Founding Fathers were not content simply with separating power among the three branches of government. Each branch was created to check the other. THE ENDURING FEDERALIST, 1-15 (Charles Beard, ed. 1948).

⁸⁰ In 1868, the elected branches eliminated the Court's appellate jurisdiction in specific cases to prevent the Supreme Court from ruling on a federal law. See *Ex parte McCordle*, 74 U.S. 506, 509-10 (1868).

⁸¹ The elected branches have changed the size of the Court in order to add Justices with different views. This has occurred three times during the Jackson, Lincoln, and Grant administrations.

⁸² See Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86, 86-87 (1976); see also CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* 1-40 (1984).

⁸³ Epstein and Knight describe various institutional contexts that influence the Justices on the Court. They write:

[J]ustices need to consider two sets of institutions that establish their relationship with relevant external actors. First, because they serve in one of three branches of government, their decisions are subject to the checks and balances inherent in the separation of powers system instantiated in the *Constitution*. To create efficacious law -- that is, policy that the other branches will respect and with which they will comply--justices must take into account the preferences and expected actions of these other government actors. Second, because the justices operate within the greater social and political context of the society as a whole, they need to be attentive to the informal norms that reflect dominant societal beliefs about the rule of law in general and the role of the Supreme Court in particular.

Epstein & Knight, *supra* note, 11 at 138.

⁸⁴ Alexander Bickel describes the tension between the U. S. Supreme Court and the elected branches as the "Counter-Majoritarian Difficulty." See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH THE SUPREME COURT AT THE SAR OF POLITICS* 16 (1962). Justice Lewis F. Powell wrote: "We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." *U. S. v. Richardson*, 418 U. S. 166, 188 (1974).

might weaken the authority and legitimacy of the Court's ruling.⁸⁵ By issuing unanimous decisions in cases involving federal action, the Court is able to protect its own power stakes.

E. Issue Areas

Civil liberties cases include decisions involving criminal procedure, civil rights, the First Amendment, due process, and privacy.⁸⁶ Non-civil liberties cases include rulings dealing with attorneys, unions, economic activity, judicial power, federalism, federal taxation, and miscellaneous issues.⁸⁷ When the issue areas are divided between these two groups, a striking pattern emerges in terms of unanimous decision making. Table 6 demonstrates a strong relationship between unanimity and cases that do not contain civil liberties issues. While 51% of non-civil liberties cases were unanimous, only 27% of civil liberties cases unified the Justices. A plethora of U. S. Supreme Court studies has established conclusively that attitudes are a critical determinant of civil liberties cases.⁸⁸ Civil liberties cases readily produce policy choices for the Justices, and therefore these decisions readily divide liberals and conservatives on the Court.⁸⁹ Having established that attitudes are a critical factor in the outcome of civil liberties cases, it is necessary to explain what factors are responsible for the results of non-civil liberties cases.

While non-civil liberties cases offer policy choices, they are not as broad or controversial because they are less salient than civil liberties cases. Therefore, the level of conflict should be reduced among the Justices in non-civil liberties decisions. The Justices might view these cases as less controversial, and as a result, devote less of their resources toward writing dissenting opinions. In addition, the Justices strategically might select these less controversial cases in order to achieve

⁸⁵ While judicial power is most difficult to justify because representative government is defined entirely in terms of public accountability, some studies suggest that the Justices' decisions do reflect public opinion. See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 161 (1989).

⁸⁶ See SPAETH, *supra* note 4.

⁸⁷ *Id.*

⁸⁸ See PRITCHETT, *supra* note 8, at 25-31.

⁸⁹ James L. Gibson writes: "The most commonly accepted explanation of the exercise of discretion in decision making is that judges rely on their own ideological positions in making their decisions. *Judges' decisions are a function of what they prefer to do; . . .*" James L. Gibson, *Decision Making in Appellate Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* (John B. Gates and Charles A. Johnson eds., 1991).

harmony on the Court.⁹⁰ Without such areas of common ground, the Justices would be unable to devote their energies toward more controversial cases of constitutional law regarded by many scholars as civil liberties.

TABLE 6: THE RELATIONSHIP BETWEEN UNANIMITY AND ISSUE AREAS (1986-1990 Terms)

	CIVIL LIBERTIES	NON-CIVIL LIBERTIES	TOTAL
UNANIMOUS	98 (27%)	161 (51%)	259 (38%)
NON-UNANIMOUS	266 (73%)	152 (49%)	418 (62%)
TOTALS	364 (100%)	313 (100%)	677 (100%)

V. STRATEGIC BEHAVIOR ON THE COURT: A NEW PERSPECTIVE FOR UNDERSTANDING UNANIMITY

In previous studies, the attitudinal and legal perspectives have struggled in its attempts to explain unanimity.⁹¹ This analysis has confirmed the difficulty of these two perspectives to explain the characteristics of unanimous decision making. A strong trend of liberalism in unanimous decisions from a highly conservative Court is most problematic for the proponents of attitudinal behavior.⁹² Likewise, scholars favoring the legal approach continue to rely upon the weak assumption that the law defines unanimity on the basis that attitudes have disappeared from the decision making process.⁹³ Proponents of the legal perspective face the difficult task of developing improved methods and techniques for measuring the influence of the law upon unanimity.⁹⁴

Contrary to these traditional approaches, the strategic perspective appears to offer an innovative way to explain unanimity.⁹⁵ Strategic behavior explains four of the five characteristics of unanimity (the amount of time spent by the Justices,

⁹⁰ Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 752 (1994). Baum lists several types of goals including achieving harmony, raising judicial salaries, and holding power within the court. *Id.*

⁹¹ See generally, PRITCHETT, *supra* note 8, at xi-xii; see also Brenner & Arrington, *supra* note 11, at 75.

⁹² See Brenner & Arrington, *supra* note 11, at 84; Hensley & Dean, *supra* note 31.

⁹³ See PRITCHETT, *supra* note 8, at 50-75; Hensley & Dean, *supra* note 31.

⁹⁴ See SEGAL & SPAETH, *supra* note 11, at 33-67.

⁹⁵ Rohde, *supra* note 50, at 224; Hall and Brace, *supra* note 11, at 391-94.

routine cases, federal action rulings, and non-civil liberties decisions) in a convincing manner. Each relates impressively to the idea of policy-minded Justices operating in an environment with various constraints.⁹⁶

The remaining characteristic--the ideological direction of the decision--is not as easily accounted by using strategic behavior. However, the frequency of unanimous rulings in liberal decisions seems suited towards either strategic or legal behavior. As noted earlier, this is based upon the fact that the argument for attitudinal behavior runs counter-intuitive to this finding.⁹⁷ If attitudes were a critical determinant of unanimity, the Rehnquist Court should have issued a much higher percentage of unanimous decisions in the conservative direction.⁹⁸

Having related these characteristics to strategic behavior, it is worthwhile to speculate about their relationship to each other. As noted above, it appears that time constraints force the Justices to expend their resources on the most significant and controversial cases. The policy disputes among the Justices are developed most fully in the significant and controversial areas of constitutional law. Therefore, Justices author a higher quantity and quality of dissenting opinions in the most notable areas of the law. Because members of the Court strategically focus on important or controversial areas at the expense of less important or controversial ones, routine cases and non-civil liberties issues might be neglected by the Court. Hence, the Justices are less likely to develop dissenting viewpoints in these less meaningful decisions.⁹⁹

Beyond the time restrictions, the Court is also limited by its institutional

⁹⁶ See EPSTEIN & KNIGHT, *supra* note 11, at 138-145.

⁹⁷ SEGAL & SPAETH, *supra* note 11, at 1-24.

⁹⁸ The conservatism of the Rehnquist Court can be characterized by the following statistics: In civil rights and liberties cases, the Warren Court (1953-69) handed down liberal decisions in 71% of cases. Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 JUDICATURE 83, 85 (Sept.-Oct. 1993). By contrast, after a number of Republican appointees joined the Court, the Burger Court (1969-1986) and Rehnquist Court (1986-present) issued liberal decisions in only 44% and 43% of civil liberties cases, respectively. *See id.*

⁹⁹ See Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 423-24 (1981). Peterson hypothesized that meaningful issues on which there was no societal consensus would increase dissent rates. *Id.* Justice Robert Jackson wrote that "Conflicts which have divided the Justices always mirror a conflict which pervades society." ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 312 (1941)

context.¹⁰⁰ It is realistic to assume that the Justices are cognizant of the actions and preferences of Congress and the President.¹⁰¹ Therefore, it must operate strategically in regard to federal action cases. The Court can protect its authority and legitimacy by speaking assertively with one voice in cases concerning the more powerful branches of government.¹⁰²

In short, unanimous decision making can be defined by the situational and institutional contexts of the Court.¹⁰³ Based on the characteristics of unanimity, it appears that time considerations and institutional pressures create frequent opportunities for the Justices to unite in their decision making.

VI. SUMMARY AND CONCLUSION

This study of the Rehnquist Court asserts that unanimity on the Court is a product of strategic behavior.¹⁰⁴ Unanimity serves the goal-related behavior of the Justices who are forced to deal with time and resource constraints as well as their institutional environment.¹⁰⁵ The consequence of this behavior is that unanimity occurs frequently in cases with one or more of the following characteristics: 1) less time spent by the Justices between oral argument and the decision date; 2) routine or less important decisions; 3) liberal rulings; 4) federal action decisions; and 5) issue areas that do not contain civil liberties.

Each of these characteristics has been encompassed within the strategic framework, with the except liberal outcomes. However, it has been argued that liberal unanimity is probably a result of either the strategic or legal approach because liberalism on the Rehnquist Court is not compatible with the attitudinal perspective.

¹⁰⁰ EPSTEIN & KNIGHT, *supra* note 11, at 112-15. Epstein and Knight describe the Court's institutional context according to internal and external factors. *Id.* For example, internal factors consist of the Rule of Four and the assignment of opinions, while external factors involve the executive and legislative branches as well as the public. *Id.*

¹⁰¹ *Id.*

¹⁰² See Peterson, *supra* note 99, at 424. Peterson hypothesized that organizational loyalty, coupled with a sense that dissent hurts the court, leads to individual judges being less dissent-prone. *Id.* For empirical confirmation regarding this hypothesis, see John P. Frank, *Book Review, The Unpublished Opinions of Mr. Justice Brandeis*, 10 J. LEGAL EDUC. 401 (1958). Brandeis supposedly withheld many dissenting opinions because he felt that random dissents would weaken the Court. *Id.* at 404.

¹⁰³ EPSTEIN & KNIGHT, *supra* note 11, at 112-120.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

While past studies focused mainly upon the attitudinal and legal approaches,¹⁰⁶ this analysis has relied almost exclusively upon strategic behavior in order to understand more fully the unanimous decision making process. Future research should continue to focus upon characteristics related to the strategic perspective. It should be emphasized that, other characteristics derived from traditional or other innovative approaches should not be overlooked because of the complexities inherent in the study of unanimity.

¹⁰⁶ See generally PRITCHETT, *supra* note 8, at 1-20; Brenner & Arrington, *supra* note 11, at 75.
<http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/2>