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Deciding Not to Decide: A Limited Defense of the Silent Concurrence

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DECIDING NOT TO DECIDE: A LIMITED DEFENSE OF THE SILENT CONCURRENCE

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I. INTRODUCTION

Justice Alito wrote many separate opinions in his first decade on the Supreme Court, but one stands apart. It read, in its entirety, "Justice Alito concurs in the judgment."[1]

This one-liner raised some eyebrows.[2] The unexplained vote is commonly understood to be the province of the legislator; judicial power is customarily exercised through reasoned, written opinions.[3]

While the concurrence without opinion—or silent concurrence—is now rarely used on the Supreme Court, it

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1. L.A. Cnty. Flood Control Dist. v. NRDC, ___ U.S. ___, 133 S. Ct. 710, 714 (2013).

2. One blogger called it the "the SCOTUS way of communicating, 'Just saying.'" Josh Blackman, *Alito, J., Concurring & Just Saying*, JOSH BLACKMAN'S BLOG (Jan. 8, 2013), http://joshblackman.com/blog/2013/01/08/alito-j-concurring-just-saying; *see also* Kedar S. Bhatia, *Concurring or Dissenting Without An Opinion*, DAILYWRIT (Jan. 8, 2013), http:// dailywrit.com/2013/01/concurring-or-dissenting-without-an-opinion (calling it a "break from the norm" and noting that "[c]oncurrences . . . without opinion used to be fairly common, but in recent years they have become increasingly rare").

3. *Cf., e.g.*, Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999) ("When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called 'judicial'? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions?"); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1371–72 (1995) (asserting that judges write "to reinforce [their] oft-challenged and arguably shaky authority to tell others—including duly elected political leaders—what to do" and "to demonstrate [their] recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike").

remains a steady feature on the federal courts of appeals.[4] And yet, it is widely regarded as illegitimate. It has been criticized as "perplexing,"[5] "an abomination,"[6] "unnecessary,"[7] "trouble-provoking,"[8] and "condemnable,"[9] accused of "thwart[ing] the judicial process,"[10] of offering "little value"[11] or none at all,[12] and condemned as a practice that "cannot be justified as appropriate judicial methodology,"[13] and must be "eradicated"[14] or "abandon[ed]."[15]

These attacks are overstated. Silent concurrences are a legitimate technique of "negative judicial agenda-setting."[16] As when a judge chooses not to reach every issue presented or to resolve a case with an unpublished disposition, the silent concurrence allows judges to decide not to decide, permitting reallocation of judicial time towards other cases that might improve the overall quality of decisionmaking. Critics are not wrong to point out problems with the silent concurrence, but these flaws are shared by other negative agenda-setting practices that are broadly regarded as legitimate.[17] The cost/benefit ratio is

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4. *See infra* Part II.

5. Ira P. Robbins, *Concurring in the Result Without Written Opinion: A Condemnable Practice*, 84 JUDICATURE 118, 118 (2000).

6. RUGGERO J. ALDISERT, OPINION WRITING 152 (3d ed. 2012) ("[T]he naked statement 'I concur in the result.'. . . is the kind of thing that prompts the young to scoff, 'Big deal!' I scoff at the 'concurrence in the result' practice as an abomination. What is being served? Very little, except, perhaps—to use the vernacular again—an ego trip.").

7. PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 19 (2010); *see also* Ryan M. Moore, Comment, *I Concur! Do I Matter? Developing a Framework for Determining the Precedential Influence of Concurring Opinions*, 84 TEMPLE L. REV. 743, 752 (2012).

8. Richard B. Cappalli, *What is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMPLE L. REV. 303, 331 (1999).

9. *See generally* Robbins, *supra* note 5.

10. *Id.* at 162.

11. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 301 (2008).

12. Moore, *supra* note 7, at 760 ("Where no opinion exists to cite to, the issue of precedential influence is without value.").

13. Cappalli, *supra* note 8, at 325.

14. *Id.* at 331 (recommending that Pennsylvania appellate courts "eradicate[] the deeply rooted, but trouble-provoking, silent concurrence").

15. Robbins, *supra* note 5, at 164.

16. *See infra* text accompanying notes 38–55 (discussing varieties of negative judicial agenda-setting).

17. *See infra* Part III.

not apparently worse for silent concurrences than for these other practices. Calls for abolition, therefore, seem to be unjustified.

This article draws on an original dataset of all silent concurrences in the federal courts of appeals from 1997 to 2014[18] and proceeds in two parts. Part II reports on patterns of contemporary usage of silent concurrences. Part III argues that silent concurrences are a legitimate technique of negative judicial agenda-setting.

II. SILENT CONCURRENCES: AN OVERVIEW[19]

Dissents and concurrences without opinion date back to the early Supreme Court, with the Marshall Court (1801–1835) recording forty-one separate opinions without opinion.[20] The practice became more prevalent, with the Taney Court (1836–1864) registering 389.[21] But, by the late twentieth century, the Court had moved away from the practice. Between 1986 and 1989, the Rehnquist Court produced just nine silent concurrences.[22] And by 2013 the silent concurrence had become

18. *See* Alexander I. Platt, *Silent Concurrence Dataset* (2016) (containing statistics on silent concurrences in the federal courts of appeals) (on file with author). The methodology used to assemble the dataset is reported in Appendix A, *infra* p. 163, and the cases included in it are listed in Appendix B, *infra* pp. 164–75.

19. This article's focus is on the federal courts of appeals, but some state appellate courts also use the technique frequently. A 2000 survey found that it was used regularly in Alabama, Florida, Georgia, Louisiana, Michigan, Mississippi, Ohio, and Pennsylvania, and that Alabama, Mississippi and Pennsylvania demonstrated a "remarkably high incidence" of the practice. Robbins, *supra* note 5, at 118. Use in Pennsylvania has been particularly broad: From 1966 through early 1999, its appellate courts used silent concurrences over 600 times. Cappalli, *supra* note 8, at 331 n.203.

20. The first recorded dissent without opinion in the Supreme Court was Herbert v. Wren, 11 U.S. (7 Cranch) 370, 382 (1813) (Johnson, J., dissenting); *see also* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 148 n.65 (1999) (citing *Herbert*).

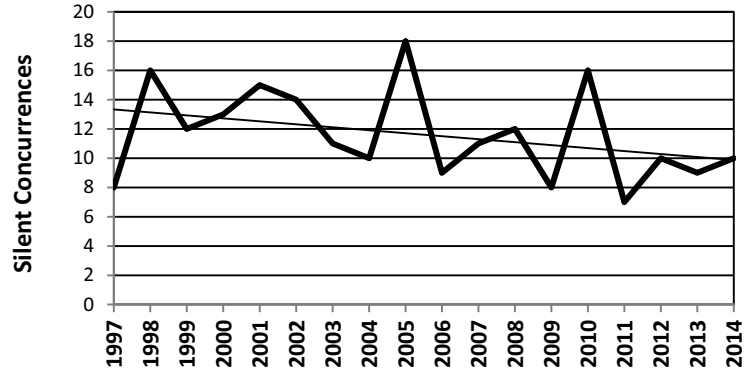
21. Kelsh, *supra* note 20, at 158.

22. CORLEY, *supra* note 7, at 32; *see* DOJ v. Tax Analysts, 492 U.S. 136, 155 (1989) (White, J., concurring); Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (Blackmun, J., concurring in result); INS v. Pangilinan, 486 U.S. 875, 887 (1988) (same); Johnson v. Mississippi, 486 U.S. 578, 590 (1988) (O'Connor, J., concurring); Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 588 (1988) (Scalia & O'Connor, JJ., concurring); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988) (Blackmun, J., concurring); Comm'r v. Fink, 483 U.S. 89, 100 (1987) (Blackmun, J., concurring in result); Bd. Of Dirs. of Rotary Int'l v. Rotary Club of

rare enough that Justice Alito's use of the technique provoked a startled reaction.[23]

Yet the practice lives on in the federal courts of appeals. Between 1997 and 2014,[24] an average of about twelve published cases per year (approximately 0.25 percent[25]) have included silent concurrences.[26] There is considerable circuit variation: The First Circuit never uses the silent concurrence; the Second, Third, and Seventh rarely do; and the Fifth and Eleventh use it most often.[27]

Table 1
Silent Concurrences in the Federal Courts of Appeals



Duarte, 481 U.S. 537, 550 (1987) (Scalia, J., concurring); *see also* Moore, *supra* note 7, at 760 n.135.

23. See *supra* note 2.

24. Data in all tables is from fiscal years 1997 through 2014. "Fiscal year" in this context means the twelve-month period ending in September 30 of the named year. *See* Appendix A, *infra* page 163.

25. *See* Table 2, *infra* page 145.

26. *See* Table 1.

27. *See* Tables 3 and 4, *infra* pages 145, 147.

Table 2
Silent-Concurrence Rates in the Federal Courts of Appeals

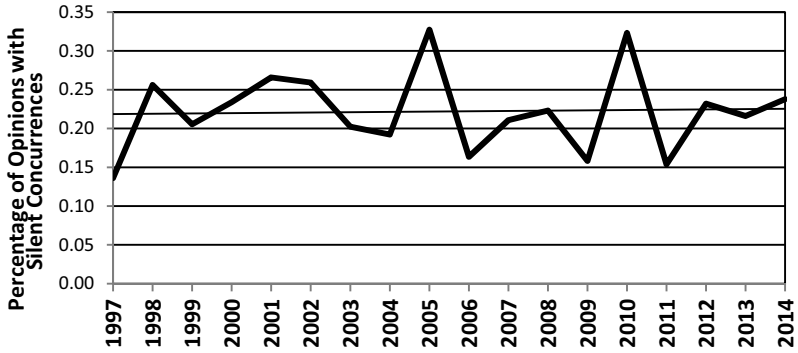
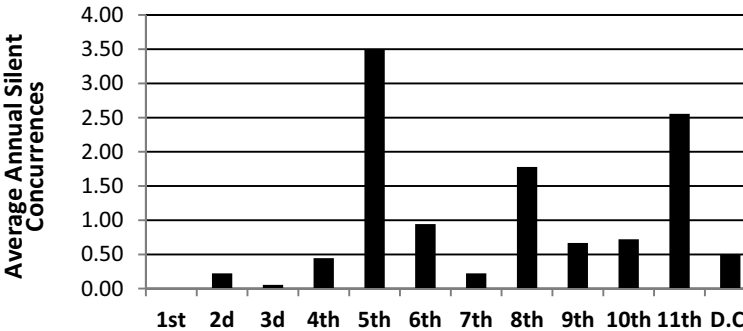


Table 3
Silent Concurrences by Circuit



Neither senior nor visiting judges use silent concurrences at a higher rate than active judges.[28] But the practices of individual judges vary widely. One judge on the D.C. Circuit is responsible for almost eighty percent of that court's silent concurrences.[29] In

28. *See* Tables 6 and 7, *infra* page 148.

29. *See* Dep't of Homeland Sec. v. Fed. Labor Relations Auth., 751 F.3d 665 (D.C. Cir. 2014) (Henderson, J., concurring in judgment); Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 663 F.3d 470 (D.C. Cir. 2011) (same); St. Marks Place Housing Co., Inc. v. HUD, 610 F.3d 75 (D.C. Cir. 2010) (same); U.S. v. Palmera Pineda, 592 F.3d 199 (D.C. Cir. 2010) (same); In re Subpoena in Collins, 524 F.3d 249 (D.C. Cir. 2008) (same); U.S. v. Gabriel, 365 F.3d 29 (D.C. Cir. 2004) (same), *vacated & remanded*, 543

the Eleventh Circuit, one judge is responsible for sixty percent;[30] and in the Second Circuit, fifty.[31]

Judges can issue both "swing" and "non-swing" silent concurrences.[32] A swing silent concurrence provides a critical vote for the majority result (even as it withholds support for the opinion), while a non-swing silent concurrence is merely the third vote on a panel whose other two judges embrace the majority opinion in full. The overwhelming majority of silent concurrences in the federal courts of appeals are non-swing.[33]

U.S. 1101 (2005); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638 (D.C. Cir. 2000) (Henderson, J., concurring in result). Just two other judges on the D.C. Circuit issued silent concurrences during the relevant period. Farah v. Esquire Magazine, 736 F.3d 528 (D.C. Cir. 2013) (Brown, J., concurring in judgment); Stop this Insanity Inc. Emp. Leadership Fund v. FEC, 761 F.3d 10 (D.C. Cir. 2014) (Sentelle, J., concurring in judgment).

30. *See* Cave v. Sec'y for Dep't of Corrections, 638 F.3d 739 (11th Cir. 2011) (Edmonson, J., concurring in judgment); Leal v. Sec'y, HHS, 620 F.3d 1280 (11th Cir. 2010) (Edmonson, J., concurring in result); DeYoung v. Schofield, 609 F.3d 1260 (11th Cir. 2010) (Edmonson, J., concurring in judgment); Green v. DEA, 606 F.3d 1296 (11th Cir. 2010) (Edmonson, J., concurring in result); Ward v. Hall, 592 F.3d 1144 (11th Cir. 2010) (same); Parker v. Allen, 565 F.3d 1258 (11th Cir. 2009) (Edmonson, C.J., concurring in result); Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259 (11th Cir. 2008) (same); Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008) (Edmonson, C.J., concurring); Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007) (same); Tello v. Dean Witter Reynolds, Inc. 494 F.3d 956 (11th Cir. 2007) (same); Epps v. Watson, 492 F.3d 1240 (11th Cir. 2007) (same); U.S. v. Maxwell, 446 F.3d 1210 (11th Cir. 2006) (same); U.S. v. Dulcio, 441 F.3d 1269 (11th Cir. 2006) (same); In re Conklin, 416 F.3d 1281 (11th Cir. 2005) (same); Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275 (11th Cir. 2005) (same); U.S. v. Crawford, 407 F.3d 1174 (11th Cir. 2005) (same); Bochese v. Town of Ponce Inlet, 405 F.3d 964 (11th Cir. 2005) (same); Seay Outdoor Advertising, Inc. v. City of Mary Esther, Fla., 397 F.3d 943 (11th Cir. 2005) (same); Carr v. Schofield, 364 F.3d 1246 (11th Cir. 2004) (same); Williams v. BellSouth Telecomm., Inc. 373 F.3d 1132 (11th Cir. 2004) (same); Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cnty., Fla, 337 F.3d 1251 (11th Cir. 2003) (same); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (same); U.S. v. Kapelshnik, 306 F.3d 1090 (11th Cir. 2002) (same); U.S. v. Humber, 255 F.3d 1308 (11th Cir. 2001) (Edmonson, J., concurring in result); Culpepper v. Irwin Mortg. Corp., 253 F.3d 1324 (11th Cir. 2001) (Edmonson, J., concurring in judgment); U.S. v. Chubbuck, 252 F.3d 1300 (11th Cir. 2001) (Edmonson, J., concurring in result); U.S. v. Gilbert, 244 F.3d 888 (11th Cir. 2001) ((Edmonson, J., concurring in judgment only); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998) (Edmonson, J., concurring in result).

31. U.S. v. Ben Zvi, 242 F.3d 89 (2d Cir. 2001) (Van Graafeiland, J., concurring in result); Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000) (Van Graafeiland, J., concurring in result); *see also* Table 5, *infra* page 147.

32. *See generally, e.g.*, Robbins, *supra* note 5 (discussing silent concurrences that function as swing votes).

33. *See* Table 8, *infra* page 149.

Table 4
Rate of Silent Concurrences by Circuit

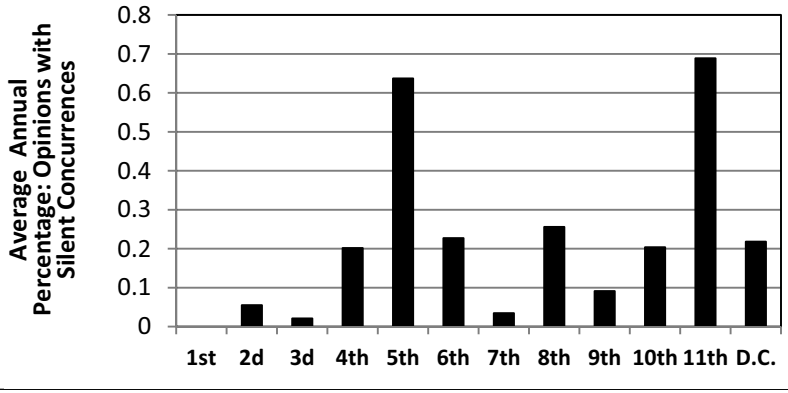
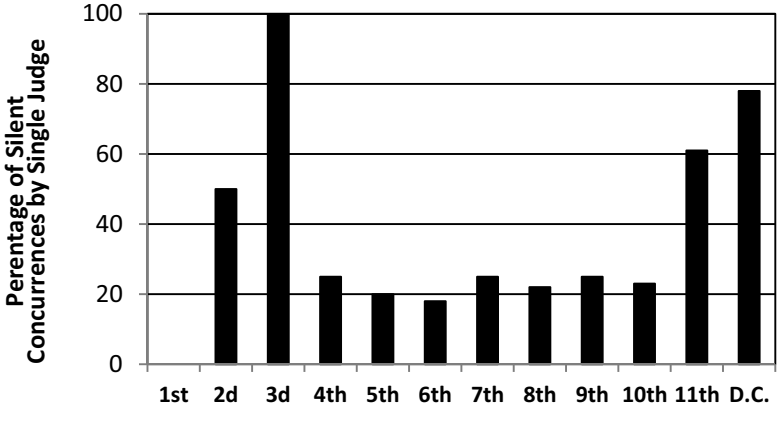


Table 5
Silent-Concurrence Concentration by Circuit[34]



34. There was only one silent concurrence in the Third Circuit, so that judge accounted for 100 percent of the Third Circuit's total. In the Sixth Circuit, two judges issued the same peak number of silent concurrences: three.

Table 6
Silent Concurrences by Federal Judge Status

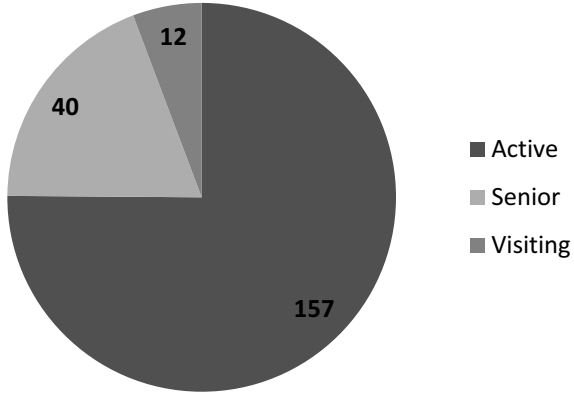


Table 7
Total Cases Heard by Federal Judge Status

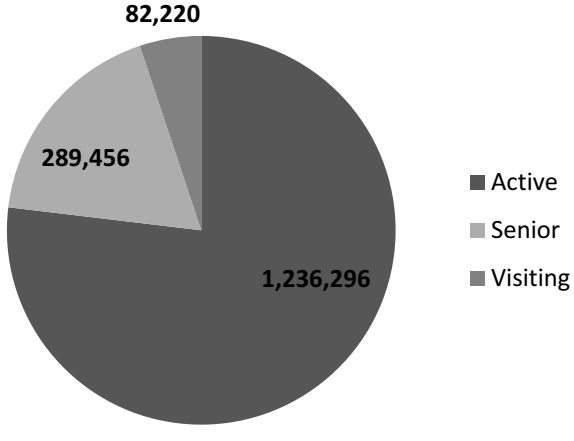
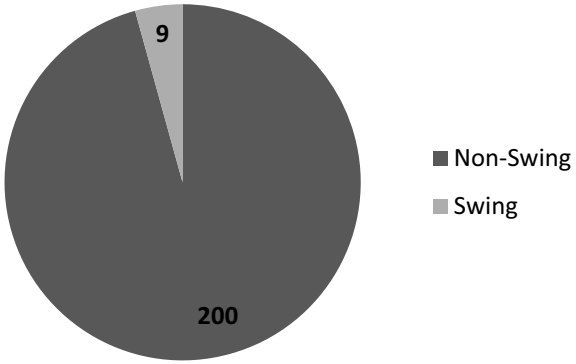


Table 8
Silent Concurrence Type: Federal Courts of Appeals



III. SILENT CONCURRENCES AS JUDICIAL AGENDA-SETTING

The quality of judicial decisionmaking is, in part, a function of judicial time: At least up to a certain point, the more time, the better the decision. But judicial time is a scarce resource. More time devoted to one case means less for another.[35] Difficult cases might well deserve more judicial time

35. *See, e.g.*, Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 L. & CONTEMP. PROBS. 157, 186–87 (1998); *see also* Wald, *supra* note 3, at 1374 ("Time does not allow for the same careful, thoughtful analysis and writing to be poured into all cases."); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH & LEE L. REV. 1667, 1695 (2005) (asserting that "[t]he enormity of appellate caseloads precludes judges from giving each case the sort of individualized attention that we presume is the hallmark of appellate justice"). It is unsurprising—but unfortunate—to find fundamental errors cropping up in unpublished dispositions. *See, e.g.*, Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2013) (discussing repeated copying and pasting of passages from one unpublished opinion into others); William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition,* 81 CORNELL L. REV. 273, 284 (1996) (maintaining that "[i]t should come as no surprise that unpublished opinions are . . . dreadful in quality"); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 95 (2004) (noting

than easy ones,[36] but an hour spent further refining the prose of a well-worked opinion might be better spent screening for basic errors in other cases.[37]

Though many key allocational issues are resolved by the other branches,[38] the federal appellate judiciary retains expansive negative agenda-setting power—that is, power to keep issues off the decisional menu.[39] In every appeal, judges must not only resolve the legal and factual issues presented, but also the antecedent question: which of the issues presented will be decided. This negative agenda-setting power allows judges to

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problems that arise when judges "fail to scrutinize the language of the unpublished decision because it is unpublished, and . . . [they] don't want to take the time to polish the product" (quoting correspondence from Judge Alfred T. Goodwin of the Ninth Circuit)).

36. Even critics of unpublished dispositions must acknowledge as much. Arnold, *supra* note 3, at 223 ("[G]iven the shortness of human life, judges' time would be better spent on hard cases than on tedious explanations of the easy ones.").

37. *See generally* Soucek, *supra* note 35 (discussing the process by which errors can spread through copying from one unpublished opinion into others).

38. Federal law sets the number of judicial hours available in the federal courts of appeals by requiring three judges to sit on each panel, 28 U.S.C. § 46(b) (2015), setting the numbers of judges in each circuit, 28 U.S.C. § 44(a) (2015), and making rules about senior status, *e.g.*, 28 U.S.C. § 371(c) (2015). And, of course, federal law also affects the number of appeals filed by constantly creating or removing causes of action and appellate rights. Similarly, the President and Senate affect the number of judicial hours available by nominating and confirming judges—or declining to do so. *See, e.g.*, *Judicial Emergencies*, U.S. CTS. (June 22, 2016), http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (listing long-unfilled circuit-judge vacancies in courts with more than 700 annual filings per panel).

39. Negative agenda-setting is contrasted with positive agenda-setting—the power to add items to the decisional menu. Examples of positive judicial agenda-setting include voting in favor of certiorari, *e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); signaling the likely decision in a future case as a method of inviting or discouraging such cases, *e.g.*, Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1 (2008); reaching issues not presented by the parties, Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 689–91 (2012) (pointing out that Supreme Court "reformulates the questions presented . . . sometimes exceeds the boundaries of the questions presented," and "injects questions, even constitutional ones that no litigant sought to raise"); Barbara Palmer, *Issue Fluidity and Agenda Setting on the Warren Court*, 52 POL. RES. Q. 39 (1999) (same); Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853 (1996) (same); *but see* Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845 (1996) (challenging the McGuire/Palmer findings); and voting to hear cases en banc, Michael W. Giles, Thomas G. Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. POL. 852 (2006).

avoid expending time on a particular issue or case, preserving their time to be reallocated to other judicial work.[40]

Appellate judges engage in negative agenda-setting through various practices and doctrines.[41] They frequently exercise discretion not to resolve every issue presented—a technique some refer to as "issue suppression."[42] Courts may choose to reach only those issues necessary to resolve the appeal and upon which they can secure a majority (or unanimity), even when this means leaving unaddressed other relevant and important issues that had been properly raised by the parties.[43] No formal doctrine or rule requires this, and it is often left unexplained.

Another example of negative agenda-setting is judges' use of unpublished dispositions, which range from totally conclusory dispositions with no analysis to relatively elaborate (but still unprecedential) opinions.[44] The majority of cases in the federal courts of appeals are now resolved with unpublished orders, opinions, or dispositions, rather than published

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40. *E.g.*, Wasby, *supra* note 35, at 91 ("Judges devote more attention to some cases than to others because they feel that it is in the interests of the legal system as a whole for them to do so."). One appellate judge described one technique of judicial agenda-setting as "a pressure valve in the system, a way to pan for judicial gold while throwing the less influential opinions back into the stream." Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 178 (1999). Other functions and purposes served by negative judicial agenda-setting, including those that are ideological and strategic, are discussed below. *See infra* text accompanying notes 74–77.

41. These examples contradict the belief, widely held among political scientists, that lower federal courts do not exercise any meaningful control over their own agendas. Thus, in political-science evaluation of appellate courts, "agenda setting has assumed a less central position, reflecting the lack of control that courts typically exercise over the cases they hear," because "[u]nlike most other political institutions, courts are generally reactive in nature and typically must wait for a party to introduce an issue in the form of a lawsuit." Giles et al., *supra* note 39, at 852. Of course political scientists do recognize that the Supreme Court remains an "exception to the judiciary's lack of agenda control," because it can "set[] its own agenda through the grant or denial of certiorari." *Id.* And so, "the study of agenda setting in the field of judicial politics has focused almost entirely on the Supreme Court and the certiorari decision." *Id.*

42. Palmer, *supra* note 39, at 40 (crediting the term to Sidney Ulmer).

43. *See id.* at 44 (finding issue suppression in more than half of a random sample of 200 cases from the Warren Court); McGuire & Palmer, *supra* note 39, at 693 (finding issue suppression in almost half of the cases in OT 1988); *see also* Monaghan, *supra* note 39, at 705–07 (noting that Supreme Court sometimes reaches issues not considered by the courts below, as if doing so were a "a matter of discretion," and sometimes acts sua sponte or bases its decisions on "legislative facts . . . that have not been subject to challenge in the adversarial process").

44. *E.g.*, Gulati & McCauliff, *supra* note 35, at 160.

opinions.[45] And because judges typically devote substantially less time and effort to drafting and reviewing these unpublished dispositions than to drafting and reviewing their to-be-published opinions,[46] the decision to resolve a given case this way leaves judges with more time to spend elsewhere.[47]

Like the decision not to reach every issue presented, the decision to resolve a case by unpublished order is almost never publicly explained.[48] Circuit rules seek to guide decisions about publication,[49] but these rules are malleable.[50] The typical

45. See Table 9, *infra* page 153.

46. Wald, *supra* note 3, at 1373 (noting that "for the most part, law clerks, not judges, draft them," and that most "are turned out within hours or days of argument or conference"); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. L. 43, 43–44 (June 2000) (explaining that "writing an opinion is much harder" than writing an unpublished disposition, noting that "[m]ost" of the latter "are drafted by law clerks with relatively few edits from the judges," and that "[f]ully 40 percent of our memodispos are in screening cases, which are prepared by our central staff"); Wasby, *supra* note 35, at 81, 93 (pointing out that "[o]n the whole, unpublished dispositions are shorter and less developed than published opinions," and that "[a] principal justification for unpublished rulings, which judges well understand, is that preparing one takes less effort than preparing a published opinion").

47. *See* Vladeck & Gulati, *supra* note 35 (characterizing the use of unpublished dispositions as a form of "judicial triage"); Wasby, *supra* note 35, at 67 (same); *but see generally* Gulati & McCauliff, *supra* note 35 (suggesting that courts may use unpublished dispositions to avoid expending time and effort on the most difficult cases, where that time should be spent).

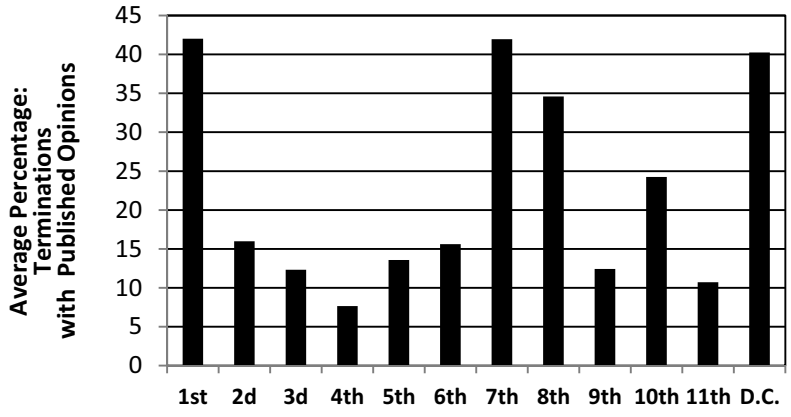
48. Vladeck & Gulati, *supra* note 35, at 1764 (describing the use of unpublished dispositions as a "'black box' process that is all but invisible to outsiders").

49. For instance, the local rules of the D.C. Circuit provide that a case may be resolved through an unpublished disposition unless it is a case of first impression involving a substantial issue or the first case to present it to the court; alters, modifies, or significantly clarifies a rule of law previously announced by the court; calls attention to an existing rule of law that appears to have been generally overlooked; criticizes or questions existing law; resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit; reverses a published decision, or affirms a decision on grounds different from those set forth in the district court's published opinion; or warrants publication in light of other factors that give it general public interest. D.C. Cir. R. 36 (U.S. Ct. of App. for the D.C. Cir., Ct. Rs. & Operating Procedures, through June 1, 2015). Some circuit rules strongly favor publication, and articulate procedures and rules governing the decision not to publish. *E.g.* 1st Cir. R. 36(2)(B) (June 1, 2016) ("[S]hould any judge remain of the view that the opinion should be published, it must be.").

50. Wald, *supra* note 3, at 1374 ("[I]n my experience the criteria are vague and infinitely maneuverable."); *see also* Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 975 (1989) (concluding that "publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe"); Donald R. Songer, *Criteria For Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 313–14 (1990) (noting that "a number of

unpublished disposition contains a bare citation to the rule authorizing non-publication, and no explanation as to how or why the case qualified for treatment under the rule.

Table 9
Publication Rates in the Federal Courts of Appeals



There are many other examples of negative judicial agenda-setting. Justiciability doctrines of standing, mootness, ripeness, political-question doctrine, and abstention allow courts to avoid resolving the merits of a dispute.[51] Waiver and forfeiture doctrines allow courts to avoid ruling on issues not adequately presented or preserved.[52] And judges may avoid definitive

judges . . . are in practice applying different standards from the official criteria" and that "there may be considerable variation among judges (even in the same circuit) in their operational definitions of what constitutes a decision that is worthy of publication"); Vladeck & Gulati, *supra* note 35, at 1703–05 (raising questions about which sorts of cases are routed to no-argument tracks); Gulati & McCauliff, *supra* note 35, at 161, 165–66 (acknowledging that "the behavior of judges is primarily governed by internally generated norms that can be altogether different from the officially stated organizational rules" regarding publication, and discussing the lack of adequate external monitoring regarding the publication rules (citations omitted)); *but see* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 72 (2001) (finding that at least some of the variables associated with nonpublication "track[ed] formal publication rules").

51. *See, e.g.*, Monaghan, *supra* note 39, at 707–11; LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 39 (2013).

52. Monaghan, *supra* note 39, at 693–99.

resolution of legal issues by deliberately drafting vague opinions that avoid stating clear rules to guide future cases.[53] Through these agenda-setting practices (and others[54]), appellate judges limit the time they spend on particular cases, creating pools of surplus time that can be drawn down elsewhere.[55]

Silent concurrences ought to be evaluated alongside other instruments of negative judicial agenda-setting. A federal appellate judge with doubts about an opinion by a colleague (particularly an opinion that has already attracted a second vote[56]) may dispense with the otherwise time-consuming process of trying to resolve those doubts while drafting a concurring or dissenting opinion, and instead issue a silent concurrence. This leaves the doubting judge with surplus time to allocate to other opinions.[57]

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53. *E.g.*, Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504, 505 (2008) ("[C]ontrol over opinion clarity presents judges with a tradeoff between managing their uncertainty and institutional prestige on the one hand and their control over policy outcomes on the other.").

54. *E.g.*, Gulati & McCauliff, *supra* note 35, at 159 (referring to "shortcuts" that "include the denial of oral argument, judicial encouragement to settle or use alternative methods of dispute resolution, the extensive use of staff attorneys and law clerks in the decisionmaking process, and the use of short-form dispositions in place of published opinions" (footnote omitted)).

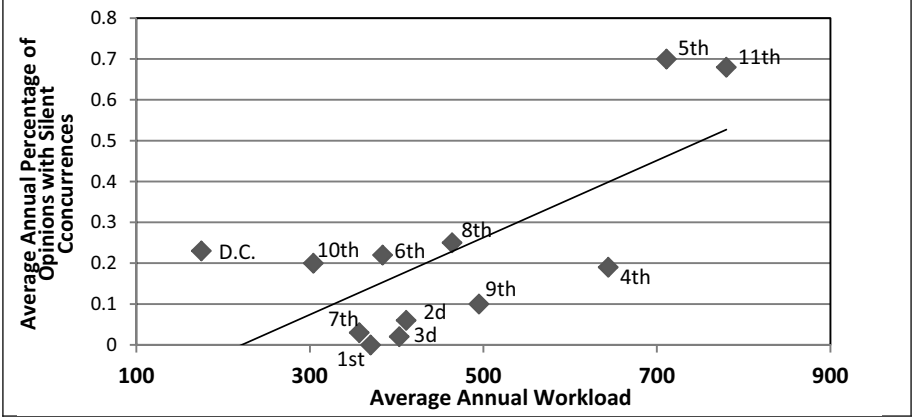
55. This is far from the only important purpose served by these negative agenda-setting practices. *E.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."); Younger v. Harris, 401 U.S. 37, 53 (1971) (describing abstention as "fundamental not only to our federal system but also to the basic functions of the Judicial Branch of the National Government under our Constitution").

56. A judge issuing a silent concurrence must have enough confidence in the result—affirmance, reversal, remand—reached by the majority to vote for it. But non-swing silent concurrences require a weaker degree of bottom-line agreement than do swing silent concurrences; once the writing judge's opinion has attracted a second vote, the third vote is dispensable.

57. The non-swing silent concurrence could be viewed as the modern version of the dubitante opinion. *See generally* Jason J. Czarnezki, *The* Dubitante *Opinion*, 39 AKRON L. REV. 1 (2006) (quoting example from dictionary definition: "the judge doubted a legal point but was unwilling to state that it was wrong" (footnote omitted)). The dubitante opinion is endangered, but not extinct. *See, e.g.*, Debra Cassens Weiss, *7th Circuit Judge Writes One-Sentence "Maybe" Concurrence; Was it a "Dubitante" Opinion?* ABA J. DAILY NEWS (Jun. 3, 2015 5:45 a.m. CDT), http://www.abajournal.com/news/article/7th_circuit_judge_writes_one_sentence_maybe_concurrence_was_it_a_dubitante. The silent concurrence could also be viewed as a partial implementation of the two-judge-panel

Statistical analysis of the dataset presented above—encompassing all silent concurrences in the federal courts of appeals from 1997 to 2014—is consistent with this view. Federal appellate judges are more likely to issue silent concurrences when they have more judicial work to attend to.[58] Higher average workload[59] by circuit correlates at a statistically significant level with the average rate of silent concurrences.[60]

Table 10
Silent Concurrences and Workload—Federal Courts of Appeals[61]



The D.C. Circuit is an outlier in this analysis, with the lowest workload figure,[62] but a moderately high level of silent

proposal floated to solve the perceived crisis of appellate volume in the 1990s. THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 172–73 (1994) ("In the run of federal appeals, two judges would be sufficient, if they agreed, and a third could be brought in to break the tie only when the two could not agree.").

58. *See* Robbins, *supra* note 5, at 160 (speculating that judges might use silent concurrences because "their dockets are large and unmanageable," and that "overworked judges may be using [silent concurrences] simply as a technique to avoid spending time articulating disagreement with the majority's or plurality's rationale").

59. "Workload" is terminations per active judge. *See* Appendix A, *infra* page 163.

60. *See* Table 10.

61. Correlation coefficient = .70. $R^2 = 0.49$. $P = 0.01$.

62. Because complex regulatory cases dominate the D.C. Circuit docket, it may not have the lowest actual workload. *E.g.*, Russell Wheeler, *Federal Judicial Nominations: Skunky D.C. Stats, Justified Ideological Nominations, Vacancies Without Nominees*, BROOKINGS FIXGOV (Nov. 4, 2013, 12:15 p.m.), http://www.brookings.edu/blogs/fixgov/posts/2013/11/4-federal-judicial-nominations-dc-stats-vacancies-wheeler (criticizing "slightly adjusted raw filings . . . used as a guideline to inform the . . . assessment of appellate court judgeship

concurrences. However, as discussed earlier, just one D.C. Circuit judge is responsible for eighty percent of that court's silent concurrences.[63] Removing this outlier judge from the calculation enhances the explanatory power of workload.[64] The Eleventh and Second Circuits also have judges who account for at least half of their silent concurrences.[65] Removing all three outlier judges from the calculation still yields a significant correlation between workload and silent concurrences.[66]

The correlation between workload and silent concurrences is similar to the correlation between workload and the rate of unpublished opinions, which have been similarly justified as a technique to allocate scarce judicial time.[67] (Average workload by circuit is also positively correlated with the average rate of resolving cases via unpublished dispositions and opinions.[68])

Thus, empirical evidence from the federal courts of appeals is consistent with the hypothesis that silent concurrences are used by judges as a negative agenda-setting technique. Judges with heavier demands on their time have greater need for time-saving devices like silent concurrences and unpublished dispositions, and make greater use of them.

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need," but acknowledging that "developing valid comparative workload measures is a challenge").

63. *See* note 29, *supra*, and accompanying text.

64. *See* Table 11, *infra* page 157.

65. *See* notes 30–31, *supra*, and accompanying text.

66. *See* Table 12, *infra* page 157. Workload can only go so far as an explanation. The two circuits with the highest uncorrected rates of silent concurrences are the Fifth and Eleventh, which used to be the same court, suggesting that circuit norms may play an important role. *Cf.* Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 875 (1998) (tracing the rise of separate opinion writing on the Supreme Court to the decline of "consensual norms" that "disappeared almost overnight" upon the appointment of Chief Justice Stone in 1941). It also raises the possibility that a common factor unique to the dockets of the Fifth and Eleventh Circuits might explain the phenomenon.

67. *E.g.*, Martin, *supra* note 40, at 183 ("What would happen if . . . we were forced to publish all our opinions? We would likely see an across-the-board lessening of quality, because judicial resources would be stretched even further, and we would see scores of remarkably brief and uninformative, but nonetheless 'published,' opinions.").

68. *See* Table 13, *infra* page 158.

Table 11
Silent Concurrences and Workload—D.C. Circuit Outlier* Omitted

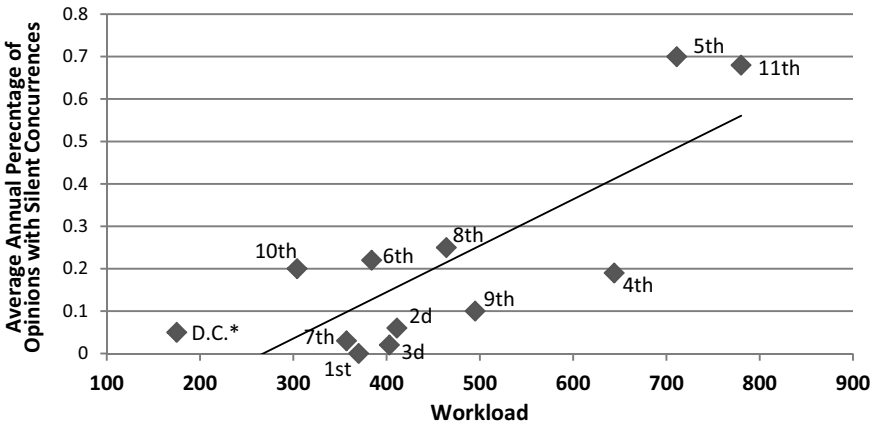


Table 12
Silent Concurrences and Workload—All Outliers* Omitted

See

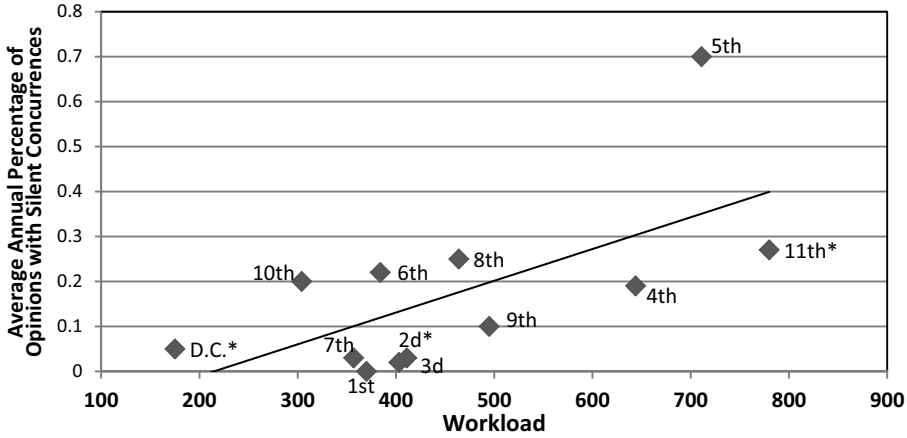
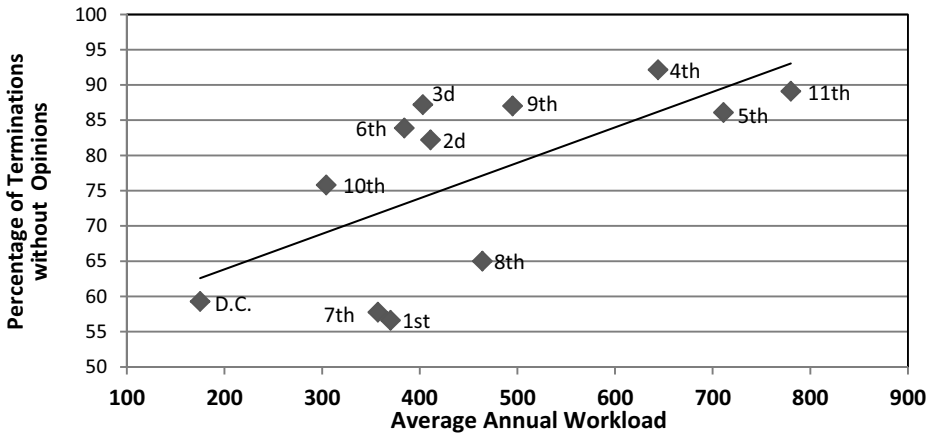


Table 13
Nonpublication and Workload—Federal Courts of Appeals[69]



The lead criticism of silent concurrences is that they "produce[] instability in the law as lawyers, courts, and commentators attempt to evaluate the case's precedential value."[70] Critics argue that a silent concurrence "produces all the evils of a concurring opinion with none of its values" because it "casts doubt on the principles declared in the main opinion without indicating why they are wrong or questionable."[71]

But virtually all techniques of judicial agenda-setting similarly preserve uncertainty. A decision not to reach an issue, to resolve it by unpublished opinion, or to decide the case on jurisdictional grounds could mean that the underlying issue will have to be briefed again and then decided by some future panel of judges. Moreover, the same "uncertainty" criticism could be leveled at all separate opinions.[72] And there is a long-running

69. Correlation coefficient = .66, R^2 = .43, P = .02.

70. Robbins, *supra* note 5, at 118.

71. BERNARD E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977) [hereinafter WITKIN MANUAL]; *see also* Bernard E. Witkin, *Appellate Court Opinions: A Syllabus for a Panel Discussion at the Appellate Judges Conference*, SEMINARS FOR CIRCUIT COURT JUDGES, 63 F.R.D. 515, 584 (1972) ("Is barebones concurrence a proper exercise of the judicial function, or is an appellate judge under a duty to concur fully or specially *with reasons?*" (emphasis original)); Moore, *supra* note 7, at 760.

72. James F. Spriggs & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1105 (2001) ("[C]ases with a larger number of

school of thought that preservation of uncertainty is a laudable goal for the judiciary, at least in some contexts.[73] Attacks on silent concurrences for perpetuating uncertainty do not seem compelling.

Silent concurrences may be deployed for less lofty purposes than those ascribed to them here. For instance, a silent concurrence might be used to maximize judicial leisure rather than to allocate a judge's time to other decisions. Or it might reflect a merely stylistic disagreement, rather than substantive doubts.[74] But other agenda-setting devices may be subject to similar misuse. A judge who understands that his preferred view on the merits is unlikely to be accepted by either of his co-panelists may be inclined to press for the case to be decided on jurisdictional grounds.[75] A judge eying elevation to a higher court may be inclined to avoid a controversial issue as "unnecessary" to the appeal.[76] And a panel that prefers a certain result but finds the case a poor vehicle for a full exposition can achieve that result through an unpublished disposition.[77]

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concurring opinions are more likely to be overruled"); *see also* CORLEY, *supra* note 7, at 10.

73. *See generally, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

74. *See* WITKIN MANUAL, *supra* note 71, at 223 (also suggesting that silent concurrences should be used "sparingly"); CORLEY, *supra* note 7, at 19 (indicating that "one is left to speculate regarding the possible reason" behind a silent concurrence). In some cases, it may be possible to guess the motivation of the silently concurring judge from the majority opinion. *E.g.*, U.S. v. Sobin, 56 F.3d 1423, 1424 (D.C. Cir. 1995) (Henderson, J.) (opening majority opinion affirming a criminal conviction and sentence by quoting novelist George Eliot: "The law's made to take care o' raskills."); *id.* (Tatel, J., concurring silently).

75. On standing's malleability, see Monaghan, *supra* note 39, at 679, and Richard J. Pierce, Jr., *Is Standing Law or Politics?* 77 N.C. L. REV. 1741 (1999).

76. *Cf.* Wald, *supra* note 3, at 1378 ("If alternative rationales are available to support a result, the one that can garner a majority of judges will be chosen, even if it is not the writer's preferred one.").

77. One critique of unpublished dispositions offered the following hypothetical examples of abuse:

> If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser. . . . Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve that result, assuming agreement with other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.

It might be argued that silent concurrences are subject to manipulation because they require no reasoned explanation, so judges using them are unaccountable to any sort of external control. But this is not unique to the silent concurrence. The exercise of discretion not to resolve every issue in a case is rarely accompanied by any explanation of why the court decided not to decide the excepted issues.[78] The same is true for the use of unpublished dispositions.[79]

Critics might argue that silent concurrences are more subject to inappropriate use than other negative agenda-setting practices because they are exercised unilaterally. But unilateralism is a feature, not a bug: A silent concurrence does not deprive the parties (or the legal system) of anything except the opinion of the single judge who deploys it. The majority opinion, fully reasoned and published, is binding on the parties and on future panels.

Critics might also argue that the proliferation of silent concurrences diminishes the quality of judicial decisionmaking because silent judges lose the opportunity of fully exploring alternate bases for decision that might reveal themselves during the process of writing full concurring opinions,[80] and majority

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Arnold, *supra* note 3, at 223; *see also* Vladeck & Gulati, *supra* note 35, at 1689 (concluding that "judges are intentionally choosing to duck some inconvenient issues" through unpublished dispositions); Gulati & McCauliff, *supra* note 35 (same); Wald, *supra* note 3, at 1374 ("I have seen judges purposefully compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.").

For a discussion of these doctrines as related to judicial leisure preference, see EPSTEIN, LANDES & POSNER, *supra* note 51, at 38–41.

78. *See supra* notes 42–43 and accompanying text.

79. *See supra* notes 48–50 and accompanying text.

80. Many judges have explained that the process of actually writing an opinion leads to greater clarity of analysis, and sometimes even changes in their views. For instance, Judge Wald explained that

> [e]ven when judges agree on a proposed result after reading briefs and hearing argument, the true test comes when the writing judge reasons it out on paper (or on computer). That process, more than the vote at conference or the courtroom dialogue, puts the writer on the line, reminds her with each tap of the key that she will be held responsible for the logic and persuasiveness of the reasoning and its implications for the larger body of circuit and national law. . . . It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because "it just won't write."

authors lose out on the possibility of learning from criticisms advanced by concurring judges' opinions.[81] But the author of an unpublished summary disposition might similarly benefit from both the discipline of writing a full exposition and the scrutiny that accompanies publication.[82] Moreover, the availability of silent concurrences (like that of unpublished opinions) also arguably enhances the overall quality of judicial opinion writing by giving judges more control over how to allocate their time among cases and by allowing them to record a vote that more accurately reflects a doubtful position when they hold one.

Silent concurrences also provide an informational benefit by allowing judges to cast votes that more accurately reflect their doubts. Without the ability to use a silent concurrence, a doubting judge would be pressured either to vote in favor of the opinion or to write separately. But a doubting judge may not be confident enough in the reasoning behind those doubts to register them in a separate opinion. Without the option of silent concurrences, the doubly doubting judge might simply vote with the majority.

Some critics claim that silent concurrences violate litigants' right to a fully reasoned explanation of the judicial decision.[83] But similar criticism might be launched against other judicial agenda-setting practices.[84] Unpublished dispositions do not fully explain to the parties why their cases were not entitled to full

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Wald, *supra* note 3, at 1374–75; *see also* BAKER, *supra* note 57, at 173 (surveying criticisms of two-judge proposal, and noting "disadvantages" of the two-judge panel, including the risk that "one fewer perspective might diminish the quality of the particular decision or the overall quality of decisionmaking").

81. *See, e.g.*, Antonin Scalia, *The Dissenting Opinion*, 19 J. S. CT. HIST. 33, 41 (1994) ("The dissent or concurrence puts my opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points. It is a sure cure for laziness, compelling me to make the most of my case. Ironic as it may seem, I think a higher percentage of the worst opinions of my Court—not in result but in reasoning—are unanimous ones."); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134, 150 (1990) (a separate opinion "heightens the opinion writer's incentive to 'get it right'"); *see also* CORLEY, *supra* note 7, at 11.

82. *See supra* note 81.

83. Robbins, *supra* note 5, at 163–64.

84. *Cf., e.g.*, Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?* 3 J. APP. PRAC. & PROCESS 175, 193–96 (2001) (assessing unpublished opinions' effect on litigants' right to due process and equal protection); Lance A. Wade, Note, Honda *Meets* Anastasoff*: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 3 B.C. L. REV. 695 (2001).

written opinions,[85] and are often not as carefully reasoned as published opinions.[86] Similarly, the decision not to reach certain issues is almost never explained to the parties.[87]

Silent concurrences are surely flawed, and may impose significant costs on both the parties to an individual case and the legal system in general. But any unfavorable evaluation of this technique must account for the persistence of parallel techniques of negative agenda-setting that seem to pose similar cost/benefit ratios and yet remain deeply entrenched in judicial practices. So far, silent concurrences' critics have failed to meet this burden.

IV. CONCLUSION

Silent concurrences are a rare but stable feature of federal appellate judicial decisionmaking. Judges appear to use silent concurrences to allocate a scarce resource—judicial time—among cases. Like other techniques of negative judicial agenda-setting, the silent concurrence is not without flaws. But critics have not articulated any reason to believe that its cost/benefit ratio is worse than that applicable to other similar techniques like unpublished dispositions, or opinions that fail to resolve all issues presented in an appeal. Until they do, the silent concurrence should be accepted as a legitimate technique for appellate judges.

85. *See supra* notes 48–50 and accompanying text.
86. *See supra* notes 46–47 and accompanying text.
87. *See supra* notes 42–43 and accompanying text.

APPENDIX A

To determine the number of silent concurrences, I screened the results of Westlaw searches for all published cases in the federal courts of appeals during the ten-year study period using "'concur!' /3 'judgment'" and "'concur!' /3 'result'" as search strategies.

I excluded all en banc cases. I also excluded any case in which there was a written explanation for the concurrence—even if it consisted of just one sentence. I also excluded four cases in which the silent concurrence was explained by the death, illness, or retirement of a judge.[88] I coded cases by the circuit in which the case was decided, not by the home circuit of the judge writing the silent concurrence. The list of cases—209 in total—is included in Appendix B.

I relied on data from the Federal Judicial Center tracking annual judicial workload by circuit and number of published opinions by circuit. These data are available by fiscal year so that the year "2007," for instance, is the period from October 1, 2006 through September 30, 2007. I used this convention throughout.

88. Martinez v. Napolitano, 704 F.3d 620, 621 n.* (9th Cir. 2012) ("The Honorable Betty Binns Fletcher, Senior Circuit Judge for the Ninth Circuit Court of Appeals, fully participated in the case and concurred in the judgment prior to her death."); U.S. v. Chew, 284 F.3d 468, 469 n.* (3d Cir. 2002) ("The Honorable Carol Los Mansmann participated in and concurred with the judgment in this case but died before the opinion could be filed."); Horstmyer v. Black & Decker, Inc., 151 F.3d 765, 767 n. 1 (8th Cir. 1998) ("At the panel's conference on January 22, 1998, following oral argument of the case, Judge Floyd R. Gibson concurred in the result reached in this opinion. Judge Gibson has been disabled by illness from reviewing the opinion, which is being filed in the interest of avoiding undue delay."); Moore v. Novak, 146 F.3d 531, 532 n.1 (8th Cir. 1998) (same, except for different conference date).

APPENDIX B

Case	Reporter	Court	Year	Silent Judge
U.S. v. Winnie	97 F.3d 975	7th	1996	Ripple
Lloyds of London v. Transcon. Gas Pipe Line Corp.	101 F.3d 425	5th	1996	DeMoss
Jackson v. Long	102 F.3d 722	4th	1996	Motz
United of Omaha v. Bus. Men's Assur. Co. of Am.	104 F.3d 1034	8th	1997	R. Arnold
In re Cajun Elec. Power Co-op Inc.	109 F.3d 248	5th	1997	Stewart
Lewis v. Aerospace Cmty. Credit Union	114 F.3d 745	8th	1997	M. Arnold
U.S. v. Grajales-Montoya	117 F.3d 356	8th	1997	Heaney
Henderson v. Norris	118 F.3d 1283	8th	1997	Henley
Vera Cruz v. City of Escondido	139 F.3d 659	9th	1997	Hawkins
ACORN v. Miller	129 F.3d 833	6th	1997	Norris
In re Firstmark Corp.	132 F.3d 1179	7th	1997	Rovner
Olinger v. Larson	134 F.3d 1362	8th	1998	Heaney
U.S. v. Pierce	136 F.3d 770	11th	1998	Black
U.S. v. Brewster	137 F.3d 853	5th	1998	Stewart
Northland Ins. Co. v. Guardsman Prods., Inc.	141 F.3d 612	6th	1998	Ryan
U.S. v. Gomez-Gutierrez	140 F.3d 1287	9th	1998	Hawkins
U.S. v. Stone	139 F.3d 822	11th	1998	Black[89]
Hindman v. Transkrit Corp.	145 F.3d 986	8th	1998	Loken

89. Although the West version of the opinion indicates that Judge Black "specially concurred and filed statement," *Stone*, 139 F.3d at 822, her statement was essentially a silent concurrence, *id.* at 839 ("I concur in the result.").

Case	Reporter	Court	Year	Silent Judge
Ramsey v. Bowersox	149 F.3d 749	8th	1998	Gibson
Barber v. Johnson	145 F.3d 234	5th	1998	King
Canales v. Roe	151 F.3d 1226	9th	1998	Rymer
H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.	150 F.3d 526	5th	1998	Wiener
Webcor Packaging Corp. v. Autozone, Inc.	158 F.3d 354	6th	1998	Ryan[90]
In re Baker	154 F.3d 534	5th	1998	Wiener
Sea Servs. of the Keys, Inc. v. State of Fla.	156 F.3d 1151	11th	1998	Black
Llampallas v. Mini-Circuits, Lab, Inc.	163 F.3d 1236	11th	1998	Edmonson
Indest v. Freeman Decorating Inc.	164 F.3d 258	5th	1999	Furgeson[91]
NLRB v. Autodie Int'l, Inc.	169 F.3d 378	6th	1999	Norris
U.S. v. Tex. Tech. Univ.	171 F.3d 279	5th	1999	Benavides
Darst v. SSA	172 F.3d 1065	8th	1999	R. Arnold
LeFevers v. Gibson	182 F.3d 705	10th	1999	Murphy
Felder v. Johnson	180 F.3d 206	5th	1999	Dennis
U.S. v. Soto-Holguin	163 F.3d 1217	10th	1999	Lucero
Brown v. Perry	184 F.3d 388	4th	1999	Niemeyer
Quartararo v. Hanslmaier	186 F.3d 91	2d	1999	Mishler [92]
U.S. v. Rahal	191 F.3d 642	6th	1999	Ryan

90. Although the West version of the opinion indicates that Judge Ryan "delivered a separate concurring opinion," *Webcor*, 158 F.3d at 354, his opinion was essentially a silent concurrence, *id.* at 361 ("I concur in the judgment of affirmance.").

91. Judge William R. Furgeson, Jr., of the United States District Court for the Western District of Texas.

92. Judge Jacob Mishler of the United States District Court for the Eastern District of New York.

Case	Reporter	Court	Year	Silent Judge
U.S. v. Hill	195 F.3d 258	6th	1999	Boggs
Ind. Lumbermans Mut. Ins. Co. v. Timberland Pallet & Lumber Co., Inc.	195 F.3d 368	8th	1999	Hansen
Hicks v. Talbott Recovery Sys.	196 F.3d 1226	11th	1999	Bright
Alenco Commc'ns v. FCC	201 F.3d 608	5th	2000	Wiener
Vanderhurst v. Co. Mtn. Coll. Dist.	208 F.3d 908	10th	2000	Reavley
Richardson v. Klaesson	210 F.3d 811	8th	2000	Hansen
Indep. Ins. Agents of Am., Inc. v. Hawke	211 F.3d 638	D.C.	2000	Henderson
U.S. v. Hawkins	215 F.3d 858	8th	2000	Gibson
Kadonsky v. U.S.	216 F.3d 499	5th	2000	Stewart
U.S. v. Beckman	222 F.3d 512	8th	2000	Beam
Williamson v. Moore	221 F.3d 1177	11th	2000	Birch
Fabry v. Comm'r	223 F.3d 1261	11th	2000	Black
U.S. v. Martinez	228 F.3d 587	5th	2000	Stewart
Kia P. v. McIntyre	235 F.3d 749	2d	2000	Van Graafeiland
U.S. v. Jones	235 F.3d 1231	10th	2000	Baldock[93]
Bronaugh v. Ohio	235 F.3d 280	6th	2000	Matia[94]
U.S. v. Pratt	239 F.3d 640	4th	2001	Widener[95]

93. Although the West version of the opinion indicates that "Babcock, Circuit Judge, concurred in result," *Jones*, 235 F.3d at 1232, the silent concurrer was Judge Baldock, *id.* ("Before Baldock, Ebel and Lucero, Circuit Judges.").

94. Judge Paul R. Matia of the United States District Court for the Northern District of Ohio.

95. Although the West version of the opinion indicates that Judge Widener "filed opinion concurring in result," *Pratt*, 239 F.3d at 641, his opinion was essentially a silent concurrence, *id.* at 648 ("I concur in the result.").

Case	Reporter	Court	Year	Silent Judge
U.S. v. Ben Zvi	242 F.3d 89	2d	2001	Van Graafeiland
U.S. v. Gilbert	244 F.3d 888	11th	2001	Edmonson
U.S. v. Gallego	247 F.3d 1191	11th	2001	Hill
U.S. v. Basin Elec. Power Coop.	248 F.3d 781	8th	2001	Beam
U.S. v. Chubbuck	252 F.3d 1300	11th	2001	Edmonson
Culpepper v. Irwin Mortg. Corp.	253 F.3d 1324	11th	2001	Edmonson
U.S. v. Riggans	254 F.3d 1200	10th	2001	Lucero
U.S. v. Rousseau	257 F.3d 925	9th	2001	Rawlinson
U.S. v. Humber	255 F.3d 1308	11th	2001	Edmonson
Dils v. Small	260 F.3d 984	9th	2001	Pregerson[96]
U.S. v. Baptiste	264 F.3d 578	5th	2001	Reavley
Standard Sec. Life Ins. Co. of N.Y. v. West	267 F.3d 821	8th	2001	Loken
Deere & Co. v. Johnson	271 F.3d 613	5th	2001	King
U.S. v. Smith	273 F.3d 629	5th	2001	Benavides
Cent. Pines Land Co. v. U.S.	274 F.3d 881	5th	2001	Stewart
U.S. v. Prentiss	273 F.3d 1277	10th	2001	Baldock
Barreto-Claro v. U.S. Att'y Gen.	275 F.3d 1334	11th	2001	Barkett
Oliver v. Scott	276 F.3d 736	5th	2002	Garza
U.S. v. Nolasco-Rosas	286 F.3d 762	5th	2002	Jones

96. Although the West version of the opinion indicates that Judge Pregerson "filed specially concurring opinion" *Dils*, 260 F.3d at 985, his opinion was essentially a silent concurrence, *id.* at 987 ("I concur in the result.").

Case	Reporter	Court	Year	Silent Judge
U.S. v. Serna	309 F.3d 859	5th	2002	DeMoss
Salinas v. O'Neill	286 F.3d 827	5th	2002	DeMoss
Blue v. Cockrell	298 F.3d 318	5th	2002	Stewart
Summum v. City of Ogden	297 F.3d 995	10th	2002	Oberdorfer[97]
U.S. v. Kapelshnik	306 F.3d 1090	11th	2002	Edmonson
Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.	305 F.3d 1293	11th	2002	Black
Hussain v. Bos. Old Colony Ins. Co.	311 F.3d 623	5th	2002	Garza
U.S. v. $242,484.00	318 F.3d 1240	11th	2003	Pogue[98]
Morris v. Burnett	319 F.3d 1254	10th	2003	McWilliams
U.S. v. Graham	327 F.3d 460	6th	2003	Cohn[99]
Murphy v. Cockrell	330 F.3d 353	5th	2003	Wiener
Eide v. Grey Fox Technical Servs. Corp.	329 F.3d 600	8th	2003	Loken
Glassroth v. Moore	335 F.3d 1282	11th	2003	Edmonson
U.S. v. Vigil	334 F.3d 1215	10th	2003	O'Brien
Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cnty.	337 F.3d 1251	11th	2003	Edmonson
Benchmark Elecs., Inc. v. J.M. Huber Corp.	343 F.3d 719	5th	2003	Reavley
Cherrington v. Skeeter	344 F.3d 631	6th	2003	Moore
U.S. v. Nelson	347 F.3d 701	8th	2003	Bright

97. Judge Louis F. Oberdorfer of the United States District Court for the District of Columbia.

98. Judge Donald C. Pogue of the United States Court of International Trade.

99. Judge Avern L. Cohn of the United States District Court for the Eastern District of Michigan.

Case	Reporter	Court	Year	Silent Judge
Granite State Outdoor Adver., Inc. v. City of Clearwater	351 F.3d 1112	11th	2003	Anderson
Modern Equipment Co. v. Cont'l W. Ins. Co., Inc.	355 F.3d 1125	8th	2004	Bright
Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.	365 F.3d 435	6th	2004	Gibbons
U.S. v. Gabriel	365 F.3d 29	D.C.	2004	Henderson
Nguyen v. Ashcroft	366 F.3d 386	5th	2004	Jones
Williams v. BellSouth Telecommc'ns, Inc.	373 F.3d 1132	11th	2004	Edmonson
Carr v. Schofield	364 F.3d 1246	11th	2004	Edmonson
Arbaugh v. Y&H Corp.	380 F.3d 219	5th	2004	Garza
AmSouth Bank v. Dale	386 F.3d 763	6th	2004	Boggs
U.S. v. Washington	387 F.3d 1060	9th	2004	Beam
Seay Outdoor Adver., Inc. v. City of Mary Esther	397 F.3d 943	11th	2005	Edmonson
Jennings v. Wentzville R-IV Sch. Dist.	397 F.3d 1118	8th	2005	Gibson[100]
Blades v. Monsanto Co.	400 F.3d 562	8th	2005	M. Arnold
Cabello v. Fernandez-Larios	402 F.3d 1148	11th	2005	Anderson
U.S. v. Haidley	400 F.3d 642	8th	2005	Heaney
Bochese v. Town of Ponce Inlet	405 F.3d 964	11th	2005	Edmonson
U.S. v. Bartram	407 F.3d 307	4th	2005	Gregory
U.S. v. Crawford	407 F.3d 1174	11th	2005	Edmonson

100. Although the West version of the opinion indicates that Judge Gibson "concurred specially and filed opinion" *Jennings*, 397 F.3d at 1119, his opinion was essentially a silent concurrence, *id.* at 1125 ("I concur in the result and in the judgment.")

Case	Reporter	Court	Year	Silent Judge
Tello v. Dean Witter Reynolds, Inc.	410 F.3d 1275	11th	2005	Edmonson
Vasha v. Gonzalez	410 F.3d 863	6th	2005	Adams[101]
In re Conklin	416 F.3d 1281	11th	2005	Edmonson
New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.	416 F.3d 290	4th	2005	Motz
Alvarez-Barajas v. Gonzalez	418 F.3d 1050	9th	2005	Farris
U.S. v. Resendiz-Patino	420 F.3d 1177	10th	2005	Lucero
Garrett v. Selby Connor Maddux & Janer	425 F.3d 836	10th	2005	Porfilio
Anderson v. Att'y Gen. of Kan.	425 F.3d 853	10th	2005	Porfilio
Harris v. Coweta Cnty., Ga.	406 F.3d 1307	11th	2005	Cox
U.S. v. Walker	428 F.3d 1165	8th	2005	Bright
ACLU of Ky. v. Mercer Cnty.	432 F.3d 624	6th	2005	Rice[102]
Nelson v. Dretke	442 F.3d 282	5th	2006	Stewart
U.S. v. Dulcio	441 F.3d 1269	11th	2006	Edmonson
U.S. v. Brown	441 F.3d 1330	11th	2006	Barkett
Willis v. Coca Cola Enters. Inc.	445 F.3d 413	5th	2006	Reavley
U.S. v. Salazar	443 F.3d 1153	9th	2006	Rawlinson
U.S. v. Maxwell	446 F.3d 1210	11th	2006	Edmonson
Smelt v. Cnty. of Orange	447 F.3d 673	9th	2006	Farris
Sylvester v. Fogley	465 F.3d 851	8th	2006	Loken

101. Judge John R. Adams of the United States District Court for the Northern District of Ohio.

102. Judge Walter H. Rice of the United States District Court for the Southern District of Ohio.

Case	Reporter	Court	Year	Silent Judge
Adams v. Groesbeck Indep. Sch. Dist.	475 F.3d 688	5th	2007	Stewart
U.S. v. Hubbard	480 F.3d 341	5th	2007	Garza
Teague v. Quarterman	482 F.3d 769	5th	2007	Clement
Scottsdale Ins. Co. v. Knox Park Constr., Inc.	488 F.3d 680	5th	2007	Wiener
Nwogu v. Gonzalez	491 F.3d 80	2d	2007	Winter[103]
Epps v. Watson	492 F.3d 1240	11th	2007	Edmonson
Watson v. U.S.	493 F.3d 960	8th	2007	Beam
Tello v. Dean Witter Reynolds, Inc.	494 F.3d 956	11th	2007	Edmonson
Auto-Owners Ins. Co. v. Tribal Ct. of Spirit Lake Indian Reservation	495 F.3d 1017	8th	2007	Beam
Arthur v. King	500 F.3d 1335	11th	2007	Barkett[104]
Smith v. Allen	502 F.3d 1255	11th	2007	Edmonson
U.S. v. Morgan	505 F.3d 332	5th	2007	Dennis
U.S. v. Escareno Sanchez	507 F.3d 877	5th	2007	Stewart
U.S. v. Ronquillo	508 F.3d 744	5th	2007	Reavley
U.S. v. Mumma	509 F.3d 1239	10th	2007	Murphy
Hepp v. Astrue	511 F.3d 798	8th	2008	Beam
Pielage v. McConnell	516 F.3d 1282	11th	2008	Edmonson

103. Although the West version of the opinion indicates that Judge Winter "concurs in a separate opinion," *Nwogu*, 491 F.3d at 80, his opinion was essentially a silent concurrence, *id.* at 83 ("I concur in the judgment.").

104. Although the West version of the opinion indicates that Judge Barkett "filed opinion concurring in the result," *Arthur*, 500 F.3d at 1335, her opinion was essentially a silent concurrence, *id.* at 1344 ("I agree that Arthur is not legally entitled to relief on this claim.").

Case	Reporter	Court	Year	Silent Judge
Rodriguez v. Farm Stores Grocery, Inc.	518 F.3d 1259	11th	2008	Edmonson
Williams v. Gerber Prods. Co.	523 F.3d 934	9th	2008	Archer[105]
In re Subpoena In Collins	524 F.3d 249	D.C.	2008	Henderson
Urban Hotel Dev. Co., Inc. v. President Dev. Grp., L.C.	535 F.3d 874	8th	2008	Bright
U.S. v. Davis	538 F.3d 914	8th	2008	Hansen
Wood v. RIH Acquisitions MS II, LLC	556 F.3d 274	5th	2009	Haynes
U.S. v. Mondragon-Santiago	564 F.3d 357	5th	2009	King
Ontiveros v. City of Rosenberg, Tex.	564 F.3d 379	5th	2009	Stewart
Parker v. Allen	565 F.3d 1258	11th	2009	Edmonson
Fautenberry v. Mitchell	571 F.3d 1341	6th	2009	Moore
Ovalles v. Holder	577 F.3d 288	5th	2009	Haynes
U.S. v. Hopkins	577 F.3d 507	3d	2009	Sloviter
Mushtaq v. Holder	583 F.3d 875	5th	2009	Dennis
Qwest Corp. v. Boyle	589 F.3d 985	8th	2009	Hansen
Ward v. Hall	592 F.3d 1144	11th	2010	Edmonson
U.S. v. Palmera Pineda	592 F.3d 199	D.C.	2010	Henderson
Kleinman v. City of San Marcos	597 F.3d 323	5th	2010	Haynes
Simms v. Acevedo	595 F.3d 774	7th	2010	Cudahy
U.S. v. Scroggins	599 F.3d 433	5th	2010	Dennis
Raby v. Livingston	600 F.3d 552	5th	2010	Stewart

105. Judge Glenn L. Archer of the United States Court of Appeals for the Federal Circuit.

Case	Reporter	Court	Year	Silent Judge
Durr v. Cordray	602 F.3d 731	6th	2010	Cole
Green v. DEA	606 F.3d 1296	11th	2010	Edmonson
Sherman v. Lamothe	608 F.3d 212	5th	2010	DeMoss
DeYoung v. Schofield	609 F.3d 1260	11th	2010	Edmonson
St. Marks Place Hous. Co., Inc. v. HUD	610 F.3d 75	D.C.	2010	Henderson
Allen v. Sec'y, Fla. Dep't of Corr.	611 F.3d 740	11th	2010	Wilson
U.S. v. Samuels	611 F.3d 914	8th	2010	Loken
ConocoPhillips Co. v. EPA	612 F.3d 822	5th	2010	Jolly
Leal v. Sec'y, HHS	620 F.3d 1280	11th	2010	Edmonson
Gulf Coast Shell & Aggregate LP v. Newlin	623 F.3d 235	5th	2010	Dennis
Wiley v. Epps	625 F.3d 199	5th	2010	Jolly
Deltoro-Aguilera v. U.S.	625 F.3d 434	8th	2010	Wollman
U.S. v. McCullough	631 F.3d 783	5th	2011	Wiener
Lefaivre v. KV Pharm. Co.	636 F.3d 935	8th	2011	Beam
Cave v. Sec'y, Dep't of Corr.	638 F.3d 739	11th	2011	Edmonson
U.S. v. Garcia	655 F.3d 426	5th	2011	Haynes
U.S. v. Moreno-Gonzalez	662 F.3d 369	5th	2011	Wiener
Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs	663 F.3d 470	D.C.	2011	Henderson
Turner v. Ks. City S. Ry. Co.	675 F.3d 887	5th	2012	Southwick
Luminant Generation Co., LLC v. EPA	675 F.3d 917	5th	2012	Garza
Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.	677 F.3d 720	5th	2012	Graves

Case	Reporter	Court	Year	Silent Judge
Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs	692 F.3d 343	5th	2012	Stewart
U.S. v. Stepp	680 F.3d 651	6th	2012	Boggs
U.S. v. Ford	683 F.3d 761	7th	2012	Tinder
U.S. v. Serfass	684 F.3d 548	5th	2012	Graves
U.S. v. Receskey	699 F.3d 807	5th	2012	Haynes
U.S. v. Quiroga-Hernandez	698 F.3d 227	5th	2012	Graves
Divers v. Cain	698 F.3d 211	5th	2012	Stewart
Tekelec, Inc. v. Verint Sys., Inc.	708 F.3d 658	5th	2013	Haynes
U.S. v. Black	707 F.3d 531	4th	2013	Traxler
Classic Concepts, Inc. v. Linen Source, Inc.	716 F.3d 1282	9th	2013	Reinhardt
U.S. v. Alvarado-Casas	715 F.3d 945	5th	2013	Graves
Goodman v. Kimbrough	718 F.3d 1325	11th	2013	Cox[106]
Jasinski v. Tyler	729 F.3d 531	6th	2013	Gilman
Dash v. Mayweather	731 F.3d 303	4th	2013	Davis
Puiatti v. Sec'y, Fla. Dep't of Corr.	732 F.3d 1255	11th	2013	Martin
Bradberry v. Jefferson Cnty. Tex.	732 F.3d 540	5th	2013	Haynes
Ritchie v. U.S.	733 F.3d 871	9th	2013	Farris
Farah v. Esquire Magazine	736 F.3d 528	D.C.	2013	Brown
U.S. v. Herrera-Alvarez	753 F.3d 132	5th	2014	Garza

106. Although the West version of the opinion indicates that Judge Cox "filed specially concurring opinion," *Goodman*, 718 F.3d at 1326, his opinion was essentially a silent concurrence, *id.* at 1336 ("I do not join Judge Wilson's opinion, but I concur in the result.").

Case	Reporter	Court	Year	Silent Judge
Kagan v. City of New Orleans	753 F.3d 560	5th	2014	Jones
DHS v. FLRA	751 F.3d 665	D.C.	2014	Henderson
Stop this Insanity Inc. Emp. Leadership Fund v. FEC	761 F.3d 10	D.C.	2014	Sentelle
Wood v. Crane Co.	764 F.3d 316	4th	2014	Duncan
Guyton v. Tyson Foods, Inc.	767 F.3d 754	8th	2014	Beam