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Charles C. Turner

Lori Beth Way

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# Classifying Supreme Court Concurrences: The Case of Justice Clarence Thomas\*

Charles C. Turner

California State University, Chico

Lori Beth Way

California State University, Chico

*Literature on the courts has demonstrated a rise in concurrences on the Supreme Court, but little attention has been given to the content of concurring opinions. Such an exploration has become crucial, as the number of concurrences has increased in recent decades, revealing a heightened sense of ideological division on the Court. Informed by new institutional concerns we contend that analysis of concurrences may provide evidence regarding how justices consider the institutional legitimacy of the Court, how they deal with precedent as a constraint and/or tool for their decision making, how they feed political discourse by attending to particular positions, and how politics are constituted within the Court. We develop a set of codes for classifying the content of concurring opinions as "Groundlaying," "Signaling," "Preserving," "Defending," or "Weakening." We apply the codes to empirical data by examining the concurrences of Justice Clarence Thomas. We conclude that this coding scheme, with some minor adaptations, will be an effective tool for understanding the concurring behavior of the Court.*

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*"I plead with you that, whatever you do, don't try to apply the rules of the political world to this institution; they do not apply."*—Clarence Thomas<sup>1</sup>

Understandably, in the study of Supreme Court decisions, most researchers focus on majority opinions because these become the law of the land. However, research has illustrated that dissents and concurrences can have a unique, if often delayed, influence in providing grounds for future reconsideration of the law by the Supreme Court, and may provide reasons to overturn the original ruling (see, for example, Primus 1998). In addition, the growth in the number of separate opinions over time suggests a need for scholarly attentiveness; there were, for example, ten times more concurring opinions written in the 1980s than there were in the 1940s.<sup>2</sup> Our goal here is to focus on understanding the *content* of concurrences. Specifically, we seek out patterns in concurring behavior by classifying the content of these opinions according to five broad categories that we outline below. In brief, informed by new institutional concerns we investigate five broad themes of concurring behavior: Groundlaying, Signaling, Preserving, Defending, and Weakening. Because this is a first attempt at systematically accounting for the content of such opinions, we focus on the concurrences of a single justice, Clarence Thomas, to assess the relevance of the codes we have generated. The questions we explore are what goals are demonstrated in concurring opinions? Do justices attempt to lay legal foundations for future cases? Do concurrences send messages to potential litigants regarding which cases to pursue? Do concurrences merely note justices' unique perspectives? Do justices

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<sup>1</sup> Statement from a speech to high school students in 2000. Quoted in Thomas (2001, 586).

<sup>2</sup> Supreme Court A to Z (2002).

reveal institutional and political concerns in separate opinions? Analysis of Thomas's concurrences allows us to offer tentative answers to these questions.

Since our main objective is to ascertain the accuracy and relevance of our proposed codes, we focus on only one justice as a case study. We selected Clarence Thomas because of the current Court members, he will likely be on the bench the longest. In a 1993 *New York Times* article he was quoted as saying: "The liberals made my life miserable for 43 years, and I'm going to make their lives miserable for 43 years."<sup>3</sup> Even if Thomas is not to be taken literally here, he is the youngest member, and the point is well made. Additionally and importantly, Thomas currently finds himself in the majority most of the time. If George W. Bush makes any appointments, he is likely to remain in this position for years to come. Being both in the majority and far from the median ideological position makes Thomas a likely candidate for frequent concurrences in the future.<sup>4</sup>

One reason to devote attention to concurrences is because these opinions are the ones potentially less likely to be shaped by compromise to please other justices and, therefore, are the opinions best suited for understanding the motivations for and consequences of actions by particular justices. As Baum notes

A justice who disagrees with the majority opinion generally writes or joins in a dissenting or concurring opinion. Because they are individual expressions rather than statements for the Court, both types of opinions can vary a great deal in form and tone. For the same reason, they usually reveal more about the author's views, and often express those views in more colorful language, than do majority opinions (2000, 135).

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<sup>3</sup> Quoted in Baum (2000, 74). Original source of the quotation is: Neil A. Lewis, "2 Years after his bruising hearing, Justice Thomas still shows the hurt," *New York Times*, 27 November 1993, p. 6.

<sup>4</sup> Moreover, Thomas's reticence during oral argument suggests that written opinions might be the best, and perhaps sole, location for identifying the Justice's point of view. (We are indebted to an anonymous referee for this observation.)

Moreover, Wahlbeck, Spriggs, and Maltzman (1999, 504) also note that dissenting opinions tend to be assigned, but concurring opinions are entirely self-selecting.

We seek to understand the way in which justices concur and the form concurrences take. Our goal is to begin a conversation regarding the content of concurrences and to assess whether our proposed coding scheme is useful. Beginning with the concurrences of one justice seems a reasonable place to start. If these codes prove to be instructive regarding concurrence behavior, then we will continue this project by extending the examination of concurrence content to all the justices of the Rehnquist Court.<sup>5</sup>

We begin by discussing the broader significance of concurrences, a previously under-studied unit of analysis. Indeed, while statistical compilations of opinions are available (see Spaeth 2001), little systematic work has been done to explore the *content* of concurring opinions. There seems to be general agreement regarding what majority opinions do: they create, change, and/or clarify the law. However, scholarly understanding of what is accomplished (or not) in concurrences is far less developed. We discuss the decline of consensus on the Supreme Court, the influence of new institutional approaches on our work, define our categories of concurring behavior, put Thomas's opinion writing behavior in context, explain what our coding endeavors revealed, and make recommendations for future research.

By engaging in the five types of activity we identify, Thomas offers an important piece in the puzzle of concurring behavior. If other justices illustrate similar concurring strategies, then justices are not merely revealing policy (or attitudinal) preferences, but rather to varying degrees are also considering the institutional history of the Court's reliance on previous minority opinions to provide a basis for future rulings that depart from precedent,

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<sup>5</sup> See Way and Turner (2003).

providing potential litigants with strategies, and attempting to narrow the legal reasoning of the Court.

### THE DECLINE OF CONSENSUS

Separate opinions have been criticized for diminishing the Court's opinion, the weight of law, and the legitimacy of courts (Walker, Epstein, and Dixon 1988; Ulmer 1970). Concurrences especially have been ridiculed as "judicial egocentrism" (Caldeira and Zorn 1998, 877). One defense of concurring and dissenting opinions is that they indicate that the case has "received careful consideration" (Moorhead 1952, 822). Yet, as O'Brien (1996, 322) aptly put it, "When individual opinions are more highly prized than opinions for the Court, consensus declines and the Court's rulings and policy-making appear more fragmented, less stable, and less predictable." Hence, an argument made in the literature is that the rise of concurrences indicates a decline in consensual norms. However, if many concurrences simply note for the record a clarifying point of little significance, their presence may not undermine the strength of majority opinions. On the other hand, the majority of concurrences may fundamentally undermine the reasoning of the Court's opinion by offering different legal tests than those used by the majority. Since there has been no systematic review of the content of concurrences, these questions remain largely unanswered.

Widespread court dissension arose in the twentieth century. Some scholars argue that the declining norm of consensus began with the Stone Court (Walker, Epstein, and Dixon 1988) and others argue that perhaps consensual norms of the Court showed signs of diminishing as early as the Hughes (Haynie 1992) or Taft Courts (Caldeira and Zorn 1998, 892). O'Brien (1999, 103) attributes the beginning of the rise of concurrences and dissents to FDR's New Deal appointees who "infused American Legal Realism and liberal legalism into the Court" and began revealing

their disagreements through opinions. The rise of minority opinions has been largely, but not solely, attributed to the leadership priorities or style of Chief Justices (Walker, Epstein, and Dixon 1998; Haynie 1992; Caldeira and Zorn 1998). Other possible influences on the rise of concurrences and dissents include the increase in the number of law clerks and secretaries as well as the introduction of computer technology, which has made it easier for justices to pen numerous opinions (O'Brien 1999).

In addition to documenting the decline of consensus, scholars have begun to reveal when or under what conditions it is likely that justices will author or join concurrences or dissents.<sup>6</sup> Ulmer (1970) argued that personal characteristics about a justice, such as religion and background as a lawyer, influence one's likelihood to dissent. Gerber and Park (1997) found that the members of the Rehnquist Court were more nonconsensual on the Supreme Court than they had been on the appellate courts on which they sat, and ultimately concluded that what mattered most regarding the behavior of Supreme Court justices was the justices' policy preferences. The team of Wahlbeck, Spriggs and Maltzman has done a particularly good job of discussing when, and perhaps why, justices concur or dissent. For example, they found that Burger Court (1999) justices were less likely to concur when they were ideologically close to the majority opinion writer, when they frequently sided with the majority opinion writer, and it was near the end of the term. The documented decline of consensus on the Court and explanations of when justices are likely to write concurrences and dissents have contributed to a broader understanding of judicial decision-making. Though scholars are

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<sup>6</sup>Studies of state courts illustrate that method of opinion assignment, presence of an intermediate appellate court, and method of judicial selection (election or appointment) affect judicial consensus (Hall and Brace 1989). Jaros and Canon (1971) also found that the presence of an intermediate level appellate court influences dissent rate. Such findings might help explain the dynamics of the Supreme Court.

beginning to reveal when concurrences are likely to be written, still absent is what justices are writing about in those concurrences. In the next section we discuss how new institutional work has informed our examination of the content of concurrences.

### MAKING MEANING OF CONTENT

While clearly much has been learned by thorough examinations of judicial votes on particular cases, public law scholars have begun to emphasize the need to look beyond votes as reflections of justices' policy preferences. New institutionalism has reminded political scientists of the power of institutional development and incentives and constraints of particular institutional configurations. Public law scholars have begun to embrace the central tenets of new institutionalism and produce a wide variety of works using this approach (e.g., Clayton and Gillman 1999; Gillman and Clayton 1999).<sup>7</sup> Informed by such approaches we contend that concurrences may provide evidence regarding how justices consider the institutional legitimacy of the Court, how they deal with precedent as a constraint on and/or tool for their decision making, how politics are constituted within the Court, and how they feed political discourse by attending to particular positions. Clayton and Gillman argue that "it is only with reference to the goals and motivations of the justices, not just to their votes, that we can explore some of the characteristics of the Court as an institution and its relationship to larger political structures" (1999, 2). It might just be that indications of justices' "goal and motivations" lie in separate opinions.

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<sup>7</sup> Also see Smith (1997) for a compelling argument regarding various traditions that are part of American Constitutional and legal development.



One of the many contributions of new institutional approaches has been to reemphasize an old tenet of the (pre-behavioralist) legal model—precedent matters. While Court scholars have not ignored this important aspect of the legal system, the focus on attitudes and policy preferences often says little about the influence of legal precedent.<sup>8</sup> An examination of the text of concurrences may reveal the influence of *stare decisis*, which is often discussed as an institutional constraint or consideration. Furthermore, concurrences may include a variety of messages to potential litigants regarding the types of arguments to which they are sympathetic (see Signaling below). Such behavior clearly bestows some credibility on particular positions and may contribute to political discourse in a particular ideological direction. With the major tenets of new institutionalism in mind, we developed five different categories for describing concurrences that we believe will further understanding of the Court and its justices.

### Thematic Analysis

For these categories to be meaningful, and eventually helpful to other scholars and court watchers, we needed to elucidate the codes in a thorough manner—such that an individual reading any concurrence would categorize that concurrence in the same manner we would. In this section we discuss how we went about coding each concurrence and thoroughly describe each type of concurrence behavior. In order to compare the content of concurrences, we employ thematic analysis. This process provides for the categorization of qualitative information; it helps make ‘thick description’ comparable.<sup>9</sup> In this project, thematic analysis in-

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<sup>8</sup> Of course, the exception to this is discussing precedent as something to be circumvented if justices do not agree with it.

<sup>9</sup> For a discussion of this method, see Boyatzis (1998).

volved the development of a set of codes for identifying recurring themes, goals, and effects in concurring opinions. Based on existing theories about the purposes of concurring opinions, we created some initial categories for describing concurrences. Next, we began a detailed reading of each of Thomas's concurrences. Specifically, we looked for both particular phrases, including key words, in an opinion and the general goal of the concurrence, which could be traced back to the text of the opinion. For example, a phrase such as, "I write separately to note that the majority is using the wrong legal test" would be clear indication that the concurrence was Groundlaying (as we will describe the code below). Turner read first and coded the opinions according to the typology described in Table 1. Turner further refined the categories during the course of the analysis and assigned multiple codes to cases when appropriate.<sup>10</sup> Next, Way read and coded the cases independently in order to assure interrater reliability. After we both completed coding, we identified any disagreements and re-read those cases. The initial agreement rate was 79%; re-reading increased that figure to 85%.<sup>11</sup> All remaining discrepancies were eliminated in conference. While there has been an increase in the use of computer software to code texts (e.g., NUD\*IST, WordStat), such technology is not well-suited to this project due to the nature of the opinions. Specifically, justices often refer back to previous cases and the positions they took in prior opinions and it is necessarily to be familiar with those references in order to accurately understand

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<sup>10</sup> In other words, cases that both signaled future litigants and defended a particular interpretive approach were assigned two codes, one for each behavior exhibited.

<sup>11</sup> This coding procedure follows, in part, the very thorough process described in Appendix B of Richards and Kritzer (2002). Regarding percentage agreement as a method of assessing interrater reliability Boyatzis (1998, 156) notes: "Typically, scores of 70% or better are considered necessary in this type of research."

the point the justice is making. Hence, this is work that needs to be done the old fashioned way.

**Groundlaying.** These categories require further elaboration and examples. *Groundlaying* cases are those in which the author

TABLE I  
TYPES OF CONCURRENCES

Category	Description
<b>Groundlaying</b>	establishes an alternative test or interpretation for possible future use; points to a different part of the Constitution or different statute than does the majority opinion
<b>Signaling</b>	speculates on how the justice might decide future cases; indicates to future litigants what types of cases to bring or arguments to make; goes out of the way to discuss issues not in contention
<b>Preserving</b>	provides a descriptive history; "just noting" for the record; sometimes expresses a warning or expresses annoyance
<b>Defending</b>	defends a philosophical or interpretive approach (e.g., original intent, judicial restraint)
<b>Weakening</b>	narrows the scope of the majority opinion (and, therefore, its <i>stare decisis</i> power) by specifically pointing to disagreements with the majority opinion

declares an interpretive difference with the majority opinion and often presents an alternative strategy for deciding such cases. The justice may lay out the possibility of applying a different test or standard for a case or class of cases, possibly in hopes of a Court majority adopting that approach in the future. He or she might also point out the majority's flaws without specifying a preferred alternative. To illustrate this last point, consider Thomas's writing in *United States v. Morrison*. In this case, which addressed the Violence Against Women Act, Thomas concurs

The majority opinion correctly applies our decision in *United States v. Lopez*, 514 U.S. 549 (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.<sup>12</sup>

This opinion suggests that in the future Thomas would be open to abolishing the use of the substantial effects test when considering Commerce Clause cases. That is quite a departure from the modern Court's interpretation of this clause and suggests that the Justice's opinion could lay the foundation for future endorsement of his approach. This concurring strategy achieves the objective of distinguishing the author's path to the disposition from that taken by the majority or plurality. If the issue at hand is one the justice has addressed previously, the opinion may be quite short, merely referencing a disagreement in a previous case. For example, in *Greater New Orleans Broadcasting Association v. United States* Thomas writes: "I continue to adhere to my view that...the Central Hudson test should not be applied."<sup>13</sup> In doing so, he briefly quotes his concurrence from *44 Liquormart, Inc. v. Rhode Island*, a case from three years earlier.<sup>14</sup>

**Signaling.** In Signaling cases, the justice goes beyond merely stating a difference of opinion and discusses directly the points of law that he or she would like to revisit in a future case.<sup>15</sup> These concurrences say very specifically that Thomas would like to review a particular case or would have liked to discuss a specific point of law but neither the petitioner nor the respondent

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<sup>12</sup> 529 U.S. 598 (2000).

<sup>13</sup> 527 U.S. 173 (1999).

<sup>14</sup> 517 U.S. 484 (1996).

<sup>15</sup> O'Brien (1996, 327) also uses the term signal in this way and notes that Justice Stevens finds such writings to be advisory opinions.

raised the issue in the case at hand. Serving as a signal to potential litigants, the opinion states a willingness to take the Court's reasoning further in an area of law, or even to change directions, or break with precedent. Thomas signals his dissatisfaction with precedent in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* when he writes: "I continue to believe that the Constitution does not constrain the size of punitive damage awards.... For this reason, given the opportunity, I would vote to overrule *BMW*. This case, however, does not present such an opportunity."<sup>16</sup> Sometimes, the issue the justice is signaling differs from the point of law under consideration in the present case. In such instances, the justice appears to be going out of his or her way to discuss a tangential point, or a point that the justice hoped the parties would have addressed in their briefs. Thomas signals his broader views on gun control in *Printz v. United States*.<sup>17</sup> In this case, the point of law that litigants and the majority opinion discuss is the Tenth Amendment. Thomas, though, extrapolates

This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here.<sup>18</sup>

It would be difficult for interested potential litigants to overlook such a plain statement of Thomas's willingness to reconsider the direction of the Court's jurisprudence regarding the Second Amendment. His last phrase seems slightly ironic as he

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<sup>16</sup> 532 U.S. 424 (2001).

<sup>17</sup> 521 U.S. 898 (1997).

<sup>18</sup> *Ibid.*, footnotes omitted.

clearly is considering the issue to the extent that he wrote a concurrence on the topic.

**Preserving.** The Preserving approach is one in which the justice presents arguments or historical descriptions that seem to hold little utility for future jurisprudence. These opinions may describe portions of American history, legal or otherwise, or they may be expressions of the justice's reasoning process that, for whatever reason, he or she wishes to preserve in writing. An example of a Preserving concurrence that is merely recording historical description is *Capitol Square v. Pinette* in which Thomas's concurrence of four paragraphs relates the history of the Ku Klux Klan's use of burning crosses.<sup>19</sup> His point, for the record, was that such an act was political and not religious in nature. The tone of such opinions can range from mundane reflection to pithy annoyance with other members of the Court to full blown jeremiad warning the reader of the dangers of the majority's interpretation. As an example of this latter tone, consider Thomas's statement in *Reno v. Bossier Parish School Board*: "I fully anticipate...that as a result of today's holding, all of the problems we have experienced in §2 vote dilution cases will now be replicated and, indeed, exacerbated in the §5 retrogression inquiry."<sup>20</sup> This proclamation warns of future dangers, but as these dangers exist in a section of the law that the present case does not touch, all Thomas can do is lament. Criticizing a dissenting opinion, as well, has little bearing on the present course of law, but a justice may wish to preserve the arguments against the dissent in case future jurists are tempted by its reasoning. Justice Thomas demonstrates this desire to have his observations preserved 'for the record' in *United Dominion Industries v. United States* when he states: "I write separately, however, be-

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<sup>19</sup> 515 U.S. 753 (1995).

<sup>20</sup> 520 U.S. 471 (1997).

cause I respectfully disagree with the dissent's suggestion that, when a provision of the Code and the corresponding regulations are ambiguous, this Court should defer to the Government's interpretation."<sup>21</sup> While Preserving opinions take many forms, they all present a minor, or even non-germane, clarification of the Justice's views.

*Defending.* The Defending concurrence is an effort to defend an approach to legal philosophy that spans beyond the confines of the present case. Occasionally the majority opinion, or a dissent, provokes a justice into writing separately in order to champion a philosophical or interpretive approach, such as original intent or judicial restraint. These opinions illustrate a broader ideological divide than a particular case and instead advocate a judicial philosophy. There are relatively few such broad philosophies—the Constitution as a living document, textualism, original intent, for example. The approach taken by another opinion might lead the concurring justice to extol the importance of common law antecedents, or defend analyzing the plain meaning of the text prior to a consideration of legislative intent. On this point, consider Thomas's concurrence in *Cornell Johnson v. United States*: "I agree with the Court's textual analysis...and think that analysis sufficient to resolve this case.... I would not rely, as the Court...and Justice Kennedy...do, on any apparent congressional purpose supporting the Court's reading of §3583(e)(3)."<sup>22</sup> In these concurrences the justice is not simply stating that a different test should be used in this particular case (which would be coded Groundlaying), but rather that a different approach should be used in an entire body of cases. For example, original intent should be examined when deciding any claim involving the Establishment Clause, or a plain reading of the text

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<sup>21</sup> 532 U.S. 822 (2001).

<sup>22</sup> 529 U.S. 694 (2000).

should be used when interpreting Congressional legislation. Thomas illustrates this type of concurrence in *Farmer v. Brennan*: "the Court's prison condition jurisprudence has been guided, not by the text of the Constitution, but rather by 'evolving standards of decency' ...I continue to doubt the legitimacy of that mode of constitutional decision-making..."<sup>23</sup> In such concurrences Thomas takes issue not just with a majority opinion, but with a larger interpretive approach.

**Weakening.** Finally, the Weakening concurrence is one in which the justice narrows the scope and authority of the majority opinion by emphasizing the points at which he or she departs from the majority's reasoning. Often, this has the effect of narrowing the breadth of the Court's opinion in some way, possibly turning parts of the majority opinion into a non-controlling plurality. We expected this to occur most often in special concurrences that concur only in part or in the judgment. It is important to note here that the Weakening category is not a psychological assessment of the author; we make no claims that the writer is intentionally seeking to muddle the Court's decision, or weaken the Court as an institution. We merely suggest that some concurrences have this effect. As Maltzman, Spriggs, and Wahlbeck (2000, 68) note: "a concurring opinion can ultimately serve as a sanction by articulating flaws in the majority opinion. By providing alternative ways to view the legal rule underlying the majority opinion, separate opinions can influence how the majority opinion is perceived, and even implemented, by judges, political decision makers, or private parties. In this sense, separate opinions possibly weaken the precedential basis of an opinion."

Indeed, the breadth of the *stare decisis* power of *Lynce v. Mathis* is likely compromised when Justice Thomas writes: "Under these narrow circumstances, I agree with the Court that the

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<sup>23</sup> 511 U.S. 825 (1994).



State's retroactive nullification of petitioner's previously accrued, and then used, release credits violates the Constitution's ban on *ex post-facto* lawmaking. I do not, however, join the majority's discussion of *Weaver v. Graham*, 450 U.S. 24 (1981), which I find unnecessary to the resolution of this case."<sup>24</sup> In another concurrence, *Republic National Bank of Miami v. U.S.*, Thomas wrote, "I cannot join the Court's discussion of jurisdiction because that discussion is unnecessary and may very well constitute an advisory opinion."<sup>25</sup> Whether it is Thomas's goal or not, such opinions have a potentially weakening—or at least narrowing—effect on the majority opinion.

If justices are not engaging in serious doctrinal work in their concurrences, then we would expect that the most frequent category would be Preserving. If, however, justices use concurrences to set the framework for a change in how particular areas of case law are determined, then we would expect to see a high percentage of Groundlaying and Weakening concurrences. A high percentage of Defending concurrences would indicate that justices are using concurrences to advocate a particular philosophy, which may or may not be linked to case outcomes. Finally, if justices frequently engage in Signaling behavior in their concurrences, then perhaps they are comfortable indicating the types of arguments they are open to and, by extension, are granting legitimacy to specific political positions.

While there are certainly concurrences that exhibit only one type of concurring behavior, there is no reason to assume that justices engage in just one of these categories in each concurrence. In fact, we assume that in many cases justices will engage in more than one type of concurrence behavior. For example, it makes perfect sense that a justice might both note his or her

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<sup>24</sup> 519 U.S. 433 (1997).

<sup>25</sup> 506 U.S. 80 (1992).

**TABLE 2**  
**JUSTICES' VOTES AND OPINIONS, 1991-2000 TERMS**

Justice/ Decision Type	Voting Behavior		Authored Opinions	
	<i>Frequency</i>	<i>Percent</i>	<i>Frequency</i>	<i>Percent</i>
<b>Thomas</b>				
majority or plurality	822	72.7	83	37.2
dissent	183	16.2	72	32.3
regular concurrence	61	6.4	39	25.8
special concurrence	65	6.8	29	19.2
Total	1131		223	
<b>Rehnquist</b>				
majority or plurality	990	85.0	109	61.2
dissent	140	12.0	49	27.5
regular concurrence	16	1.6	12	9.3
special concurrence	19	1.9	8	6.2
Total	1165		178	
<b>Stevens</b>				
majority or plurality	670	57.8	95	21.1
dissent	346	29.9	233	51.7
regular concurrence	59	7.3	51	23.3
special concurrence	84	10.3	72	33.0
Total	1159		451	
<b>O'Connor</b>				
majority or plurality	930	80.5	105	44.9
dissent	125	10.8	61	26.1
regular concurrence	61	5.9	44	25.4
special concurrence	39	3.8	24	13.9
Total	1155		234	
<b>Scalia</b>				
majority or plurality	837	72.2	97	30.8
dissent	177	15.3	95	30.2
regular concurrence	73	7.4	63	28.6
special concurrence	72	7.3	60	27.2
Total	1159		315	

preference for a different legal test than the majority (Groundlaying) and indicate that he or she would have voted differently had the plaintiff raised this particular legal issue (Signaling) in the same opinion. While, of course, there is generally a desire for categories to be mutually exclusive, we think in this case such a scheme would oversimplify the variety of behaviors contained in concurrences. With a more thorough understanding of the categories in mind, the following section explains Thomas's voting behavior and opinion writing compared to his fellow Rehnquist Court members.

### Thomas In Context

Before examining the substance of Thomas's opinions specifically, we will situate his separate writing within the broader institutional context. Justice Thomas took his seat on the Court October 23, 1991 and took part in his first case on November 4, 1991. As seen below in Table 2, Justice Thomas took part in either a regular or special concurrence about 13.2% of the time in which he voted with the majority during his first decade on the bench. During this period, only Stevens (17.6%), Scalia (14.7%), and Breyer (13.4%) concurred more often. Concurrences comprised 45% of Thomas's non-dissenting written opinions, the third highest percentage behind Stevens (56.3%) and Scalia (55.8%). In numbers of concurrences, Thomas's 68 primary concurrences as Stevens and Scalia (both with 123).<sup>26</sup> While Thomas is not the most prolific concurrer, these comparisons

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<sup>26</sup> Ginsburg and Breyer have fewer due to a shorter period on the bench during the time period under investigation. Rehnquist's paltry concurrence totals are consistent with previous findings regarding the tendency of chief justices to refrain from writing separately (for example, see Wahlbeck, Spriggs, and Maltzman 1999; Maltzman, Spriggs, and Wahlbeck 2000). Scalia's high number is perhaps not surprising, as he has publicly embraced concurrences (Scalia 1994).

**TABLE 2**  
**JUSTICES' VOTES AND OPINIONS, 1991-2000 TERMS**  
 (continued)

Justice/ Decision Type	Voting Behavior		Authored Opinions	
	Frequency	Percent	Frequency	Percent
<b>Kennedy</b>				
majority or plurality	1001	85.7	93	49.5
dissent	75	6.4	30	16.0
regular concurrence	51	4.7	38	24.1
special concurrence	41	3.8	27	17.1
Total	1168		188	
<b>Souter</b>				
majority or plurality	905	77.7	91	41.9
dissent	159	13.6	64	29.5
regular concurrence	61	6.1	37	24.2
special concurrence	40	4.0	25	17.1
Total	1165		217	
<b>Ginsburg</b>				
majority or plurality	634	73.5	73	42.4
dissent	146	16.9	49	28.5
regular concurrence	53	7.4	34	27.6
special concurrence	29	4.1	16	13.0
Total	862		172	
<b>Breyer</b>				
majority or plurality	512	70.3	58	34.7
dissent	137	18.8	69	41.3
regular concurrence	50	8.5	25	25.5
special concurrence	29	4.9	15	15.3
Total	728		167	

Data derived from Spaeth (2001). Data for Justice Ginsburg begin with 1993 and for Justice Breyer begin with 1994. For concurrences, percent is calculated as the percent of cases in which the justice concurred out of the total number in which he or she voted with the majority.

indicate that he is more likely than most other justices both to concur and to author his own concurrence. Though concurrences are the most likely types of opinions to be signed by a single individual, 13 of Thomas's 68 concurrences were joined by another justice, Scalia in each case. The relationship between him slightly above the median, though he wrote just over half as these two conservative justices appears even stronger when one observes that these 13 cases comprise 52% of all the cases in which Scalia joined another justice's concurrence during this decade.<sup>27</sup>

Wahlbeck, Spriggs, and Maltzman (1999) found that Burger Court justices were less likely to author concurrences when justices who are ideologically closer to the justice in question write the majority. Caldeira and Zorn (1998) also see the norm of reciprocity as a likely factor that influences the choice of justices regarding whether to write separately or not. Furthermore, they found that justices who often cooperate with one another are less likely to write concurrences when the colleague whom the justice cooperates with writes the majority opinion. Consistent with this research, Thomas was significantly less likely to concur when Rehnquist or Scalia authored the opinion of the court.<sup>28</sup> Hence, in various ways Thomas is not so atypical in his concurring behavior as to make him an undesirable candidate for the evaluation of our proposed codes.<sup>29</sup>

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<sup>27</sup> Likewise, Thomas joined 40 of Scalia's concurrences, representing 63% of all the concurrences Thomas joined. The connection between these two jurists is well-documented. *The American Lawyer* (2001), for example, reports that Scalia and Thomas have been in vote alignment between 82.8% and 97.7% percent of the time for each term between 1991 and 2000 (reprinted in "Friends and Foes" 2001).

<sup>28</sup> Examining all cases where Thomas voted with the majority disposition, the correlation between a Scalia or Rehnquist authored majority and Thomas writing a concurrence was negative and significant (the Pearson correlation is  $-.070$  at  $p < .10$ , one-tailed).

<sup>29</sup> Of course for many research questions Thomas would not be a good candidate (e.g., an examination of nomination politics), but such concerns should not be the case given our particular focus.

## REVEALING CONCURRING BEHAVIOR

We categorized all sixty of Thomas's concurrences for analysis.<sup>30</sup> Frequencies are reported in Table 3. Thomas's most prevalent concurring behavior was Groundlaying at over 58%. Groundlaying concurrences are those engaging in substantive legal departures from the majority's reasoning. As the theme most typical of Thomas's concurrences, Groundlaying offers some important insights into the act of concurring. First, it clearly establishes that a justice does not have to dissent in order to take issue with the majority's legal reasoning in an area of law. On several occasions Thomas used a concurrence to establish his

TABLE 3  
FREQUENCIES FOR OPINION CHARACTERISTICS

Characteristic	Yes
Groundlaying	35 (58.3%)
Signaling	19 (31.7%)
Preserving	24 (40.0%)
Defending	15 (25.0%)
Weakening	14 (23.3%)

position favoring, for example, the use of strict scrutiny in commercial speech cases. Second, the prevalence of Groundlaying supports scholars' contentions that a rise in concurrences may indicate a factitious Court.<sup>31</sup> For example, in *Bank of America v. 203 North LaSalle Street Partnership*, Thomas disagrees with the majority's interpretation of the Bankruptcy Code and offers what

<sup>30</sup> For the purposes of the statistical analysis, 1 case (*Holder v. Hall*) was removed as an outlier, making N = 59 for those tests. This total is slightly smaller than that found by Spaeth due to differences in coding decisions which concur in part and dissent in part.

<sup>31</sup> O'Brien (1996, 285) offers that this may be because there is less deliberation and compromise about opinions due to a heavy workload.

is, to his mind, a clearer alternative.<sup>32</sup> Declaring a different path of reasoning indicates that, regardless of the case disposition, there is a lack of agreement in an area of law that extends beyond what vote totals, as traditionally calculated, reveal. In fact, Groundlaying behavior was positively correlated with writing a special concurrence.<sup>33</sup> Finally, Groundlaying may be an important precursor to future interpretive changes. Though we do not measure the ultimate effects of this phenomenon, the fact that Groundlaying concurrences present an alternative approach supported by at least one member of the Court suggests that this alternative could be a leading contender for the majority's interpretation in the future. For example, if Thomas stakes out his position favoring strict scrutiny in commercial speech in a series of concurrences, then if Thomas ever has the opportunity to construct a majority opinion on a case in this area of law, it seems likely that this is the interpretive approach he would take. While this claim is speculative, the prevalence of Groundlaying concurrences suggests this scenario may be worthy of more attention in the future.

Thomas Signaled 31.7% of the time. In nearly one-third of his concurrences, Thomas indicated that he would like to overrule a particular case or review an entire body of precedent. However, he clearly indicated that when litigants did not *ask* him to review a previous case, he saw it as inappropriate to do so. He might say, for example, that he did not agree that a precedent had been properly decided, but since the parties in the present case had accepted the precedent, he felt he must as well. These Signaling concurrences illustrate the power of institutional norms on the Court.<sup>34</sup> Thomas is clearly indicating that he does not agree

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<sup>32</sup> 526 U.S. 434 (1999).

<sup>33</sup> The Pearson correlation is .392 at  $p < .01$ , one-tailed.

<sup>34</sup> See Kahn (1999) for more on the institutional constraint of *stare decisis*.

with rulings but is unwilling to consider overruling them until a party *specifically* asks him to do so.<sup>35</sup> The following are a couple of examples of such behavior. In *Georgia v. McCollum* Thomas writes

As a matter of first impression, I think that I would have shared the view of the dissenting opinions: A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action. Yet, I agree with the Court and the Chief Justice that our decision last term in *Edmonson v. Leesville Concrete Co.* governs this case and requires the opposite conclusion. *Because the respondents do not question Edmonson*, I believe that we must accept its consequences. I therefore concur in the judgment... [emphasis added].<sup>36</sup>

Thomas even expressed such sentiments in an area of law in which he has strongly advocated that the Court has been misguided. For example, the entire concurrence in *South Central Bell v. Alabama* consists of "I join the opinion of the Court. I agree that it would be inappropriate to take up the State's invitation to reconsider our negative Commerce Clause doctrine in this case because 'the State did not make clear it intended to make this argument until it filed its brief on the merits.' *Ante*, at 10."<sup>37</sup> He seems to be indicating to potential future litigants that they should not make the same mistake.

Often, Thomas's Signals were not narrow, but rather indicated that the justice disagrees with an entire area of Supreme Court rulings. We think it is worth noting that he does not indicate once that he disagrees with a body of precedent, but instead repeatedly

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<sup>35</sup> These opinions seem to ignore the power of the Court's ability to define the issue in the case largely as they wish. See McGuire and Palmer (1995) on issue fluidity.

<sup>36</sup> 505 U.S. 42 (1992).

<sup>37</sup> 526 U.S. 160 (1999).



writes concurrences saying so in multiple cases regarding that area of the law. This seems to be especially the case in Commerce Clause, vote dilution, and commercial speech cases. Hence, in a few areas of law he repeatedly engages in Signaling concurrence behavior.<sup>38</sup> Such opinions point to a seeming judicial activism as he is essentially asking litigants to bring him cases (Wermiel 2002). Perhaps Moorhead (1952, 884) was prophetic when he wrote

If a concurring or dissenting opinion is not written with full respect for *stare decisis*, it serves neither to improve our jurisprudence nor to afford a reliable basis for prediction. It is one thing to respect the doctrine of *stare decisis*, but, from time to time in a dissenting or concurring opinion, to argue that a particular precedent is wrong or outmoded and should be overruled. It is quite a different thing to indulge in an iconoclastic endeavor to upset all that has gone before by making concurring and dissenting opinions mere vehicles for the conveyance of pet ideologies.... If the decisions of a court are consistently accompanied by concurring or dissenting opinions which represent attempts to substitute the impulses of the present for the wisdom of the past, the law suffers, and the only possible prediction is one of chaos.

Of course, Thomas's response to this is likely to be that he is advocating a return to the original understanding of the issue or principle in question, which the Court has unfortunately ignored for a period of time.<sup>39</sup>

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<sup>38</sup> This is consistent with Gerber's (1999) portrayal of Thomas as having unique and adamant views on these subjects.

<sup>39</sup> *U.S. v. Lopez* (1995) is an excellent example of Thomas's use of original intent (see also Schmidt 1997). It will be interesting in future research to see the degree to which this is idiosyncratic for Thomas or whether other justices behave similarly over time on particular issues.

Thomas exhibited Weakening behavior in 23.3% of his concurrences. Such a percentage would indicate that Thomas is comfortable with reducing the scope and/or legitimacy of the majority opinion. However, Weakening opinions could do the most damage if the court's vote contained a minimum winning coalition (typically 5-4 decisions), effectively turning a majority opinion from a controlling precedent into a merely persuasive plurality opinion. In fact, Thomas was much less likely to write Weakening concurrences in such instances.<sup>40</sup> One explanation for this behavior is that Thomas is hesitant to exercise his ability to Weaken in cases where this action is most likely to have a negative impact on the legitimacy of the institution and the law. As O'Brien (1996) notes, another possible explanation is that the majority opinion writer may be more likely to accommodate various views in his or her opinion for the Court in minimum winning coalition cases because if such a compromise is not made, a Court opinion may not result.

We expected that Weakening concurrences would most often be special concurrences in which the justice agrees with the dispositional judgment of the Court but not with its reasoning. Special concurrences are more likely to weaken the opinion of the Court and, therefore, the clarity of the law. A special concurrence, then, has greater repercussions for the institutional legitimacy of the Court than does a regular concurrence. Thomas did not write a single Weakening regular concurrence. In other words, he only engaged in Weakening behavior when he was writing a special concurrence. That being said, Thomas did write special concurrences that we did not code as weakening. Thus, "Weakening" and "special concurrence" are not definitionally

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<sup>40</sup> Thomas wrote a Weakening opinion in only one of the fifteen cases (6.7%) which had a minimum winning coalition.

synonymous. Rather, Weakening is best understood as a subset of special concurrences.

We applied the Defending code to 25% of Thomas's opinions. In these cases, a justice goes beyond the point of law in the case at hand to discuss his or her broader views on legal reasoning. In Thomas's case, Defending most often took the form of discussing original intent. In fact, Thomas explicitly mentions the Framers in about half of the cases we coded as Defending. In *Loving v. United States*, for example, Thomas spends about one-third of his concurrence discussing the Framers' knowledge of English military and Parliamentary history, in this case criticizing the majority's analysis of that history.<sup>41</sup> In the remainder of Defending cases, Thomas notes either agreement or disagreement with the line of legal reasoning employed in another opinion. In *United States v. R.L.C.*, for example, Thomas echoes an argument made in Scalia's concurrence on the limitations of legislative history as an interpretive approach.<sup>42</sup>

Opinions that were solely Preserving did nothing more than note minor clarifications, argue with a dissent, or present historical information. These are the opinions that would describe what has previously been expected of concurrences—they do little of jurisprudential significance. The number of opinions that *only* Preserved was somewhat small—20%. However, a full 40% of Thomas's concurrences exhibited Preserving behavior. Hence, he often Preserved when he also did other more meaningful tasks. In those instances, it was likely a lengthy description of historical information that led to assignment of the Preserving code. It may be the frequent appearance of such obvious *dicta* that has led many to discount the value of concurrences. The fact that half of Thomas's concurrences which display this behavior also

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<sup>41</sup> 517 U.S. 748 (1996).

<sup>42</sup> 503 U.S. 291 (1992).

exhibit another type of concurring behavior may indicate that scholars have been too quick to assume that the presence of “judicial egocentrism” (Caldeira and Zorn 1998, 877) also means an absence of substance.

Thomas’s concurrences often met the requirements of more than one code. The average number of codes per concurrence was 1.78. Therefore, Thomas’s concurrences often do more than one thing—such as Weaken and Groundlay or Groundlay and Signal. In other words, in one section of the concurrence he might Groundlay while in another he may Defend. The variety of combinations displayed in Table 4 suggests a great degree of flexibility in combining strategies. That being said, the vast majority (79%) of concurrences employ two or fewer types of concurring behavior.

### LESSONS LEARNED

Clearly, concurrences are not politically, legally, or historically insignificant. Seventy-five percent of Thomas’s concurrences fall into one of the three jurisprudentially important categories: Signaling, Groundlaying, or Weakening. This alone is relatively compelling as it is a strong argument for why concurrences are opinions worthy of further study. Justice Thomas exhibits a clear willingness to use concurrences to not only indicate a particular position, but also to advocate, especially through Signaling and Groundlaying.

The absence of literature on the content of Supreme Court concurrences leads one to assume there is not much to learn from them. This effort, however, illustrates that not all concurrences are alike. In some cases, concurrences are the sites of serious doctrinal disagreements. Also, such opinions often include the important jurisprudential work of outlining preferred legal doctrine for hopeful adoption in the future. Finally, concurrences provide a window into the political dynamics of the Court. They

illustrate where compromise could not be met in the majority opinion and when a justice feels compelled to note his or her disagreement with the Court's opinion.

Maveety (2002, 9) argues that the proliferation of concurrences may have "bifurcated judicial policy goal-seeking into two, at times mutually exclusive dimensions: policy in case outcomes, and policy in doctrinal rules."<sup>43</sup> It seems that a justice's vote with the majority would indicate his or her "policy in case outcomes" preferences, while the content of his or her concurrence indicates a "doctrinal" preference. Thomas is using concurrences to seek both of his preferences; rather than suppressing his doctrinal preferences, he chooses to write them in the concurrences, perhaps due to the ebb of consensual norms. One can also see from the content of these concurrences both the institu-

TABLE 4  
FREQUENCIES OF CODE COMBINATIONS

Characteristic	Frequency
<b>Cases assigned only one code</b>	<b>28 (47.0%)</b>
Groundlaying only	10
Signaling only	4
Preserving only	12
Defending only	1
Weakening only	1
<b>Cases assigned two codes</b>	<b>19 (32.0%)</b>
<b>Cases assigned three or more codes</b>	<b>13 (22.0%)</b>

tional constraint of *stare decisis* and one justice's attempt to thwart it by signaling to future litigants that they must specifically argue against a precedent in order for the Court to consider overturning it.

<sup>43</sup> See also Baum (1997) on justices' pursuit of legal and policy goals.

With the preceding lessons learned, we will continue (and encourage others to continue) to explore the significance of separate opinions. Our future work will compare the concurring behavior of members of the Rehnquist Court and consider what might explain variation in content. We will also consider whether Rehnquist Court justices are so comfortable with the collapse of consensus norms that they have all begun to write Weakening concurrences at a rate that could compromise both the institution of the Court and legal clarity. It will also be interesting to see whether justices considered conservative and liberal concur in similar fashion. Finally, do those who claim to be advocates of judicial restraint write different kinds of opinions than do their more activist colleagues? These are all important questions for further study.

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