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Deliberation Rules and Opinion Assignment Procedures in State Supreme Courts: A Replication

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Conference discussion, voting, and opinion assignment affect court collegiality and policy output. We examine these institutional mechanisms at the state supreme courts and update decades-old research regarding these practices. We find significant differences between previous findings and our own. We note recent developments in deliberative rules and opinion assignment procedures at these courts and offer a preliminary analysis regarding their likely impact on court collegiality and doctrinal development. We conclude with suggestions for further research in light of our findings regarding strategic behavior and policy output at the state courts of last resort.

KEYWORDS: state supreme courts, conference deliberation, conference voting, opinion assignment, strategic behavior

The formal and informal rules and procedures by which courts deliberate, vote, and assign opinions in cases can affect consensus (Brace and Hall 1990, 1993; Hall and Brace 1989) as well as policy output (Epstein and Shvetsova 2002; Hammond, Bonneau, and Sheehan 2005; Maltzman, Spriggs, and Wahlbeck 2000; Maltzman and Wahlbeck 1996). Understanding the nature of these conventions, therefore, is crucial to understanding the policies attained. Among these rules and norms, scholars have identified that the order of conference discussion, vote order, and the means of majority opinion assignment are important mechanisms by which preferences interact with institutions to shape policy output (Hall 1990). Given the variation of these procedures among the state supreme courts, these institutions are ripe laboratories for study among those examining the interplay of rules, preferences, and legal policy.

Nevertheless, with fifty-two state courts of last resort, the task of identifying these procedures remains considerably more difficult than with one Supreme Court.[1] Political institutions adapt to the changing preferences and exigencies of their personnel and environment. Thus, periodic accounts for the means of deliberation in the state high courts become necessary for accurate academic inquiry.

McConkie (1974, 1976) made the first comprehensive attempt to account for rules and practices of conference deliberation in forty-nine state supreme courts using mailed questionnaires to each court. Over a decade later, Hall (1990) updated McConkie's study via telephone interviews with

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[1]Texas and Oklahoma each use two distinct state courts of last resort—one for civil cases, another for criminal cases.

the offices of the several chief justices of the state courts of last resort. She determined that the interceding period witnessed considerable change in the norms by which the high courts of the states deliberated cases on the merits and assigned majority opinions. In fact, only four states from McConkie's data had left intact their internal operating procedures between his and Hall's analysis. Because time can render received wisdom vulnerable to error (Ward 2004), we consider whether conventions in the state courts of last resort have again changed. As an answer to this question, we replicate Hall's 1990 study in order to provide updated information about the current rules that govern state supreme court discussion, voting, and opinion assignment. Our research identifies important differences that have occurred in the nearly twenty-five years since this information was last studied.

LITERATURE REVIEW

Courts create policy not only in light of the preferences of their members but also through the structural rules and norms of the institution in which the members serve (e.g., Banks 1985; Baron and Ferejohn 1989; Shepsle 1979; Shepsle and Weingast 1984; Weingast 1979). At least as early as Murphy (1964), judicial scholars sought to identify the mechanisms by which intra-instutional rules or norms affect policy outputs on collegial courts. Judicial scholars have identified at least three primary means by which these rules affect policy: (1) the order in which members debate the merits of the case, (2) the order in which members vote on a case's disposition, and (3) the means by which the institution assigns a member to write a majority, binding opinion for the immediate case. We discuss each of these items further below.

Order of the Deliberation

The order in which members of a court discuss the cases before them can have serious implications for collegiality and policy output on that court. Like the United States Supreme Court, most state courts of last resort discuss a case in some predefined order (usually delineated in one form or another by seniority). These norms may have developed either to maximize the influence of members with the most seniority by allowing them first to speak, or to protect junior members from the opinions of influential colleagues (such as the chief justice) by allowing these freshmen to speak first (Hall 1990; Perry 1991). The argument goes that courts on which the chief justice speaks first afford the titular leader opportunities to strategize, particularly in cases in which he or she holds a minority viewpoint (Danelski 1979; Epstein and Shvetsova 2002; Murphy 1964).

Accordingly, a rational leader with some degree of control over the structure of discussion can cut off debate at opportunistic moments, make proposals that act as a "wedge" issue (splitting an otherwise cohesive majority), or relist a case for another docket, thereby avoiding an expectedly averse conclusion on the merits entirely (Epstein and Knight 1998; Epstein and Shvetsova 2002; Murphy 1964). In short, a sophisticated chief who operates in a strategically rich institution may engage in strategic behavior. Chief Justice Burger was occasionally accused of each of these tactics, most famously perhaps in his decision to relist arguments for *Roe v. Wade*[2] in order to

[2]410 U.S. 113 (1973).

enlist the support of Richard Nixon appointees Lewis Powell and William H. Rehnquist (Epstein and Knight 1998, 131–135).

Conversely, courts in which discussion proceeds in some informal or minimally structured format can mitigate the influence of powerful personalities otherwise predisposed to dominate discussion. Institutions that utilize some random or rotating order of discussion may afford greater autonomy to junior members of the court. This can occur if the court designates a new order of discussion for each case deliberated at conference such as when a court provides for a reporting justice or discussion leader to present a case, which changes for each case discussed. Nonetheless, too much informality may permit strong personalities again to dominate. Thus, in those states that discuss cases on a system of volunteerism may exhibit greater agenda control by dominant justices. In short, the extent to which court members are institutionally permitted to maneuver strategically during the discussion phase of the conference has implications for the disposition of the case at hand, and many of the strategic alternatives available to justices during the deliberation are likewise available during the vote on the merits.

Order of the Vote on the Merits

Courts scholars also have identified that the vote order is a significant factor over the size of the majority coalition in a given case and the type of policy adopted by that coalition. Specifically, those voting last have considerable advantages over their peers if joining the majority coalition carries policy benefits that outweigh incentives to dissent (Carrubba et al. 2012). This may especially be the case if the justice who votes last also assigns the majority opinion. In this event, she or he may be incentivized to join the majority coalition and to assign the opinion to an ideologically proximate peer (Epstein and Knight 1998).

Regardless, a rational justice can take advantage of a number of formalized voting orders, and these different systems benefit different members. Courts that vote by seniority place junior members into more opportunistic positions of strategic behavior, more so if those senior members voting first are unsure over the vote choices of their colleagues. Courts that permit senior-most members to vote last similarly benefit these justices. But as with the orders of discussion, states that permit a rotating order of voting may distribute strategic advantages among the members of the court more equitably by allowing different justices to play critical roles in a case-by-case manner. Likewise, institutions that vote simultaneously (e.g., by raising hands all at once or by submitting their votes blindly) largely eliminate any institutionalized advantages to the order of the vote as no one justice can condition his or her vote on the previous votes of their colleagues.[3]

Despite these tactical advantages, any justice additionally may strategize during the discussion and simply obfuscate her opinion over the case. If debate and voting are disjoint (a circumstance discussed below), then this obfuscation may carry over into the voting phase of deliberation. That is, a rational justice can affect the case's outcome by withholding her vote on the merits at her designated moment to vote. Such a tactic emphasizes the institutional prerogatives of any member

[3]Interestingly, no study to the authors' knowledge has analyzed policy output on courts that vote simultaneously compared to those that vote sequentially.

with opinion assignment prerogatives (such as the U.S. chief justice).[4] Thus, by withholding his decision during the first round of voting, a rational chief who is uncertain over the preferences of his colleagues may bet on a winning horse by joining the majority coalition at a later phase of the game when the voting coalitions are more clear.

More generally, on a collegial court every member possesses some ability to strategize when their institution imposes some type of rule over the vote order (Banks 1985; Shepsle and Weingast 1984). Institutions that do not impose such rigid vote order rules lack many of the incentives for strategy and obfuscation among the institution's members. Thus, if court members vote either simultaneously (such as in Georgia, where members raise their hands all at once) or blindly (such as in Kentucky, where members cast their votes electronically, removed from the formal setting of the conference altogether), fewer strategic options likely result in more sincere behavior.

Simultaneity of the Discussion and Vote

One distinction (mentioned briefly above) to the discussion and voting dynamic often overlooked remains whether courts require their members to disclose their vote (even if only tentatively) at their designated turn during the discussion process. If a court does not differentiate its discussion from its voting phase of the deliberation (that is, requires its members to disclose their vote immediately following their discussion on the merits of the case), then the justices may condition their votes on the previous discussion of their colleagues.

Consider a court that discusses and votes by seniority such that the chief justice discusses first, followed by each associate justice, and then votes first following the discussion of her peers, followed by the vote of the associate justices. A rational chief justice in this scenario may condition her vote on the revealed preferences of her colleagues such that she retains a first-voter advantage not seen in the court that discusses and votes simultaneously, where she votes somewhat uninformed of the preferences of her colleagues. Such was considered to be the case on the U.S. Supreme Court when scholars believed that justices discussed "down" with respect to seniority, and subsequently voted "up" (e.g., Rohde and Spaeth 1976). Of course, justices have seemed eager to repute this (Perry 1991, 44–47).[5] As one justice put it, "[T]hat would be silly. Everyone is aware of what your vote is when you are discussing" (quoted at 45).

The distinction between simultaneous and non-simultaneous discussion and voting is significant for the very reason pointed out by the justice quoted above. Allowing an institution's members to condition their later vote off of the earlier discussion of their peers provides those with votes in the early phase of the process particular benefits over those lower in the sequence of play. That is, non-simultaneous procedures allow for greater strategy among a court's justices than simultaneous procedures such as those used at the U.S. Supreme Court. But despite the quoted justice's sentiment, we find that nearly 49 percent of the state courts in our study use non-simultaneous discussion and voting. Thus, one is mistaken to conflate the two types of deliberative procedures. Who joins the majority coalition can have major implications for the content

[4]Once again, Chief Justice Burger became the target of such accusations among the more liberal members of the Court (Epstein and Shvetsova 2002).

[5]Although Perry's (1991) work regards the conference vote to grant or deny *certiorari*, his informants pointed out that the vote on the merits followed the same order as the vote for review.

of the opinion, especially if the means of opinion authorship delegate assignment responsibilities to a majority member.

Assignment of the Opinion of the Court

Perhaps the most crucial element in the deliberative process remains the manner by which the opinions of the court are assigned in any given case. These elements have significant implications for the size of the majority coalition, in addition to the policy itself enacted by that coalition. Early judicial research suggested that courts in which the opinion of the court was assigned by some randomized procedure (such as by lot) contributed to larger-sized coalitions supporting the opinion of the court. The conventional wisdom held that a randomized assignment process mitigated against controversy among court members (Sickels 1965; Slotnick 1977). Neo-institutionalist work, however, found the opposite effect to result (greater dissensus among courts with randomized assignment norms). Brace and Hall (1990, 1993) and Hall and Brace (1989) found that courts in which members were unable to punish recalcitrant colleagues in future periods of play eliminated many of the structural incentives to engage in consensual behavior.

More substantively, assignment norms affect the placement of the opinion of the court in doctrinal space. For example, courts that afford a specific member assignment prerogatives (either when in the majority coalition or for all cases, regardless of his or her majority status) permit him or her a degree of control over the court's precedential and ideological output (Hammond, Bonneau, and Sheehan 2005; Lax and Cameron 2007; Schwartz 1992). This means that an ideological extremist with the power to assign opinions may generate likewise extremist opinions that comport with his or her legal vision by making a rational opinion assignment.

Conversely, institutions in which opinion assignment norms have been decentralized may effectively strip senior members of their ability to strategize via assignment prerogatives. Thus, courts in which the majority opinion is assigned completely at random (oftentimes by the clerk of the court) or in which justices take turns by rotating assignment duties (for instance, by seniority) are more likely to witness a greater diversity of opinions in court output than if one or two justices always make the assignments. Of course, the justice to which assignment has fallen may still craft a rational opinion that satisfies his own preferences, in addition to a sufficient number of his colleagues (Carrubba et al. 2012; Hammond, Bonneau, and Sheehan 2005). What matters, however, is that one or two members of the court cannot consistently bend the court's policy output toward their preferences. Nonetheless, senior members of the court may still attempt to circumvent these rules of randomization or rotation by scheduling docketed cases in a particular order or by bargaining over the opinion's content with the recipient of the assignment (Carrubba et al. 2012; Clark and Lauderdale 2010; Maltzman, Spriggs, and Wahlbeck 2000). The extent to which an assigned justice enacts his policy preferences is, therefore, largely dependent on the degree of autonomy she has over the opinion itself (Bonneau et al. 2007; Carrubba et al. 2012; Clark and Lauderdale 2010).

THE STUDY

Our research replicates the study conducted nearly twenty-five years ago in Hall's (1990) update of McConkie's (1976) study. As such, we follow many of the same data-gathering conventions

established by McConkie and Hall. For contemporary information on the state courts of last resort, we initiated a three-pronged approach to determine norms across the states in discussion, vote order, and majority opinion assignment. First, we initiated a Web-based search for courts' internal operating procedures on government websites that either listed these procedures outright or quoted procedures delineated in the specific state's code. We retrieved information from three states in this manner.[6] Next, we followed this effort with telephone interviews with justices and clerks of the courts. Nevertheless, it became apparent after a short time that most clerks could not supply us with the information we needed. Thus, we were finally prompted to supplement this information with questionnaires that were mailed to the individual judges of the state high courts. We asked these justices to correct any errors in our received wisdom. Each questionnaire listed the norms outlined in Hall (1990) and provided a postmarked, self-addressed envelope containing a form on which justices were given space to outline differences in their institution's practices and the procedures outlined in the cover letter. The results of our study are provided in Table 1.

Our results confirm that substantial change has occurred at the state supreme courts since 1990. Forty-three of the fifty-two state courts in our study (approximately 83 percent) exhibited at least one difference in procedure compared to information gathered by Hall (1990). Twenty-five courts (48 percent) made a change to the order in which members discuss the cases being reviewed. Twenty-two courts (42 percent) made some change to their procedure for voting, and twenty-two courts indicated that they voted during the same phase of discussion. Finally, we found that sixteen state courts of last resort (31 percent) altered in some way the function by which opinions receive authorship.

The results of our study indicate that the greatest amount of change occurred in the manner by which discussion and voting take place at the state high courts. We are unable to discern any noticeable trend among the states in their changes with respect to order of discussion. Among those states that changed the order of their discussion, most (60 percent) were strategically benign, neutral alterations that did not add or eliminate any more or less deliberative structure to any considerable extent. That is, most of these changes involved either switching from a system of seniority to a system of rotation or vice versa. For example, in 1990, members of the New Jersey high court discussed via rotation; however, we find that the court now allows the reporting justice to discuss first, followed by his or her peers in order of seniority. Our results regarding the changes in discussion norms are provided in Table 2.

Four of the fifteen courts that made changes to their discussion format, while doing so with structural neutrality, simultaneously made alterations that now permit greater autonomy to senior members of their institutions during the discussion phase. For instance, while the Oregon high court deliberated by means of rotation in 1990, we find that today the chief justice selects the first speaker, which is then followed in terms of rotation. This is an interesting change in discussion inasmuch as a chief justice may now rationally select a speaker with whom the associated order of discussion is optimal for the chief justice. Meanwhile, North Dakota and Rhode Island, which each discussed by order of reverse seniority in 1990, moved to afford greater autonomy to other members of the court. Each institution opted to remove the chief justice as the member who speaks last and now permits the justice assigned to author the court's opinion to have the last word in the discussion. Nonetheless, the other nine courts that experienced little structural change

[6]These were Pennsylvania, New Mexico, and Virginia.

TABLE 1
Methods of Discussion, Voting, and Assignment

State Court	*Order of Discussion*	*Order of Vote*	*Simultaneity*	*Method of Assignment*
Alabama	Reporting justice, then open	Reverse seniority	Not simultaneous	From clerk's office, rotation
Alaska	Authoring justice, reverse seniority	Same as discussion	Not simultaneous	From clerk's office, rotation (seniority)
Arizona	Vice CJ, then seniority, CJ last*	Same as discussion*	Simultaneous*	CJ if in majority, else senior justice
Arkansas	Reporting justice, back-up, then seniority from back-up, then seniority of those left, CJ 1st if left*	Same as discussion*	Simultaneous*	From clerk's office, rotation
California	Seniority, CJ last	Same as discussion	Simultaneous*	CJ, for all cases
Colorado	Reverse seniority	Same as discussion	Simultaneous*	CJ, for all cases*
Connecticut	Most junior member, then open	Reverse seniority*	Not simultaneous	CJ, for all cases
Delaware	Reverse seniority	Same as discussion	Not simultaneous	Senior-most justice on panel*
Florida	Reporting justice, seniority, CJ last	Same as discussion	Simultaneous*	From clerk's office, by rotation
Georgia	Reporting justice, then open	By show of hands*	Not simultaneous	From clerk's office, by rotation
Hawaii	Reporting justice, seniority, CJ last*	Same as discussion*	Simultaneous*	Reporting justice if in majority, else consensus of majority*
Idaho	Reporting justice, seniority, irrespective of CJ status	Same as discussion	Not simultaneous	From clerk's office, at random
Illinois	Reporting justice, then open	Reverse seniority*	Not simultaneous	From CJ, by rotation
Indiana	Reverse seniority	Same as discussion	Simultaneous*	Consensus of the majority
Iowa	Reporting justice, counter-clockwise*	Same as discussion*	Simultaneous*	From CJ, at random*
Kansas	Reporting justice, then open	Same as discussion	Not simultaneous	CJ if in majority, else senior justice*
Kentucky	Discussion leader, clockwise rotation*[a]	Blindly online*	Not simultaneous	CJ for cert grants, else clerk (random)*
Louisiana	Reporting justice, then open	Same as discussion	Not simultaneous	Drawn at random after orals
Maine	Reporting justice, reverse seniority, CJ last	Same as discussion	Simultaneous*	From CJ, by rotation
Maryland	Reverse seniority, CJ last	Same as discussion	Simultaneous*	CJ if in majority, else senior justice
Massachusetts	Reporting justice, seniority, CJ last*	Seniority, CJ last	Not simultaneous	CJ, for all cases
Michigan	Discussion leader, then seniority[b]	Same as discussion	Simultaneous*	At random, after orals
Minnesota	Reporting justice, seniority, CJ last	Same as discussion	Not simultaneous	From commissioner's office, rotation
Mississippi	Reporting justice, separate opinionwriters (by seniority), then seniority*	Reverse seniority*	Not simultaneous	From clerk's office, rotation (seniority)*
Missouri	No formal order*	Reverse seniority	Not simultaneous	From CJ, by rotation (after orals)
Montana	No formal order*	Same as discussion*	Simultaneous*	From CJ, by rotation
Nebraska	Reporting justice, then open	Seniority, CJ first	Not simultaneous	From clerk's office, by rotation

(Continued on next page)

TABLE 1
Methods of Discussion, Voting, and Assignment *(Continued)*

State Court	*Order of Discussion*	*Order of Vote*	*Simultaneity*	*Method of Assignment*
Nevada	Reporting justice, then around table	Same as discussion	Not simultaneous	From clerk's office, by rotation
New Hampshire	CJ first, then open*	No formal order	Simultaneous*	Random draw (before orals)*
New Jersey	Reporting justice, seniority*	Seniority, CJ first	Not simultaneous	CJ if in majority, else senior justice
New Mexico	Reporting justice, then open	Same as discussion	Not simultaneous	From clerk's office, at random*
New York	Reporting justice, reverse seniority, CJ last	Same as discussion	Simultaneous*	At random (after orals)
North Carolina	No formal order*	Reverse seniority	Not simultaneous	Rotation, not by CJ*
North Dakota	Reverse seniority, authoring justice last*	No formal order	Not simultaneous	From clerk's office, by rotation
Ohio	Seniority, CJ first	Same as discussion*	Not simultaneous	Random draw (after orals)
Oklahoma (Civil)	Reporting justice, reverse seniority	Same as discussion	Not simultaneous	From Vice CJ, by rotation*[c]
Oklahoma (Criminal)	Authoring justice, justice who brought case to conference, then seniority*	No vote at conference*	Not simultaneous	Rotation (seniority)
Oregon	CJ first, then around table*	CJ selects the first voter, then rotation*	Simultaneous*	CJ, for all cases[d]
Pennsylvania	CJ leads discussion, no formal order*	Reverse seniority*	Not simultaneous	CJ if in majority, else senior justice*
Rhode Island	Justice to left of authoring member, clock-wise, authoring justice last*	Same as discussion*	Simultaneous*	From CJ, by rotation
South Carolina	Reporting justice, seniority	Same as discussion	Simultaneous*	From clerk's office, by rotation
South Dakota	Reporting justice, then clockwise*	Same as discussion*	Simultaneous*	From clerk's office, at random[e]
Tennessee	First speaker random, then rotation*	No formal order	Simultaneous*	CJ, for all cases*
Texas (Civil)	Authoring justice, then rotation	Same as discussion	Not simultaneous	Random draw
Texas (Criminal)	Presiding judge, reverse seniority*	Same as discussion*	Not simultaneous	From clerk's office, by rotation* [f]
Utah	No formal order	Same as discussion	Not simultaneous	From clerk's office (before orals)[g]
Vermont	Reporting justice, reverse seniority, CJ last*	Same as discussion*	Simultaneous*	By rotation, if in majority*
Virginia	Justice to right of authoring member, around table, authoring justice last*	Same as discussion*	Not simultaneous	From clerk's office, at random
Washington	Reporting justice, CJ calls on those with contrary views (raised hands)*	Reporting justice, then rotation	Not simultaneous	From clerk's office, at random[h]
West Virginia	Reporting justice, reverse seniority	Same as discussion*	Not siimultaneous	From CJ, by rotation

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TABLE 1
Methods of Discussion, Voting, and Assignment *(Continued)*

State Court	*Order of Discussion*	*Order of Vote*	*Simultaneity*	*Method of Assignment*
Wisconsin	Reporting justice, the seniority with respect to reporting justice*	Same as discussion*	Simultaneous*	Random draw among majority*
Wyoming	Reporting justice, CJ, seniority with respect to reporting justice*	Same as discussion*	Simultaneous*	By CJ, for all cases

Note. An asterisk indicates a difference with Hall's (1990) database.

[a]The discussion leader rotates clockwise as well for each case.

[b]Discussion leader rotates in each case by seniority.

[c]Also by Chief Justice for cases retained on the merits (i.e., not *certiorari* or original jurisdiction cases). Chief Justice not a part of the normal rotation of authorship

[d]But if the case is a direct appeal, then assignment is defined by rotation. Nevertheless, the CJ could, in theory, reassign.

[e]The assigned justice must carry a majority of the court, however, or the opinion goes to a majority member.

[f]The assigned justice must carry a majority of the court, however, or the opinion goes to a majority member.

[g]The assigned justice must carry a majority of the court, however, or the opinion goes to a majority member.

[h]This is true even if assigned justice is in the minority so long as he will conform to the majority's viewpoint.

in discussion also made changes that neither benefited nor harmed any particular justice or group of justices.[7]

We also find that six courts moved toward greater structure in their order of discussion, while four opted for less. Thus, courts such as Arizona and Hawaii, which discussed with no formal order in 1990 now use a form of seniority in which the chief justice discusses the immediate case last. Moreover, courts such as the Missouri high court, which discussed cases via reverse seniority in 1990 now have no formal means of deliberation. Only two of the four state courts opting for greater structure (Arizona and Hawaii) likewise opted for greater benefits to senior-most members.[8] The others each made changes with benign consequences to power structures on the courts.

Changes made at the state high courts with respect to order of the vote on the merits exhibited slightly less uncertainty than did the order of the discussion. Among those courts that made changes to the means of voting since 1990, only the Oklahoma Court of Criminal Appeals provided for less structure than it had at that time. We find that today, this court submits its votes entirely outside of the conference setting and at the justices' own discretion. Hall (1990), meanwhile, found this body to vote by order of seniority. We find, moreover, that seven state

[7]Interestingly, we found that Kentucky's high court meets infrequently for conference deliberation and actually "discusses" cases via e-mail. Thus, any critical examination of the Supreme Court of Kentucky's deliberation must contend with the fact that much of their discussion occurs beyond the conference room.

[8]Nevertheless, none of these courts opted for less structure. It should also be noted that Arizona and Hawaii's high courts, while nevertheless allowing senior members such as the chief justice to discuss and vote last, also chose to have their senior associate members discuss and vote first. Because we determined that Arizona and Hawaii discussed and voted at the same time, one might argue that this court had a mixed outcome regarding which members of the court "won" or "lost" strategically. Nonetheless, we believe that the chief justices most certainly won, even if his or her senior-most associates did not.

TABLE 2
Changes in Discussion since 1990—Structure and Power

State	*Greater Structure*	*Lesser Structure*	*Neutral/ Unclear*	*Centralized Power*	*Decentralized Power*	*Neither/ Unclear*
Arizona	√			√		
Arkansas			√			√
Hawaii	√			√		
Iowa	√					√
Kentucky	√					√
Massachusetts			√			√
Mississippi			√	√		
Missouri		√			√	
Montana			√			√
New Hampshire	√					√
New Jersey			√			√
North Carolina		√			√	
North Dakota			√		√	
Oklahoma (Criminal)			√			√
Oregon			√	√		
Pennsylvania		√		√		
Rhode Island			√		√	
South Dakota			√			√
Tennessee	√					√
Texas (Criminal)			√	√		
Vermont			√	√		
Virginia			√			√
Washington		√				√
Wisconsin			√			√
Wymoning			√			√

Note. A check mark indicates that a state court has the indicated quality. "Greater Structure" refers to a state court opting for some defined order (such as rotation) over an informal or open mechanism of discussion ("Lesser Structure" indicates the opposite phenomenon). "Neutral/Unclear" changes are essentially lateral (e.g., moving from seniority to reverse seniority). "Centralized Power" refers to an alteration in discussion that affords a central figure (i.e., the chief justice) greater control over the discussion process ("Decentralized Power" indicates the opposite phenomenon). "Neither/Unclear" alterations indicate that no group of justices benefited from the change in procedure.

courts made changes that provided for greater structure in the voting process. For example, in 1990 the Georgia Supreme Court had no formal means of voting. Today, in comparison, they use a simultaneous means of voting by which members raise their hands for preferred dispositions all at once. Fourteen of these twenty-two states, however, made changes with no implications for greater or lesser structure to the voting process.[9] Our results regarding the changes made among states altering their procedures for voting are provided in Table 3.

We also find that, whereas sixteen courts used either an informal or open means of discussion in 1990, today seventeen do so. This indicates little overall change among courts that prefer a non-structured means of deliberation. But we also find that, of the fifteen courts that voted informally,

[9]Five of these fourteen state courts that made structurally neutral changes made some that had the effect of empowering certain senior members on their courts over the outcome of the vote on the merits.

TABLE 3
Changes in Voting since 1990—Structure and Power

State	*Structure of Vote*	*Centralization of Power*
Arizona	+	+
Arkansas		
Connecticut	+	+
Georgia	+	
Hawaii	+	+
Illinois	+	−
Iowa	+	
Kentucky	+	
Mississippi		+
Montana		
Ohio		−
Oklahoma (Criminal)	−	−
Oregon		+
Pennsylvania		+
Rhode Island		−
South Dakota		
Texas (Criminal)		+
Vermont		+
Virginia		
West Virginia		
Wisconsin		
Wyoming		

Note. A plus mark indicates that a state court experienced an increase in either the structure of its vote or the power given to centralized members. Greater structure in a state court's voting procedure is indicative of it opting for some defined order (such as rotation) over an informal or open mechanism of voting. More centralized power in a state court's voting procedure refers to an alteration in voting that affords a central figure (i.e., the chief justice) greater control over the voting process. A minus sign indicates less of the quality, and a blank space indicates that the change was neutral or that the effect of the change was unclear. Neutral changes are essentially lateral (e.g., moving from seniority to reverse seniority).

today that number has shrunk to eight (a 47 percent decrease). Thus, it would appear as if states are moving away from informal means of aggregating votes and more toward a structured means of determining case dispositions, even if they remain tied to informal means of discussion.

Overall, the majority of state courts (thirty-three) use some form or another of seniority (either by strict [reverse] seniority or as the basis of rotation) as the means by which they aggregate votes, thus affording certain members greater strategic advantages, depending on their placement in the decisional process. Conversely, many states continue to operate in a manner likely intended to mitigate strategic behavior. Eleven of the courts in our analysis (21 percent) use some form of rotation for the order of the vote. If that court binds discussion and voting to the jurist presenting the case for analysis, then strategy will be limited to case-specific factors, and senior members will lose their ability to dominate their junior colleagues consistently.

Only the high court of Georgia elects to vote simultaneously, opting for a single-shot game of raised hands as opposed to a sequential series of voting. Kentucky's high court and the court

of criminal appeals in Oklahoma each use voting schemes entirely removed from the conference setting (and, therefore, highly akin to single-shot voting), such that votes over case dispositions occur electronically. This procedure is entirely novel since Hall's (1990) examination and reflects the growing use of computers in the courts of the United States.[10] Five state courts continue to vote with no formal order whatsoever, compared to the eight that did so in 1990.

The chief justices of the state supreme courts occupy an interesting position in the voting process. For example, nine states vote strictly by seniority in each case, but five of those courts permit the chief justice to vote last, despite her seniority over her colleagues. Given that nineteen courts (37 percent) vote in order of reverse seniority, a total of 24 courts (46 percent) permit their chief justice to vote last. Likewise, five of the states that vote by seniority do not have their justices discuss and vote simultaneously; therefore, the chief justice in these five states may vote with the benefit of knowing each of his colleagues' views. Given this finding, these states are ripe for study among those scholars searching for evidence of either a strategic (e.g., Maltzman and Wahlbeck 1996, 2004) or a conciliatory chief justice effect (e.g., Cross and Lindquist 2006) during the voting process.

Analyzing the types of changes in assignment norms that have occurred, it appears that some are fairly minor. For example, Hall (1990) observes that New Hampshire's justices randomly draw for the opinion assignment after oral arguments, while we find that this draw now occurs *before* oral arguments.[11] Whereas three states that used rotation in 1990 no longer do so today, two switched from a randomization process to one of rotation. Overall, then, the plurality of state courts (42 percent) use a form of rotation today to assign majority opinions. Thirteen courts (25 percent) use a form of randomization to assign opinions. Thus, approximately 67 percent of all state courts of last resort use an assignment norm that eliminates many of the strategic incentives present in courts such that one justice enjoys autonomy over the assignment. Fifteen courts (29 percent), on the other hand, permit a single justice to have autonomy over the assignment process.[12] Our results regarding changes made to opinion assignment procedures are provided in Table 4.

These are important distinctions for the researcher who wishes to weigh a strategic model of judicial behavior (e.g., Maltzman and Wahlbeck 2004), which one might associate more with courts permitting autonomous opinion assignments against a labor market model of judicial behavior (e.g., Epstein, Landes, and Posner 2013), which one might associate more with courts using a more routinized method of opinion authorship. As such, these courts are ripe for comparative research to consider these competing hypotheses. What is more, some of these changes have serious implications for the types of policies adopted by a court of last resort. We find that three states opted to give their chief justice or administrative leader greater discretion in the assignment process, sacrificing some form of rotation or randomization used in 1990. Thus, the Tennessee high court now gives the chief justice nearly total autonomy to make assignments; whereas in

[10]One respondent from Delaware mentioned that members occassionally voted by fax. What is more, Delaware's high court meets *en banc* only occasionally, disposing of cases via panels similar to the method used by the the circuit courts of appeals of the United States; thus, the manner by which panels are selected can crucially affect the disposition of the case (Barrow and Walker 1988).

[11]Four states in total made changes such as New Hampshire's that had no serious consequences for strategic considerations.

[12]Indiana stands out, however, inasmuch as its high court is the only one to select a majority opinion author via a consensus of the majority members.

TABLE 4
Changes in Assignment Norms since 1990

State	*More Centralized*	*Less Centralized*	*More Randomized*	*More Rotational*	*Not Significant*
Colorado	√				
Delaware		√			
Hawaii		√			
Iowa			√		
Kansas		√			
Kentucky		√			
Mississippi				√	
New Hampshire					√
New Mexico			√		
North Carolina					√
Oklahoma (Civil)	√				
Pennsylvania		√			
Tennessee	√				
Texas (Criminal)				√	
Vermont					√
Wisconsin					√

Note. A check mark indicates that a state court has the indicated quality. "More Centralized" refers to a change that gives greater autonomy to a single member of the court for opinion assignments, as opposed to some rotating or randomized process ("Less Centralized" indicates the opposite phenomenon). "More Randomized" refers to a court switching to an assignment norm that selects authors at random. "More Rotational" refers to a court switching to an assignment norm that selects authors on a rotating basis. "Not Significant" indicates an alteration to assignment norms with no strategic consequence.

1990, the court used a randomization process. Five state courts, on the other hand, chose to decentralize the power of the chief justice. The high courts of Hawaii and Kansas, for example, weakened their chief justices, each of which allowed the chief justice to assign every opinion of the court, today must be a member of the majority coalition to do so. Those scholars interested in studying the power of a chief justice over the ideological content of an opinion should consider these four courts ripe for study.[13]

Our study, like any, is not without its limitations. Responses from the written questionnaires were generally more forthcoming than those taken in telephone interviews.[14] Upon shifting to our direct mail approach, we were surprised by some of the candid views given by our respondents. For instance, one jurist from the Supreme Court of Idaho, responding to whether conference discussion still began with the reporting justice, proceeding in order of reverse seniority, had this to say: "This is how it operates in theory, or at least according to our internal rules. In practice, we hear from the reporting justice and then discuss the case without regard to seniority." In fact,

[13]Interestingly, we find that the chief justice of the Oklahoma Court of Civil Appeals is largely an administrative post who does not actively participate in the authorship of court opinions, unless he or she takes an interest in a specific case. This ability implies that the chief justice is afforded remarkable discretion over how actively he or she chooses to guide the court in terms of administration, efficiency, and doctrinal development.

[14]Nonetheless, it must be noted that courts which provide a public information officer were of invaluable assistance. Texas and Ohio deserve particular merit for the work of their public information officers.

members from five of the courts surveyed indicated that the rules of procedure were at least somewhat informal.[15]

In other instances, jurists from the same court reported procedures at odds with each other. Clearly, the inability of members to agree over proceedings inhibits accurate coding. It may be the case that discrepant responses were due to members of the same institution interpreting prompts from the questionnaire differently. We managed these discrepancies in one of two ways: first, if we received multiple responses from the same court, we deferred either to the plurality response or to the respondent who gave the most detailed response; second, if details were missing, we deferred to the status quo coding provided in Hall (1990). Fortunately, there were only five courts from our survey that provided such dissonant responses, most of which were centered on the order of discussion.[16]

One final limitation bears mention. Among the states that indicated that they voted by rotation, this rotation generally involves moving "around the table," as several respondents phrased it. But if the justices sit in a defined order (seniority, for example, as is the case at the U.S. Supreme Court), then we likely conflate the two ideas, and there may exist more states voting and discussing with respect to members' seniority than we suggest.

DISCUSSION

The state courts of last resort provide scholars interested in any number of models of judicial behavior with invaluable opportunities for comparative research (Hall and Brace 1999). Because the "rules of the game" affect the game's outcome, we believe that an accurate assessment of those rules must occur. Our study updates findings from McConkie (1976) and Hall (1990) regarding the internal procedures of the state courts of last resort—specifically, the order of discussion, the order of the vote on the merits, and the assignment of the opinion of the court. We also include whether members of the court provide their vote during the same phase at which they discuss the case (as in the U.S. Supreme Court), an important distinction that merits consideration.

Whereas our results indicate that state courts of last resort have evolved over the past twenty-five years, future research must examine whether these changes have manifested themselves in the policy content of courts or in the collegiality among their members. Such inquiries, for example, might examine dissensus as a function of voting, discussion, and assignment norms (e.g., Brace and Hall 1993). Others might consider the placement of policy dispositions of the courts as functions of varying discussion and vote orders in order to test agenda control versus median voter or median of the majority coalition hypotheses of policy dispositions on collegial courts (Bonneau et al. 2007; Carrubba et al. 2012; Clark and Lauderdale 2010; Hammond, Bonneau, and Sheehan 2005).

[15]These courts were Arkansas, Idaho, Michigan, Oregon, and Texas (Criminal).

[16]These courts were Connecticut (discussion order), Kentucky (discussion order), Missouri (discussion order), Oklahoma's criminal court (vote order), and Wyoming (discusion and vote order).

And while we have noted that the state courts have evolved, we have not yet uncovered why the states have opted for change or whether particular political actors are driving this change.[17] Future research might consider whether states with more contentious political systems (such as those using partisan elections) are more likely to abandon informal discussion, voting, or assignment procedures in favor of those that benefit certain members. Others might consider the possibility that these changes occurred from outside of the courts, mandated by statutory or constitutional revisions to state law. If this is the case, there may be an interesting story regarding the role of interest groups in the manner by which state courts deliberate and assign their opinions.

Finally, we believe that the role of the chief justice in the decisional process may significantly affect the types of policies effected by a given court and therefore urge future scholars to consider comparative research into the chief justices among the state courts of last resort as fruitful avenues for further consideration. Institutions in which the chief justice either enjoys autonomy over the opinion assignment process or in which he or she is permitted to vote last have the unique potential to place his or her imprimatur on the doctrinal development of the state. Finally, scholars interested in formal models of doctrinal placement should recognize the ripeness of state institutions for studying comparatively the effects voting rules can have on the spatial disposition of cases.

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[17]Interestingly, none of our respondents indicated why certain attributes on their courts had changed since 1990. It is possible, however, that many of the justices interviewed or questioned did not serve at the time that their institutions altered their rules.

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